WOMEN'S LEGAL SERVICE NSW

18 November 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 offences – Draft proposals

1. Women's Legal Service NSW (WLS NSW) thanks the NSW Law Reform Commission (NSWLRC) for the opportunity to comment on *Consent in relation to sexual offences – Draft proposals (Proposals 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 assault, 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 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. We welcome the NSWLRC draft proposals and commend efforts to simplify the law and to be more inclusive of transgender and intersex people. We support clearly defining affirmative consent, introducing principles which can be drawn on for a wide evidence-based community education campaign, introducing a single list of factors negating consent, seeking to more clearly recognise sexual violence within a domestic violence context, clarifying the knowledge provision and introducing legislated jury directions.

5. We provide recommendations of how the law can be further improved below.

6. In order for the draft proposals to *"achieve what we intend them to achieve"*, legislative reform must be accompanied by a well-resourced extensive evidence-based community education campaign developed by experts and a specialist response to sexual violence. We also advocate for further research and an ongoing review mechanism to ensure ongoing improvements to the law and the addressing of any unintended consequences. This is discussed further below.

7. In summary we recommend:

7.1 Adopt the principles outlined in proposed s61HF.

7.2 The principles outlined in Recommendation 25-9 of the ALRC and NSWLRC *Family Violence – A National Legal Response Final Report* be included in proposed s61HF.

7.3 Adopt proposed s61HI on consent.

7.4 Remove *"by words or conduct"* from proposed s61HI(2).

7.5 Adopt a single list of non-exhaustive specific circumstances in which a person does not consent to a sexual activity as outlined in proposed s61HJ.

7.6 Consideration be given to including circumstances when a person participates in a sexual activity due to a mistaken belief within a religious framework such as a sect or cult-environment.

7.7 Add *"or monetary exchange"* to the examples of purpose of sexual activity at proposed s61HJ(f)(iii).

7.8 *"Harm"* in proposed s61HJ(1)(e)(i) be replaced with *"harm of any type"* to clearly capture forms of violence other than physical violence.

7.9 Include *"or dependence"* or *"or reliance"* in proposed s61HJ(1)(e)(iv).

7.10 Further consider an appropriate threshold descriptor in proposed s61HJ(1)(e)(iv) other than *"overborne".*

7.11 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.

7.12 Remove *"of itself"* and *"reliable"* from proposed s292(10) and proposed s292(9)(b) and *"of itself"* from proposed s292(8)(b).

7.13 In proposed s292(9) add "*and (c) trauma affects people differently".*

7.14 *"Fear of harm"* in proposed s292(11) be replaced with *"fear of harm of any type"*.

7.15 The family violence direction includes a definition of family violence and explains *"coercive and controlling behaviour"*.

7.16 The family violence direction more clearly states a threat of harm need not be immediate.

7.17 The family violence direction refers to the prevalence of sexual violence within a domestic violence context.

7.18 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. A comprehensive primary prevention strategy is required that includes preschools, schools, tertiary institutions, workplaces, sporting clubs, media and entertainment. Significant and ongoing investment is required.

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

7.20 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; LGBTQ awareness; and disability awareness.

7.21 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.

7.22 People who have experienced sexual violence are able to access the support they need when they need it – for example, wrap around services including intensive case management.

7.23 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.

7.24 The Government when amending the legislation includes a review mechanism of these proposals and any legislation relevant to the prosecution of sexual offences similar to that included in s119 of the *Victims Rights and Support Act 2013 (NSW)* that provides for the first review as soon as possible after 3 years of the legislation receiving assent and thereafter every 3 to 5 years.

7.25 The Government establishes a committee of experts, similar to the Criminal Justice Sexual Offence Taskforce, to oversee each legislative review.

7.26 The commissioning of research that involves the examination of all sexual assault matters in the District Court over a period of time, such as a year, be undertaken at regular intervals and this research be considered in future legislative reviews.

7.27 The commissioning of research that involves the testing of jury directions, including to examine if they are adequately addressing misconceptions and rape myths.

7.28 That a body such as Australia's National Research Organisation for Women's Safety (ANROWS) with expertise in this area be commissioned to undertake such research.

