Community Legal Centres NSW

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The Executive Director
NSW Law Reform Commission
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Submission to the NSW Law Reform Commission's inquiry into consent in relation to sexual offences

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Dear Panel Members,

Community Legal Centres NSW welcomes the opportunity to make this submission to the Law Reform Commission of NSW's inquiry into consent in relation to sexual offences.

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1. ABOUT COMMUNITY LEGAL CENTRES NSW

Community Legal Centres NSW is the peak representative body for almost 40 community legal centres in NSW. Our team supports, represents and advocates for our members, and the legal assistance sector more broadly, with the aim of increasing access to justice for people in NSW.

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

Community legal centres are embedded within the communities they serve and are highly attuned to local experiences, needs and perspectives. Our expertise comes from this intimate connection with communities, and from exposure to the lived experience of victims-survivors.

Community legal centre solicitors generally do not practice criminal law. However, many centres, including Women's Legal Service NSW and Wirringa Baiya Aboriginal Women's Legal Centre, work daily to support people who have experienced sexual violence to navigate the legal process. This can include advising women who have experienced sexual violence about:

- reporting to police, evidence collection and legal processes
- accessing victims' support entitlements
- privacy and use of sensitive information
- making complaints about service providers like the police.

Community legal centres also help services that offer therapeutic support to women to respond to subpoenas and requests for records in court proceedings. Through this work, they witness first-hand the significant barriers to justice victim-survivors face throughout the process, from first reporting to prosecution.

As such, our interest in this issue is to improve access to justice for victim-survivors of sexual violence, regardless of whether their matter is heard in court, improve the safety and well-being of those who do pursue charges through the criminal justice system, and ideally reduce the number of sexual assaults perpetrated in the first place.

2. GENERAL COMMENTS

This review is significant. It presents an opportunity to clarify and simplify the law relating to consent in NSW. More importantly, it is an opportunity to engage the community and the legal profession in a broader conversation about the historic social discrimination and institutional power structures that enable many offenders to commit sexual assault with impunity.

Community Legal Centres NSW strongly believes that on its own legislative reform will not:

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

This view is supported by the high volume of preliminary submissions to the inquiry that argued:

- NSW consent laws already include a communicative model of consent and are reasonably robust
- the decision in *Lazarus* resulted from an incorrect application of the law rather than obvious deficiencies in the legal principles expressed in s61HE and changing the definition of consent would not have changed the outcome
- the legislation of affirmative consent in other jurisdictions like Tasmania has not resulted in improved responses to sexual assault
- victims-survivors face significant barriers to accessing the justice system, a fact evidenced by the low rates of reporting and convictions for sexual assault and the high rates of attrition for matters that do proceed to court
- broader attitudinal and cultural change is critical to reducing the prevalence of sexual violence and improving community and criminal responses to sexual assault in NSW.

However, Community Legal Centres NSW also recognises that the inquiry's terms of reference specifically require the Commission to investigate legislative amendments to strengthen the law of consent in NSW. As such, this submission:

- recommends legislative amendments we believe will clarify and simplify the law on consent in relation to sexual offences in NSW
- summarises the key non-legislative reforms the community legal sector believes are critical to challenging and eradicating outdated attitudes to sexual violence in the community and improve legal responses to sexual assault in NSW.

We believe that failure to engage in a meaningful dialogue about community-wide reforms will represent a significant opportunity lost to better protect victims-survivors of sexual violence in NSW.

This submission follows our preliminary submission to the Commission's inquiry into consent in relation to sexual offences in June 2018. It has been informed by consultation and engagement with our member centres, the wider legal assistance sector and specialist rape and domestic violence services.

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

SUMMARY OF RECOMMENDATIONS

Community Legal Centres NSW recommends that the NSW Government:

1. Clearly adopt an affirmative model of consent for NSW by:
    a. Amending section 61HE(2) of the *Crimes Act 1901* (NSW), so that consent is positively defined to include a requirement for active communication.
    b. Inserting a new sub-section into section 61HE(5), to establish that a person does not consent to sexual intercourse where 'the person does not say or do anything to communicate consent to the act.'
2. Maintain a list of factors that negate consent in s61HE(5) but reframe them as 'circumstances in which a person does not consent' to sexual activity.
3. Replace sections 61HE(5), (6), (7) and (8) with a single list of circumstances in which a person does not consent and reframe the factors in section 61HE(5) that are currently relevant to but not determinative of non-consent as circumstances in which a person does not consent.
4. Amend the legislation to better capture sexual assaults that occur within violent family relationships.
5. Retain an objective standard as part of the knowledge test for sexual assault in NSW.
6. Reject proposals to create a lesser offence of 'negligent sexual assault' with a maximum penalty of five years' imprisonment.
7. Replace the three-tiered knowledge test based on actual knowledge, recklessness and 'no reasonable grounds' in sections 61HE(3)(a), (b) and (c) with a single test expressed as a 'no reasonable belief' test.
8. Amend section 61HE(4)(a) to clarify that the fact-finder should have regard to 'any verbal or physical steps taken by the person to ascertain whether the other person consents to the sexual intercourse.'
9. Implement a comprehensive campaign to educate the police, legal professionals and the public about safe relationships, ethical sexual conduct and to address misogynistic, sexist, racist, ableist and homophobic views that underpin a culture of impunity for sexual violence.
10. Investigate establishing a specialist sexual violence court to facilitate specialisation and trauma-informed case management practice for legal professionals and improve the safety of victims-survivors.
11. Implement, expand and improve court and social supports and services for victims-survivors, including community-based legal assistance services.
12. Design and implement an expanded restorative justice pilot for sexual assault that complainants can access regardless of whether the accused is convicted.

