

D O M E S T I C
V I O L E N C E
N S W

SUBMISSION TO THE

NSW LAW REFORM COMMISSION

Review of Consent in relation to
sexual offences

February 2019

About Domestic Violence NSW

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

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

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

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

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

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

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

For inquiries relating to this submission:

Moo Baulch

CEO, Domestic Violence NSW

(02) 9698 9777, ceo@dvnsw.org.au, PO Box 3311 Redfern NSW 2016, www.dvnsw.org.au

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Endorsement of submissions

Domestic Violence NSW endorses the submission of **Rape and Domestic Violence Services Australia (R&DVSA)**, the joint submission of **Community Legal Centres NSW (CLCNSW)**, **Women's Legal Service NSW (WLSNSW)** and refers to our previous preliminary submission on the consultation from June 2018.

Domestic Violence NSW submission approach

In regards to the Terms of Reference for the review of consent in relation to sexual assault offences, this submission from Domestic Violence NSW broadly addresses:

1. Whether s 61HA should be amended, including how the section could be simplified or modernised;
2. All relevant issues relating to the practical application of s61HA, including the experiences of sexual assault survivors in the criminal justice system; and
3. Sexual assault research and expert opinion;
4. The impact or potential impact of relevant case law and developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia, and internationally, on the content and application of s61HA; and
5. Any other matters that the NSW Law Reform Commission considers relevant.

Recommendations

- **An affirmative definition of consent**
- **A single list of circumstances in which consent is not present (that incorporates all of the factors in the NSW act that may negate consent currently)**
- **Amend legislation so that it better protects victims of sexual assault within the context of domestic and family violence**
- **A single knowledge test based on Victoria’s ‘reasonable belief’ test**
- **That in isolation, legislative reform will be ineffective to reform attitudes and responses to sexual assault and that the NSW government should:**
 - **Design and implement a comprehensive community education program including specialist education programs for those working in the justice system that promote trauma-informed practice**
 - **Improve court and social support services**
 - **Establish specialist sexual assault courts**
 - **Establish a restorative justice pilot program for sexual assault matters**

Questions

The meaning of consent

DVNSW supports the affirmative consent model, and a communicative model of consent. In our previous preliminary submission, we surveyed members on this issue and majority supported active consent otherwise known as enthusiastic consent model, meaning a person does not consent if they do not say or do anything to communicate consent, for example a lack of a verbal no. DVNSW is supportive of these reforms as they highlight that sexual assault is not only a physical offence, it is an offence against a person’s agency. However we believe the meaning of consent can be strengthened further, to provide more clarity and ensure that it operates the way it is intended.

In relation to specific legislative amendments, DVNSW endorses the submissions of **CLCNSW** and **R&DVSA**.

Currently s 61HE(2) of the *Crimes Act 1901 (NSW)* (the *Crimes Act*) states that, “a person **consents** to a sexual activity if the person freely and voluntarily agrees to the sexual activity”. While this is useful it could be improved to more clearly support a communicative consent model.

As **R&DVSA** proposes, we recommend that the NSW Government amend section s 61HE(2) of the *Crimes Act* so that consent includes a requirement for active communication, and insert a new subsection which outlines that a person does not consent to sexual intercourse where “the person does not say or do anything to communicate consent to the act.”

In our preliminary submission to this review DVNSW members clearly stated that fear, past trauma, exhaustion, illness, disability and intoxication (drugs or alcohol) may impede consent and shared multiple case studies where this had occurred for their clients. “Enthusiastic

consent” would be beneficial in establishing a clear idea of what consent is and what it should look like. Consent needs to be clearly stated and understood by both parties.¹

Despite changing attitudes around sexual violence in society, DVNSW is still concerned by rape myths which are victim blaming, rather than ensuring the perpetrator is accountable. Improving the laws around consent, can ensure that rape myths don’t influence the decision making by the fact finder in sexual assault trials so that the laws of consent are not applied correctly. These reforms needs to be supported by judicial education, lawyer and police support as well as the broader community, which is addressed further below.

Negation of consent

DVNSW supports a list of circumstances in which consent, by definition, does not exist as provided for in s 61HE(6) of the *Crimes Act*. However, DVNSW recommends changing the list where negation of consent *may* be established in s 61HE(8) of the *Crimes Act*, to one list *where consent does not exist*. As identified in the submissions of **CLCNSW** and **R&DVSA**, having two lists of circumstances, one in which consent does not exist and one in which a person *may* not consent can be confusing and lead to inconsistencies in operation of the law. This is because it’s not a clear direction, so both decision makers and jurors could be unsure when to apply it, and may lead to instances where it’s not applied when it should be.