New interpretive principles

8. We welcome the introduction of new interpretive principles. Proposed s61HF states:

> ***Principles to be used in interpreting and applying Subdivision***
>
> *Regard must be had to the following principles when interpreting or applying this Subdivision—*
>
> *(a) every person has a fundamental right to choose whether or not to participate in a sexual activity,*
>
> *(b) a person's consent to a sexual activity should not be presumed,*
>
> *(c) sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.*

9. We support the purpose as outlined in the *Proposals Paper* to recognise the objectives behind the communicative model of consent, guide interpretation at all stages of the criminal justice process and provide a *"firm foundation for community education initiatives about consent"*.

10. We refer to Recommendation 25-9 of the ALRC and NSWLRC *Family Violence – A National Legal Response Final Report* which recommended at a minimum the following principles be included:

    10.1 Sexual violence constitutes a form of family violence

    10.2 There is a high incidence of sexual violence within society

    10.3 Sexual offences are significantly under-reported

    10.4 A significant number of sexual offences are committed against women, children and other vulnerable persons, including those from Aboriginal and Torres Strait Islander and culturally and linguistically diverse backgrounds, and persons with a cognitive impairment;

    10.5 Sexual offenders are commonly known to their victims;

    10.6 Sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.

11. We recommend these additional principles also be included.

Recommendation 1

Adopt the principles outlined in proposed s61HF.

Recommendation 2

The principles outlined in Recommendation 25-9 of the ALRC and NSWLRC *Family Violence – A National Legal Response Final Report* be included in proposed s61HF.

The meaning of consent

12. We support proposed s61HI which outlines the meaning of consent.

13. We welcome specific reference at proposed s61HI(2) to the fact that consent can be withdrawn at any time before or during the sexual activity. We have reservations about inclusion of *"by words or conduct"* in the legislation in reference to withdrawal of consent, since it may not fully capture a response such as a freeze response from a victim-survivor.

14. We welcome the addition of "*verbal"* at proposed s61HI(3) so it *reads "A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity"*.

15. We welcome a clear statement at s61HI(5) that highlights consent is specific and consent is required for each sexual activity.

Recommendation 3

Adopt proposed s61HI on consent.

Recommendation 4

Remove *"by words or conduct"* from proposed s61HI(2).

When a person does not consent

A single list of circumstances in which there is no consent

16. We support a single list of non-exhaustive specific circumstances in which a person does not consent to a sexual activity.

17. We support the list outlined in proposed s61HJ.

18. We support inclusion of affirmative consent as outlined in proposed s61HJ(1)(a):

    A person does not consent to a sexual activity if -

    The person does not do or say anything to communicate consent

19. We support the framing of proposed s61HJ(1)(c) that:

    A person does not consent to a sexual activity if:

    The person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity.

20. As the *Proposals Paper* states this shifts the focus to *"the complainant's capacity to consent, rather than to whether their level of intoxication is substantial".*

21. We note the Victorian legislation states the circumstances when a person does not consent to an act includes:

    "the person is so affected by alcohol or another drug as to be incapable of consenting to the act"[1]

    and

    "The person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act"[2].

22. Has the NSWLRC considered proposing that NSW introduce a similar provision to s36(2)(f) of the *Crimes Act 1958 (Vic)*? We recommend consideration of this.

23. We support proposed s61HJ(f) which outlines the circumstances in which consent is negated due to mistake.

24. We support the proposal by Rape and Domestic Violence Services Australia and others that consideration also be given to circumstances when a person participates in a sexual activity due to a mistaken belief within a religious framework such as a sect or cult-environment.

25. The *Proposal Paper* outlines an intention to capture *"where the accused person dishonestly represents that the accused person will pay the complainant for the sexual activity, not intending to do so".* The NSWLRC suggest this could be achieved through proposed s61HJ(1)(g) which states:

    A person does not consent to a sexual activity if-

[1] Section 36(2)(e) *Crimes Act 1958 (Vic)*
[2] Section 36(2)(f) *Crimes Act 1958 (Vic)*

(g) the person is fraudulently induced to participate in the sexual activity.

26. We agree with Rape and Domestic Violence Services Australia that this could more clearly be captured through explicit reference by adding *"or monetary exchange"* to the examples of purpose of sexual activity at proposed s61HJ(f)(iii).

27. We also support the inclusion of proposed s 61HJ(1)(g).

Recommendation 5

Adopt a single list of non-exhaustive specific circumstances in which a person does not consent to a sexual activity as outlined in proposed s61HJ.

Recommendation 6

Consideration be given to including circumstances when a person participates in a sexual activity due to a mistaken belief within a religious framework such as a sect or cult-environment.

Recommendation 7

Add *"or monetary exchange"* to the examples of purpose of sexual activity at proposed s61HJ(f)(iii).