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3. RECOMMENDATIONS FOR LEGISLATIVE REFORM

3.1 An affirmative model of consent

Community Legal Centres NSW strongly supports the maintenance of a consent-based approach to sexual offences in NSW. A consent-based approach is rooted in the fundamental principle of sexual autonomy and recognises that sexual violence is primarily a violation of a person's agency and not simply their body.

As noted in our preliminary submission to the inquiry, Community Legal Centres NSW endorses an affirmative model of consent. Under an affirmative model, consent is characterised positively rather than negatively and comprises a requirement both that consent be actively sought and clearly communicated.

As noted above, the definition of consent in section 61HE(2) of the *Crimes Act 1901* (NSW) tends towards a communicative model. However, there remains ambiguity about whether consent must be communicated to be effective.

Community Legal Centres NSW endorses R&DVSA's recommendation that the government legislate to clearly adopt an affirmative model of consent in section 61HE(2) by clarifying that consent must be actively communicated.

R&DVSA recommends a two-pronged approach for NSW to unambiguously adopt an affirmative model of consent:

- Amending the definition of consent in section 61HE(2) to provide that 'a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity and communicates this agreement through words or actions.'
- Adding an additional circumstance to section 61HE(5) (factors negating consent), which provides that 'a person does not freely agree to an act if the person does not say or do anything to communicate consent.'[1] By amending the substantive definition of consent in section 61HE(2), R&DVSA's proposal ensures NSW's legislation clearly adopts and is consistent with an affirmative model. It also removes the ambiguity in the current section by making immediately clear that active communication is a core element of consent. The qualification that a person does not consent if they do not do or say something to communicate that consent inserted into section 61HE(5) makes clear to fact-finders that the positive definition of consent must be interpreted as requiring an act of communication rather than a state of mind.

On balance, Community Legal Centres NSW believes that clearly adopting an affirmative model of consent:

- makes clear that consent goes beyond mere acceptance of sexual contact to require an active grant of permission (ref Victorian Dept. of Justice paper). As Mason and Monahan note, adopting an affirmative standard focuses 'the attention of the fact-finder on whether there is evidence to support the presence of consent rather than evidence that supports the absence of dissent.'2

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- provides better guidance to fact-finders about what does and does not amount to consent. As we noted in our preliminary submission in June 2018, an affirmative standard may help jurors to understand that a lack of verbal or physical resistance to sexual contact does not constitute consent.3 Similarly, Mason and Monaghan argue that: "In clarifying that consent requires positive affirmation, such a change may go some way towards minimising the impact of outdated or 'victim-blaming' views amongst the jury by giving them more guidance…"4
- shifts the burden of social expectations about appropriate behaviour in sexual interactions onto the person who initiated them. That is, rather than a recipient of unwanted sexual advances being required to resist them, an affirmative model makes clear the social expectation that everyone who initiates sexual contact must seek and confirm permission before proceeding.

We are not persuaded by and strongly reject arguments that legislating an affirmative model of consent will transform the offence of sexual assault into one of strict liability or shift the legal burden from the prosecution to the defence. We endorse R&DVSA's detailed submissions on these points.

RECOMMENDATION 1

Strengthen the definition of consent and clearly adopt an affirmative model by:

(a) Amending section 61HE(2) so consent is positively defined to include a requirement for active communication

(b) Inserting a new sub-section into s61HE(5), to establish that a person does not consent to sexual intercourse where "the person does not say or do anything to communicate consent to the act."

[1] *Criminal Code Act 1924* (Tas) s 2A(2)(a).
[2] Professor Gail Mason and James Monaghan. *NSW Law Reform Commission: Review of Consent in Relation to Sexual Assault Offences*. 20 June 2018. https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/PCO40.pdf 3
[3] Community Legal Centres NSW. *Submission to the Review of Consent in Relation to Sexual Assault.* 28 June 2018. https://www.clcnsw.org.au/sites/default/files/2018-08/CLCNSW%20-%20Submission%20re%20Consent%20in%20relation%20to%20sexual%20assault%20-%2027%20June%202018.pdf 5
[4] Professor Gail Mason and James Monaghan. *NSW Law Reform Commission: Review of Consent in Relation to Sexual Assault Offences*. 20 June 2018. https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/PCO40.pdf

3.2 Circumstances in which a person does not consent

Community Legal Centres NSW disagrees with the Bar Association's preliminary submission to the inquiry, which argues that listing factors that negate consent serves no purpose and that sections 61HE(5), (6), (7) and (8) should be removed. Instead, we believe these sections provide important guidance about consent to fact-finders in criminal trials.