DVNSW recommends that s 61HE (8) of the *Crimes Act* be replaced with a single list of circumstances where a person does not consent which would incorporate s 61HE(6) and s 61HE(8) as circumstances where a person does not consent. This would remove listing any circumstances where a person may not consent and remove confusion as well as improve consistency in decision making.

Amend legislation so that it better protects victims of sexual assault within the context of domestic and family violence

DVNSW is also concerned that in circumstances where domestic and family violence is present it is often harder to demonstrate that a person has not consented. In our preliminary submission some members suggested that domestic and family violence should be included as a factor that ‘may’ negate consent.² While s 61HE(8)(b) refers to intimidatory or coercive conduct, or other threat that does not involve a threat of force, it doesn’t explicitly provide for situations where this threat is not immediate but may form part of an ongoing abusive pattern over time, which is most common in intimate partnerships affected by domestic and family violence.

DVNSW recommends amending the legislation so that it better protects victims of sexual assault when they occur in the context of domestic and family violence or an intimate partnership. This could be by including in the provision that where domestic and family violence is present, the threatening or intimidating or coercive conduct does not need to happen at the same time the sexual offence occurs.

¹ Domestic Violence NSW. Submission to the Review of Consent in Relation to Sexual Assault. June 2018. http://dvnsw.org.au/wp-content/uploads/2018/07/DVNSW-submission_sexual-consentFINAL.pdf 5.

² Domestic Violence NSW. Submission to the Review of Consent in Relation to Sexual Assault. June 2018. http://dvnsw.org.au/wp-content/uploads/2018/07/DVNSW-submission_sexual-consentFINAL.pdf 7.

However, we also support the submission of **WLNSW** which highlights that any reforms made should not limit the agency of the victim/survivor to decide when they consent to sex, as even during a relationship where domestic and family violence is present, there may be times where consent may be given.

Knowledge about consent

DVNSW supports retaining an objective standard for knowledge of consent of sexual offences in NSW.

Currently there are three tiers to the test set out in s 61HE(3)(a), (b) and (c) which outline that a person's knowledge about consent will be due to them knowing that the victim does not consent, or the person was reckless as to whether they consented, or they have no reasonable grounds for believing that they had consented. This approach is overly confusing for jurors, and it will be clearer for fact finders if there is one test.

The Victorian Department of Justice in formulating its recommendations found that one test of 'no reasonable belief' was the preferred option, as a reasonable belief test incorporates actual knowledge as well as recklessness and an objective standard based on reasonableness.³

We support **R&DVSA** and **CLCNSW**'s recommendation that a single knowledge test expressed as a 'no reasonable belief' test should be applied.

DVNSW also supports changing s 61HE(3)(c) of the *Crimes Act* to provide that the fact finder should consider any verbal or physical steps taken by the accused to establish whether the other person consents to the sexual act. As recommended by both **CLCNSW** and **R&DVSA** this approach shifts the focus off the complainant and onto the accused behaviour. Ensuring that verbal and physical steps are required will support active communication about consent.⁴

DVNSW supports the inclusion of s 61HE(4)(b) of the *Crimes Act* which directs fact finders to exclude any self-induced intoxication of the accused when making findings about knowledge. This is consistent with other criminal offences and also the Victorian legislation.

Other non-legislative recommendations

As indicated in our previous submission, any legislative amendment needs to be accompanied by other reforms and support. Whilst this review is focused on legislative reform, we outline some of the areas that would support broader change that is required to address sexual assault in NSW.

One of the most significant barriers in addressing sexual assault relates to issues with reporting sexual assault. DVNSW members reported that only approximately 42 per cent of their clients disclosed they had been sexually assaulted, with only 12 per cent of these clients reporting the

³ Victoria Department of Justice and Regulation. Victoria's New Sexual Offence Laws: An Introduction, Criminal Law Review, pg. 4. June 2015. <https://assets.justice.vic.gov.au/justice/resources/f33fe495-275d-465f-8087-ba96872b27f1/copy-of+%28cd-15-260259%29+---+discussion+paper+-+victoria+s+new+sexual+offence+laws+-+an+introduction+-+web+site+version+3+pdf.pdf>

⁴ Andrew Dyer. Submission to the NSW Law Reform Commission's Review of *Consent Commission's Review of Consent and Knowledge of Consent in Relation to Sexual Assault Offences*. 29 June 2018. <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/PCO50.pdf> 11

assault to Police. Members also noted that the issue lies in the difficulty in reporting of sexual assault and the level of evidence required, which equates to a low conviction rate.⁵

Victims do not report to Police for a variety of factors some of which which include; the stigma around sexual assault, survival, fear, shame, guilt, humiliation, embarrassment, self-blame, judgment, fear of not being believed or an unsympathetic response, lack of evidence, distrust in the justice system, untrained Police and lack of support from Police, re-traumatisation due to telling their story numerous times throughout the court process, the length of time sexual assault matters take to be finalised in court, fear of reprisal from perpetrator, fear of the impact on their visa/residency status and fear it may impact on Family Law Court proceedings.