Better recognition of sexual violence in a domestic violence context

28. We welcome better recognition of sexual violence within a domestic violence context with the inclusion of proposed s61HJ(e)(i) and (ii) which state:

A person does not consent to a sexual activity if –

(e) the person participates in the sexual activity –

(i) because of force or fear of force or harm to the person, another person, an animal or property, regardless of when the force or the conduct giving rise to the fear occurs, or
(ii) because of coercion, blackmail or intimidation occurring at any time

29. However, we recommend *"harm"* be described as "*harm of any type"*. This is to emphasise that harm need not by physical harm. It could, for example, be psychological or financial harm.

30. Further, the addition of *"harm of any type"* is consistent with the ALRC and NSWLRC recommendation in the *Family Violence – A National Legal Response Final Report* [3] and s 36(2)(b) of the *Crimes Act 1958 (Vic).*

31. We welcome acknowledgement in both proposed s61HJ(e)(i) and (ii) that the *"force", "fear or force", "fear of harm", "coercion", "blackmail" or "intimidation"* can occur at any time and that there is no requirement to consider immediacy. As the *Proposals Paper* states this is intended to recognise *"long-term patterns of abuse"*.

32. We support the inclusion of s61HJ(e)(iv) which states:

A person does not consent to a sexual activity if –

[3] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response,* Sydney, 2010, Recommendation 25-5(c)

(e) the person participates in the sexual activity -

(iv) because the person is overborne by the abuse of a position of authority or trust.

33. However, we question if this should be further expanded. We acknowledge that people with a disability can consent to sexual activity in informal care relationships. We also acknowledge that some people with a disability are dependent or reliant on a formal or informal carer[4] for day to day needs and there may be circumstances where that person is fearful of withdrawal of such support and participates in sexual activity in circumstances that should also be captured by s61HJ(1)(e).

34. While this could be captured by "*trust",* in discussions with People with Disability Australia, we recommend also including either ''*or dependence"* or *"or reliance"* to more clearly capture these circumstances.

35. We understand why a term is included to provide a threshold to make clear that not every circumstance of abuse of a position of authority or trust is intended to negate consent to sexual activity and criminalise the behavior of the person in a position of authority or trust. However, we question if the term *"overborne"* is the right term or a term that would be easily understood. We recommend further consideration of a threshold descriptor.

36. We welcome the inclusion of a jury direction on family violence in proposed s 292(11) and discuss this in detail in the section on jury directions below.

Recommendation 8

"Harm" in proposed s61HJ(1)(e)(i) be replaced with *"harm of any type"* to clearly capture forms of violence other than physical violence.

Recommendation 9

Include *"or dependence"* or *"or reliance"* in proposed s61HJ(1)(e)(iv).

Recommendation 10

Further consider an appropriate threshold descriptor in proposed s61HJ(1)(e)(iv) other than *"overborne".*

Knowledge of consent

37. We believe proposed s61HK outlining knowledge about consent is simpler and clearer than the current law.

38. We support retaining an objective fault element for knowledge of consent for the reasons outlined in our submission dated 22 February 2019.

39. We particularly welcome the framing at proposed s61HK(1)(c):

A person is *taken to know that another person does not consent to a sexual activity if-*

(c) ***Any*** *belief that the person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances. (emphasis added)*

[4] A formal carer is someone who is employed in a professional care capacity to care for a person. An informal carer may be a spouse, partner, family member or friend.

40. We are concerned that the current law is too narrow and the presence of *any* reasonable ground for a belief can result in an acquittal even if there is also *"considerable evidence that the mistake was an unreasonable one"* (citing McNamara et al preliminary submission).

41. We agree that the proposed framing is intended to *"encourage fact finders to assess the reasonableness of a belief holistically, in light of all relevant circumstances".*

42. While proposed 61HK is an improvement on the current law we question if more needs to be done. This highlights the importance of research and an ongoing review mechanism discussed below.

What fact finders must, and must not, consider

43. We support the restructuring of proposed s61HK(2) to make clear it applies to any finding under proposed s61HK.

44. We welcome the requirement to consider what the accused person *"said or did"* to ascertain if the other person consented to the sexual activity. 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".*

45. We continue to support Rape and Domestic Violence Services Australia recommendation 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.

Recommendation 11

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 on consent

46. We welcome the proposal to include legislated jury directions, especially to fulfil an essential role in challenging myths about sexual violence and how people respond to sexual violence.