In their joint 2010 report on family violence, the Australian Law Reform Commission and NSW Law Reform Commission noted that the provision of legislative guidance to fact-finders about circumstances in which a person does not consent to sexual activity operates to address the vagueness of the requirement that consent must be 'freely' given in the definition in section 61HE(2).[5]

Similarly, Burton argues that the inclusion of a non-exhaustive list of circumstances in which a person does not consent provides for consistency of decision-making in common cases and flexibility in non-common cases.[6]

However, Community Legal Centres NSW believes that as currently drafted sections 61HE(5), (6), (7) and (8) are overly complex and may be confusing to lay jurors. As such, in this section we recommend clarifying and simplifying the current provisions by:

- amending the language used to describe the circumstances set out in sections 61HE(5)
- replacing sections 61HE(5), (6), (7) and (8) with a single list of circumstances in which a person does not consent.
- amending section 61HE(8)(b) to ensure that it extends to circumstances in which a person is sexually assaulted in a relationship affected by family violence.

3.2.1 Reframe the language used in section 61HE(5)

Community Legal Centres NSW recommends that NSW reframe the factors in section 61HE(5) as circumstances in which a person does not consent as in section 36(2) of the *Crimes Act 1958* (Vic).

Community Legal Centres NSW supports R&DVSA's position that the language of negation currently used in s61HE(5) is inconsistent with an affirmative model of consent and creates ambiguity in the criminal justice process.[7] It may lead fact-finders to assume prima facie that the complainant consented to the sexual contact unless he or she can negate or rebut that assumption. This could potentially increase the risk of unjust outcomes for the complainant.

Instead, the proposed language makes clear that in fact, in the circumstances described, the only available finding is that the person did not consent and could not have consented at all. As

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[5] Australian Law Reform Commission. *Family Violence – A National Legal Response (ALRC Report 114, NSW Law Reform Commission Report 128).* 11 November 2018. https://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114.

[6] Associate Professor Kelly Burton. *Submission for the NSW Law Reform Commission – Consent in Relation to Sexual Offences*. University of Southern California Law School. 29 June 2018.

[7] Rape & Domestic Violence Services Australia. *Submission to the NSW Law Reform Commission Review of Consent and Knowledge of Consent in Relation to Sexual Offences*. 29 June 2018.

the Victorian Department of Justice noted in its 2013 report, section 36(2) 'fleshes out the definition of consent as 'free agreement' by identifying some of the circumstances in which there is in fact no free agreement.'[8]

3.2.2 Reformulate the circumstances in section 61HE(8) as absolute thresholds

Community Legal Centres NSW recommends NSW adopt a single, non-exhaustive list of circumstances in which a person does not consent. Such a provision should be based on section 36(2) of the *Crimes Act 1958* (Vic), which provides that:

> "Circumstances in which a person does not consent to an act include, but are not limited to, the following…"[9]

The list should contain all of the circumstances currently listed in sections 61HE(6), (7) and (8). In particular, the circumstances in section 61HE(8) (substantial intoxication, intimidating and coercive conduct and abuse of position of trust), which are currently expressed as relevant to but not determinative of non-consent, should be reformulated as absolute thresholds, rather than as mere discretionary considerations.

With respect to s62HE(8)(a), Community Legal Centres NSW endorses R&DVSA's recommendation that NSW adopt the Victorian wording for an absolute threshold on the impact of a complainant's intoxication on their capacity to consent. The Victorian provision states that a person does not consent if they are 'so affected by alcohol or another drug as to be incapable of consenting to the act.' This wording makes clearer than the current formulation of 'substantial intoxication' that a person must be so intoxicated that they are no longer able to make informed and rational decisions for the provision to be triggered. Importantly, articulating the provision on intoxication as an absolute threshold will bring NSW law in line with most other Australian jurisdictions.

Reformulating the factors in section 61HE(8) as absolute thresholds will:

- support consistent decision-making by making clear to fact-finders that the circumstances listed are always relevant to determining whether the complainant consented and improve consistency
- improve fairness for complainants by requiring fact-finders to consider the circumstances listed if they are satisfied the prosecution has proved them beyond reasonable doubt.

[8] Victoria Department of Justice. *Review of Sexual Offences: Consultation Paper, Criminal Law Review. September 2013.* https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2018/07/df/256101ca1/summarypaperrapereformoptions2013.pdf.
[9] Criminal Act 1958 (Vic) s 36(2).

3.2.3 Amend the legislation to better protect complainants experiencing domestic violence

Community Legal Centres NSW recognises the particular access to justice issues faced by women who have been sexually assaulted in violent family relationships. A number of our member centres, particularly Women's Legal Service NSW and Wirringa Baiya Aboriginal Women's Legal Service NSW, have advocated over many years for NSW law to better capture sexual violence perpetrated in the context of family violence. We endorse Women's Legal Service NSW's submission on this issue, which clearly expresses the nuanced considerations relevant to responding appropriately to sexual assaults that occur in violent family relationships.