Domestic Violence NSW members support measures that will increase the confidence of victims to report incidences of sexual assault, some of which could be addressed below.

Develop a community education program

Strategies to actively address patriarchal, victim blaming, and archaic attitudes towards women and sex are key to reducing sexual assault and ensuring people are safe in the community. Proactive campaigns and consistent whole of community responses are essential if we are to improve access to justice and adequately support victims of sexual assault. DVNSW recommends that the NSW government introduce community education that challenges gender norms, advocates for healthy respectful relationships (in particular, respect for women), debunking rape myths and reducing stigma around sexual assault. This education should span the entire formal education system from early childhood to university/TAFE and must be coordinated with community programs tailored to speak to the diversity of NSW communities.

It's essential that communities who are most affected or experience the most significant barriers are engaged and included in the design, development and delivery of this work, including specific strategies for Aboriginal and Torres Strait Islander communities, culturally and linguistically diverse communities, LGBTIQ communities, people with disabilities and people working in the sex industry. In our previous submission, DVNSW shared the expertise of our members and practitioners who indicated that it was important to address young people and that prevention programs should be a compulsory part of the school curriculum as well as education on consent being critical for high school students.

In conjunction with broad community-based approaches, specific education and ongoing professional development must be targeted at those involved in supporting victim-survivors of sexual assault and in particular embedded throughout the justice system, including legal practitioners, police, barristers, and judges. There is a profound need for institutional understandings of the impacts of sexual assault on all aspects of a victim-survivor's life alongside the impacts of vicarious trauma, as well as trauma informed care.

Improve court and social support services

Improved court and social support support is critical to ensuring victims have access to justice that meets their needs and lessens the risk of re-traumatisation throughout the court and broader justice process. One of the main barriers to reporting sexual assault is the court

⁵ Domestic Violence NSW. Submission to the Review of Consent in Relation to Sexual Assault. June 2018. http://dvnsw.org.au/wp-content/uploads/2018/07/DVNSW-submission_sexual-consentFINAL.pdf 5.

process, many victim-survivors may not want a criminal justice response and ensuring that victims have adequate support pathways that meet their needs is important. DVNSW members outlined the need for better ways for police and support services to collaborate, ensuring services are appropriate and work sensitively with children, ensuring mixed genders of police attend or are available, as well as being culturally safe, this may include having a cultural support worker or Aboriginal and Torres Strait Islander police officer available.

Trauma-informed systems include offering access to audio-visual equipment in all courts, ensuring physical safety at court (separate safe rooms), and well-resourced wraparound supports such as trauma counsellors, psychologists, and lawyers. All support services should be resourced and regularly trained to provide trauma informed care, as well as supporting the judiciary, legal practitioners, police and specialist workers with policies that address vicarious trauma.

[Establish a Specialist Court for sexual assault](#)

In our survey with DVNSW members, they overwhelmingly supported the establishment of specialist courts, or the piloting of specialist court models, particularly for sexual assault cases. Members were unequivocal that specialist sexual assault courts would provide a safer setting for victims, with trained and trauma-informed court staff, magistrates and judges with expertise, a greater understanding of the needs of victims, and that this would significantly assist in lessening the risk of re-traumatising victims.

Specialist court staff should be trained in the emotional and lifelong impacts of sexual assault (including childhood sexual assault) and this should be taken into consideration in sentencing. Several submissions drew attention to the positive outcomes for victim-survivor and their families where court staff and officials did have a good understanding of the nature of trauma and the impacts of violence. Members also identified an urgent need for specialist courts and specialist court models to be funded in rural and remote locations throughout NSW.

[Establish a restorative justice pilot program for sexual assault matters](#)

DVNSW recommends that introducing a restorative justice trial for sexual assault would ensure better access to justice for victims and survivors, as there is a low level of reporting and conviction rate. DVNSW members identified that a restorative justice model could improve the quality of justice, lessen trauma and better support victims of sexual assault, and supported restorative justice models particularly for communities where there is a mistrust of interventions by authorities.