Community Legal Centres NSW shares Women's Legal Service's NSW and R&DVSA's concerns that section 61HE8(b) does not adequately protect people who are sexually assaulted in violent family relationships. As such, we endorse their recommendations that the list of circumstances in which a person does not consent be amended to provide that a person does not consent if they *submit* because of fear of harm of any type against the complainant, another person, an animal or property.

We also support Women's Legal Service NSW and R&DVSA's recommendations that the legislation be further amended to make clear that fear of harm need not be present immediately before or during the sexual violence. This would ensure the provision would apply to circumstances in which the complainant was fearful due to systematic threats or coercion over a period of time and not just circumstances in which the accused acted in a threatening, intimidating or coercive manner at the time of the charged sexual assault.

Similarly, we agree with R&DVSA that it would be valuable for the legislation to include further guidance for fact-finders on what family violence is. Using the Victorian legislation as a model, this could include definitions of emotional, financial and psychological abuse and examples of the kind of factors that would fall within the provision's scope.

In combination, these amendments will ensure the legislation provides better protection to family violence victims-survivors by:

- recognising the impact on a woman's capacity to consent of sustained exposure to what Carline and Esteal (2014) describe as the complex interplay of social coercion, interpersonal coercion, threats of physical force and actual physical force that typifies many abusive relationships[10]
- removing the requirement for the prosecution to prove causation between the accused's immediate conduct and the complainant's fear in circumstances where family violence is present.

Finally, we endorse Women's Legal Service NSW's recommendation that the government hold a roundtable discussion with subject matter experts, to identify additional legislative provisions that could be implemented to better capture sexual violence that occurs within the context of family violence.

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[10] Anna Carline and Patricia Easteal, *Shades of Grey – Domestic and Sexual Violence against Women* (London: Routledge, 2014) 213.

RECOMMENDATION 2

Maintain a list of factors that negate consent in section 61HE(5) but reframe them as circumstances in which a person does not consent to sexual contact.

RECOMMENDATION 3

Replace sections 61HE (5), (6), (7) and (8) with a single list of circumstances in which a person does not consent and reframe the factors in s61HE(5) that are currently relevant to but not determinative of non-consent as circumstances in which a person does not consent.

RECOMMENDATION 4

Amend the legislation to better capture sexual assaults that occur within violent family relationships.

3.3 Knowledge

Community Legal Centres NSW strongly supports the retention of an objective standard for knowledge of consent for sexual offences NSW. We also believe that the inquiry presents an opportunity to simplify and to strengthen the knowledge test for these offences. As such, in this section we also recommend the government:

- adopt a single knowledge test for sexual offences expressed in the following terms: “a person has knowledge that another person does not ‘consent’ to sexual contact if the person *does not reasonably believe* that the other person consents”.
- strongly reject the creation of a lesser offence of ‘negligent’ sexual assault with a maximum penalty of five-years imprisonment.
- make clear that fact-finders must consider the ‘physical and verbal’ steps an accused took to confirm whether the complainant consented when determining the accused’s knowledge about consent.

3.3.1 Retain an objective standard for knowledge of consent in sexual offences

Community Legal Centres NSW strongly rejects the NSW Bar Association’s proposal to abolish the ‘no reasonable grounds’ test for knowledge of consent from NSW sexual assault laws. We believe that there is an accepted and appropriate role for objective knowledge tests in the criminal law and that removing the objective element from the knowledge test for sexual offences would:

- wind back the law in NSW to its pre-2007 position in which a defendant’s honest but mistaken belief as to consent would result in acquittal

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- perpetuate the influence of rape myths in sexual assault trials. Rape myths are prescriptive beliefs or stereotypes about perpetrators, victims and the causes and consequences of sexual violence, which deny, downplay or justify sexually aggressive behavior by men towards women.[11] Common examples include that silence amounts to consent, that a person who does not actively or physically resist sexual activity consents to that activity, and that intoxicated women are to blame for rape. Research suggests that juries in sexual assault trials are often heavily influenced by rape myths in their decision-making.[12]
- undermine efforts to promote understanding and awareness about the harmful impacts of sexual assault on victim-survivors and to challenge patriarchal, sexist and misogynistic views that create significant barriers to justice for sexual assault complainants

The Bar Association's proposal is grounded in the principle that an accused person should never be convicted of a criminal offence if they did not actually know what they did was wrong.

However, there are a number of criminal offences in NSW which include an objective knowledge test or for which there is no mental element at all. These include some drug trafficking offences, which deem possession of a defined quantity of a prohibited substance as possession for the purpose of supply[13] and dangerous driving occasioning grievous bodily harm, which is a strict liability offence.[14] These offences can carry serious penalties (for dangerous driving occasioning grievous bodily harm the penalty is 11 years in prison) and the risks of causing serious harm as a result of their commission are high.

In the case of dangerous driving occasioning grievous bodily harm, the court assesses the defendant's moral culpability in circumstances in which risk of serious harm is reasonably foreseeable. Specifically, the court asks whether the defendant abandoned responsibility for his or her conduct and whether the conduct was so grossly negligent as to be reasonably condemned.

Similarly, in sexual assault matters, the risks of serious harm to victims-survivors is so great that it significantly outweighs any unfairness to the accused of requiring that his or her actions to establish consent be assessed against a reasonable community standard.

The question of whether to include an objective knowledge test for sexual offences in NSW was definitively settled in 2007. Reverting to a purely subjective test and reviving the defence of an honest but mistaken belief would be to once again privilege and to condone outdated and dangerous views about the causes and impacts of sexual violence in NSW. It would also be out of step with national and international law reform trends.

As such, we agree with R&DVSA's submission that retaining an objective knowledge element for sexual offences is vital to prevent defendants from relying on archaic views that fall well below accepted community standards about human dignity, agency and acceptable conduct in sexual relations to avoid being convicted of rape.

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3.3.2 Reject the creation of a lesser offence of 'negligent sexual assault'

As noted above, in its preliminary submission to the inquiry, the NSW Bar Association recommended that the 'no reasonable grounds' test for an accused's knowledge about consent be abolished altogether. In the alternative, it recommended a lesser offence of 'negligent sexual assault' be created with a maximum penalty of five years' imprisonment. Community Legal Centres NSW strongly opposes the creation of a lesser offence of negligent sexual assault. We believe that:

- the risk of serious harm resulting from sexual violence is so great that both advertent and inadvertent recklessness as to consent ought to be punished in the same way as actual knowledge the person did not consent
- creating a lesser offence of negligent sexual assault would undermine recent and proposed reforms to the law in NSW and send the wrong message to the community about the seriousness of sexual offences.

As Ashworth (2009) notes, 'there are certain situations where a risk of doing serious wrong is so obvious that the law must impose a duty to take care before proceeding.'[15]

Community Legal Centres NSW believes that the risk of serious harm to victims of sexual violence is so great that it warrants the imposition of such a duty. Further, both advertent (considering the possibility of non-consent but ignoring it) and inadvertent (failing to give even a moment's thought to the possibility of non-consent) recklessness as to consent should be equally and seriously punished by the law.

Creating a lesser offence of 'negligent' sexual assault offence punishable by five years' imprisonment would send the wrong message to the community about the nature, severity and impacts of sexual violence. Enabling courts to impose lesser sentences on people who do not take the time to find out the facts before engaging in sexual conduct (inadvertent recklessness) or consider the consequences that their actions could have if they make poor decisions (advertent recklessness) is inconsistent with modern community expectations. People convicted of the offence would likely serve substantially fewer than five years in prison depending on sentencing and parole decisions. As such, the proposals would result in inappropriately lenient prison terms.

Creating a lesser offence would effectively remove the 'no reasonable grounds' test from the knowledge element of the offence of sexual assault. Removing this partially objective test would make it more difficult to secure convictions for the more serious offence and

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[11] H. Gerger, H. Kley, G. Bohner, F. Siebler. *The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English.* March 2007. https://onlinelibrary.wiley.com/doi/abs/10.1002/ab.20195.

[12] See for example: N. Taylor. *Juror attitudes and biases in sexual assault cases*. Trends and Issues in Crime and Criminal Justice No 344. Australian Institute of Criminology, 2007.

[13] *Drug Misuse and Trafficking Act 1985* (NSW), s29.

[14] *Crimes Act 1900* (NSW), s52

[15] Andrew Ashworth. *Principles of Criminal Law.* Oxford University Press, 6th edition, 2009. Cited in Larcombe et. al. *Reforming the Legal Definition of Rape in Victoria - What Do Stakeholders Think?* (2015) 15(2) Queensland University of Technology Law Review 30.

would again enable defendants to argue they honestly (but mistakenly) believed the complainant was consenting. As noted above, this would undo the reforms implemented in 2007, perpetuate the influence of rape myths in sexual assault trials and be out of step with national and international trends. Police and prosecutors would also be more likely to pursue charges for the lesser offence from the outset, as the mental element for negligent sexual assault would be easier to prove. This would lead to a further reduction in conviction rates for sexual assault.

Finally, creating a lesser offence would enliven the summary jurisdiction of the local court. This does not adequately reflect the seriousness of sexual violence and its impacts on victims-survivors. It may also result in the police prosecuting sexual assault matters. In our view, it is preferable that the Department of Public Prosecutions continues to prosecute all sexual assault matters. While we recognise the efforts NSW Police are making to improve responses to victims-survivors, the Department of Public Prosecutions has better institutional structures and supports available for complainants, like victim liaison officers.

3.3.3 Create a single knowledge test expressed as a 'no reasonable belief' test

As noted above, Community Legal Centres NSW believes the inquiry presents an opportunity to simplify the knowledge element for sexual offences in NSW. The current three-tiered test for knowledge set out in sections 61HE(3)(a), (b) and (c) is confusing and overly complicated for fact-finders to apply. To address this, we recommend replacing the three-tiered test with a single test, which requires the prosecution prove the defendant 'does not reasonably believe' the other person consented.

As in Victoria, the legislation should also make clear to fact-finders that in applying the test they 'must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent.'[16]

A single mental element expressed in this way would require fact-finders to consider the defendant's actual belief about whether the complainant consented and then assess whether that belief accorded with reasonable community expectations about appropriate sexual behaviour.

The Victorian Department of Justice consulted extensively on options to reform the mental element for consent in that jurisdiction in 2013. Through that process, most participants in the consultation preferred a single mental element expressed as a reasonable belief test over the 'no reasonable grounds' test used in NSW.[17] As the Department articulated in its final report, a reasonable belief test incorporates actual knowledge and both forms of recklessness as well as an objective standard based on reasonableness:

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[16] Jury Directions Act 2015 (Vic) s47(3)(d)

[17] Victoria Department of Justice and Regulation. *Victoria's New Sexual Offence Laws: An Introduction, Criminal Law Review,* pg. 12. 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

- A person who had actual knowledge their sexual partner did not consent could not be found to have had a reasonable belief that partner was consenting
- A person who had not considered the issue of consent at all (inadvertent recklessness), or who had considered the issue but proceeded without determining it (advertent recklessness), similarly could not be found to have had a reasonable belief their partner consented to the sexual activity.

Community Legal Centres NSW notes the debate in Australia and internationally about the strengths and weaknesses of the 'reasonable belief' formulation. Ultimately, we are persuaded by Larcombe et. al.'s (2015) finding that 'variations in the wording of the reasonable belief standard do not appear to make a significant difference' on how jurors apply it.[18] We endorse R&DVSA's view that a single test based on whether the defendant held a reasonable belief that the complainant consented will be easier for fact-finders, and particularly lay jurors, to understand and apply than the current three-tiered test and will lead to fairer outcomes for complainants than the 'no reasonable grounds' formulation currently in the Act.

3.3.4 Clarify the circumstances fact-finders must consider when determining the accused's knowledge

In addition to simplifying the test for knowledge of consent, Community Legal Centres NSW supports Dyer's recommendation that 61HE(4)(a) be amended to make clear that fact-finders must consider any "verbal or physical steps" taken by the accused to determine whether the other person consents to the sexual activity.

As Dyer noted in his preliminary submission to the inquiry, this reform would reverse the NSW Court of Criminal Appeal's decision in *Lazarus* on the meaning of the section. Firstly, it would prevent judges from directing juries that purely subjective mental 'steps' taken by an accused to form a positive belief the complainant consented should weigh in their favour in assessing if they had reasonable grounds. Secondly, it would encourage active communication about consent and shift some of the onus onto defendants to actively ensure that prospective sexual partners want to engage in sexual activity.[19]

Community Legal Centres NSW believes section 61HE(4)(b) should continue to prohibit fact-finders from considering a defendant's self-induced intoxication when determining his or her knowledge about consent.

We also note that many preliminary submissions suggested NSW legislate additional specific factors for fact-finders to consider (or not) when determining a defendant's knowledge about consent. We have not formed a definite view on these suggestions. However, the government may wish to consider the potential benefits of legislating the following suggestions:

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[18] Larcombe et. al. *Reforming the Legal Definition of Rape in Victoria - What Do Stakeholders Think*? (2015) 15(2) Queensland University of Technology Law Review 30.

[19] Andrew Dyer. *Submission to the NSW Law Reform 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

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- That the court *should not* consider:
  - the accused's attitudes, values and opinions that fall below accepted community standards
  - 'general assumptions' about a complainant's behaviour
  - Specific assumptions about the complainant's appearance or behaviour that are based on rape myths, for example the complainant's clothing, level of intoxication, presence in a particular location like a nightclub (as recommended by Annie Cossins).
- That the court *should* consider:
  - the impact of the accused's conduct on the complainant and what impact this had on her capacity to consent. Importantly, this requirement would help to shift the focus of attention onto the accused's behaviour (as recommended by R&DVSA).

RECOMMENDATION 5

Retain an objective standard as part of the knowledge test for sexual assault in NSW

RECOMMENDATION 6

Reject proposals to create a lesser offence of 'negligent sexual assault' with a maximum penalty of five years' imprisonment

RECOMMENDATION 7

Replace the three-tiered knowledge test based on actual knowledge, recklessness and 'no reasonable grounds' in sections 61HE(3)(a), (b) and (c) with a single test expressed as a 'no reasonable belief' test

RECOMMENDATION 8

Amend section 61HE(4)(a) to clarify that the fact-finder should have regard to any *verbal or physical* steps taken by the person to ascertain whether the other person consents to the sexual activity.

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4. RECOMMENDATIONS FOR BROADER REFORM

As noted at the start of this submission, Community Legal Centres NSW strongly believes that amending the legislative definition of consent and the mental elements for sexual offences will not on its own effectively address the key barriers to justice faced by victims-survivors of sexual violence. This section summarises the significant barriers to justice for sexual assault victims-survivors in the criminal justice system in NSW. It then briefly reiterates the broader reforms the community legal sector believes must be implemented if we are to successfully challenge the patriarchal, racist and homophobic cultural norms that enable sexual violence to be perpetrated with impunity and to improve institutional and community-based responses to sexual violence in NSW.

As many preliminary submissions to the inquiry noted, and indeed the Commission itself in CP21, rates of reporting and conviction for sexual offences are extremely low in NSW and attrition rates for matters that do make it to trial are high. In large part, these poor outcomes are attributable to the:

- poor handling of matters by police and prosecutors, pressure to accept plea deals, constantly changing victim liaison officers and lengthy delays in the investigation and trial process[20]
- adversarial nature of our criminal justice system, which can result in undue focus and savage attacks on complainants' credibility through cross-examination, and can be deeply re-traumatising for complainants required to give evidence
- lack of physical safety for women in court settings, particularly in regional, rural and remote areaslack of adequate psychosocial support services to assist complainants navigate the court process
- prevalence of rape myths and the minimisation or lack of understanding of the impacts of sexual violence on victims-survivors in the broader community, which influence the investigation, prosecution and resolution of matters in the criminal justice system.

As well as the above, Aboriginal and Torres Strait Islander women, and people from other marginalised groups (including LGBTIQ people, people with a disability and people from culturally and linguistically diverse backgrounds) face additional, specific barriers to justice. These can include mistrust of police and the criminal justice system, fear of community reprisal and shaming, and the influence and intersection of racist, homophobic and other discriminatory beliefs through all stages of the criminal justice process.

Community Legal Centres NSW agrees with the numerous preliminary submissions to the inquiry, which highlighted that previous reforms in NSW (2007) and in other jurisdictions like Tasmania:

- have not led to a significant change to the way sexual assault matters are handled by the criminal justice system.
- would not have changed the result in *Lazarus*.

For example, Cockburn's preliminary submission argued that Tasmanian prosecutors still rely on traditional views while arguing non-consent (for example, arguments about lack of consent continue to be framed largely in terms of a complainant's attempts at physical resistance.[21] While Dyer's preliminary submission argued that the sole adoption of an affirmative model would not have changed the outcome in *Lazarus*.[22]

Community Legal Centres NSW believes this represents a failure of implementation rather than a deficiency in the policies that underpin the law. That is, the legal principles are sound but have not yet been translated from policy into practice. This suggests that legislative change in these jurisdictions has not been accompanied by cultural change within the police, the legal profession or the broader community.

This absence of cultural change underlines the inherent inadequacy of pursuing legislative reform in the absence of a strategy to change attitudes to sexual assault in the community and to educate legal professionals in the proper application of the law.

As such, Community Legal Centres NSW believes the inquiry presents an opportunity to spark a broader cultural shift within the police, the legal profession and the wider community about consent in the context of sexual interactions. The failure to seize this opportunity will represent a significant failure to protect the rights and dignity of victims-survivors of sexual violence in NSW.

We acknowledge that the Commission is working within limited terms of reference. However, given the significance of the issues at stake, in this section we summarise key non-legislative recommendations the community legal sector believes are critical to challenging and eradicating archaic and misogynistic views that significantly limit sexual assault complainants' access to justice and to improving the safety and wellbeing of those whose matters are heard in the courts.

4.1 Implement a comprehensive education campaign for the community, the police and the legal profession

Community Legal Centres NSW strongly believes that changing and challenging archaic cultural norms that govern sexual relationship is critical to reducing the incidence of sexual violence in the community and improving safety and access to justice for victims-survivors. As such, we recommend that the government implement a community-wide community education campaign to promote understanding about respectful relationships and ethical sexual conduct and to challenge the misogynistic, sexist, racist, ableist and patriarchal views that underpin widely held rape myths and enable some offenders to commit sexual assault with impunity. The campaign should specifically target men and focus on the physical and psychological impacts of the trauma associated with sexual violence on victims-survivors.

Given that Aboriginal and Torres Strait Islander women experience higher rates of sexual violence than non-Aboriginal women, it is critical that the campaign is developed in consultation with and led by Aboriginal and Torres Strait Islander communities. People with disabilities, people from diverse cultural backgrounds and people from other marginalised groups should also be consulted to determine appropriate educational measures.

The government should also develop a targeted education program for legal practitioners, including the police, barristers, prosecutors and judicial officers. The program should focus on increasing understanding of the impacts of sexual violence and trauma, supporting trauma-informed practice across the legal profession and challenging rape myths and stereotypes about female sexuality, the influence of culture on sexuality, people with a disability and the LGBTIQ community. Specialist education for legal practitioners should include specific modules that address the particular experiences and impacts of sexual violence for Aboriginal and Torres Strait Islander people and communities, people with a disability, people from culturally and linguistically diverse backgrounds and LGBTIQ people.

Community Legal Centres NSW refers the Commission to our preliminary submission, in which we make detailed recommendations about how education campaigns targeting the community, the police and the legal profession could be rolled out (see recommendations 2 – 8 in particular).

4.2 Investigate establishing a specialist sexual violence court in NSW

Community Legal Centres NSW notes the volume of preliminary submissions that recommended the government establish a specialist sexual violence court in NSW, including R&DVSA, Domestic Violence NSW, Women's Legal Service NSW and Wirringa Baiya Aboriginal Women's Legal Centre. For example, Women's Legal Service NSW noted the ongoing 'need for specialist courts which adopt trauma-informed practice, including specialist judges and specialist prosecutors.'[23]

A specialist court would:

- facilitate the development of specialist legal expertise in sexual assault matters and the law of consent
- improve the criminal justice system's sensitivity and responsiveness to complainants' needs, including through the implementation of a trauma-informed approach
- send a clear signal to the community that sexual violence is taken seriously by the criminal law
- make it easier to provide physical facilities, such as separate waiting rooms, to ensure that complainants feel safe.

Community Legal Centres NSW believes the recommendation has merit and that the government should explore the practicalities and benefits of establishing a specialist sexual violence court in NSW.

4.3 Improve court and social supports and services for complainants

As noted above, one of the key drivers of high attrition rates for sexual assault matters is the lack of physical safety and appropriate supports for complainants throughout the court process. This includes the fear re-traumatising effect for complainants of being confronted by the accused in waiting areas and courtrooms and the changeability of victim liaison and other court support officers. To address these issues, Community Legal Centres NSW recommends the government implement improved and expanded court and social supports for complainants. This should include but is not limited to:

- the installation of **audio-visual link facilities and safe rooms** in court buildings, particularly in in regional, rural and remote areas. This would reduce the intimidation and trauma that victim-survivors experience throughout the court process and ensure that the value of their evidence is not diminished
- the provision of **specialist support workers for complainants**, including witness intermediaries, specialist trauma-informed court staff, court support dogs and Aboriginal support workers
- guaranteed access to free, **high-quality counselling and domestic violence services** for all complainants, including women in prisons
- **additional funding for all community legal centres** working in the area of sexual assault.

4.4 Implement an expanded restorative justice process for sexual offences in NSW

Community Legal Centres NSW endorses the submission of our member Elizabeth Evatt Community Legal Centre, which recommends the implementation of a restorative justice trial for sexual assault complainants in NSW, which complainants could access before, or instead of a criminal trial, and irrespective of whether the accused is convicted.

In Australia, as in many other jurisdictions, only a fraction of sexual assaults is ever reported to police (between 5-30%),[24] and sexual offences have the lowest conviction rate of any crime. This means that only a small proportion of victims-survivors ever have access to a 'justice process' through traditional legal pathways.

To improve access to justice for people who have been sexually assaulted, alternative responses should be considered. One option is to introduce expanded restorative justice processes in NSW, similar to those legislated in other jurisdictions such as the Australian Capital Territory, New Zealand, Europe and North America. While Corrective Services NSW

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[23] Women's Legal Service NSW. *Consent in relation to sexual offences: Preliminary submission.* June 2018. *https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Preliminary-submissions/PCO61.pdf*.

[24] Kelly, Liz. "Routes to (In)justice: A research review on the reporting, investigation and prosecution of rape cases" London, UK: Her Majesty Crown Prosecution Services Inspectorates (HMCPSI), 2001.

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currently provides restorative justice, the process relies upon a successful conviction. This severely limits access to the process for sexual assault victims-survivors.

The United Nations (2002) defines restorative justice in the criminal setting to be *"any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party".*[25]

In victim-focused restorative justice, emphasis is placed on the victim identifying all the components of harm (be they physical, social, emotional, material, symbolic or spiritual) before considering what restorative justice options could address all, some or none of these harms. Evidence indicates that the combination of these restorative justice processes, while not a complete solution to the recovery process, does provide victims with a counterpoint to the loss of power and control inherent in sexual assault.[26]

Despite best efforts, years of reform and ongoing advocacy to improve these systems, this loss of power is also common to many victims-survivors' experiences of current police and court processes supporting consideration of an alternative justice mechanism.

RECOMMENDATION 9

Implement a comprehensive campaign to educate the police, legal professionals and the public about safe relationships, ethical sexual conduct and to address misogynistic, sexist, racist and homophobic views that underpin a culture of impunity for sexual violence.

RECOMMENDATION 10

Investigate establishing a specialist sexual violence court to facilitate specialisation and trauma-informed case management practice for legal professionals and improve the safety of victims-survivors.

RECOMMENDATION 11

Implement, expand and improve court and social supports and services for victims-survivors, including community-based legal assistance services.

RECOMMENDATION 12

Design and implement an expanded restorative justice pilot for sexual assault that complainants can access regardless of whether the accused is convicted.

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[25] United Nations 2002, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* Article 1 (3)

[26] Daly, K. (2015). *What is restorative justice? Fresh answers to a vexed question.* In Victims & Offenders, Vol. 11 (1), 1-21.

5. MORE INFORMATION

Thank you for taking the time to consider our submission. If you have any questions or require further input, please contact Emily Hamilton via emily.hamilton@clcnsw.org.au or (02) 9212 7333.

Yours faithfully,

Tim Leach

Executive Director

Community Legal Centres NSW

Kingsford Legal Centre

Western Women's Legal Support

Western NSW Community Legal Centre

Domestic Violence NSW