47. We believe it is important to ensure jury directions are working as intended. It is important they are developed with input from experts, including sexual and domestic violence experts and they are tested. Research is vital to ensure jury directions are working as intended and addressing rape myths and they should be regularly reviewed as would occur through an ongoing legislative review mechanism as discussed below.

48. We support the inclusion of a mandatory direction about assumptions about consent. We agree that *"sexual offences are unique in the way they attract misconceptions and assumptions"* and that fact finders "*need to be aware of their own assumptions"*.[5]

49. We support the remaining proposed legislated directions be discretionary.

50. We support the statement in the legislated jury directions that *"it is not necessary a particular form of words be used"* and that a direction can be given at *"any time"* and *"on more than one occasion during the trial".*

[5] NSWLRC, *Consent in relation to sexual offences: Draft proposals*, 2019, paragraph 8.10.

51. We believe it is important to provide flexibility, so judges can tailor directions to the facts. We acknowledge the research referred to in the *Proposals Paper* that *"directions given earlier in a trial can have more impact that those given at the end"* and repeating jury directions may assist jurors to understand the directions.

52. We support the circumstances outlined in proposed s292(2) as to when a jury direction is required to be given. Proposed s292(2) states:

> *In a trial to which this section applies, the judge must—*
>
> *(a) give the direction in subsection (5), and*
>
> *(b) give any one or more of the directions in subsections (6)–(11)—*
>
> *(i) if there is a good reason to give the direction, or*
>
> *(ii) if requested to give the direction by a party to the proceedings, unless there is a good reason not to give the direction.*

53. We welcome the judge having the power to make a direction without a request.

54. We support the topics for jury direction on the basis there is research undertaken to test their effectiveness and an ongoing review mechanism.

Reinforcing rape myths

55. It is important that jury directions do not inadvertently reinforce rape myths.

56. We believe the framing of proposed s292(10) risks reinforcing rape myths. Proposed s292(10) states:

> ***Behaviour and appearance of complainant***
>
> *Direction—*
>
> *None of the following is, of itself, a reliable indicator that a person consents to a sexual activity—*
>
> *(a) the person's clothing or appearance,*
>
> *(b) the consumption by the person of alcohol or any other drug,*
>
> *(c) the person's presence in a particular location.*

57. We believe a person's clothing, appearance, presence in a particular location or consumption of alcohol or any drug should never be used to justify sexual assault. To refer to *"of itself"* and *"reliable"* serves only to reinforce the very rape myths the provision is intended to challenge. We therefore recommend the removal of *"of itself"* and *"reliable"* so it states: *"None of the following is an indicator that a person consents to a sexual activity".*

58. Similarly, *"of itself"* and *"reliable"* should be removed at proposed s292(9)(b) which currently states:

> *the presence or absence of emotion or distress is not, of itself, a reliable indicator of whether or not a person is telling the truth.*

59. Similarly, *"of itself"* should be removed at proposed s292(8)(b) which currently states:

The absence of injury or violence, or threats of injury or violence, does not, of itself, mean that a person is not telling the truth about an alleged sexual offence.

Other directions

60. We support the inclusion of a direction on responses to giving evidence but recommend this also include words to the effect that "*trauma affects people differently".*

61. Proposed s292(9) currently states:

> ***Responses to giving evidence***
>
> *Direction—*
>
> *(a) some people may show obvious signs of emotion and distress when giving evidence in court about an alleged sexual offence, but others may not, and*
>
> *(b) the presence or absence of emotion or distress is not, of itself, a reliable indicator of whether or not a person is telling the truth.*

62. We note proposed s293A(2)(ii) states *"trauma may affect people differently"* so see no reason why it cannot be included as part of a response direction.

Recommendation 12

Remove *"of itself"* and *"reliable"* from proposed s292(10) and proposed s292(9)(b) and *"of itself"* from proposed s292(8)(b).

Recommendation 13

In proposed s292(9) add "*and (c) trauma affects people differently".*

Family violence direction

63. We welcome the inclusion of a family violence legislated jury direction. As we outlined in our previous submissions, we do not believe sexual violence within a domestic violence context has been adequately addressed in the law. Proposals to include better recognition of sexual violence in a domestic violence context both in reference to a list of factors negating consent discussed above as well as jury directions are important.

64. Proposed s292(11) states:

> ***Family violence***
>
> *Direction—*
>
> *A person may participate in sexual activity because of fear of harm in circumstances of domestic and family violence—*
>
> *(a) including where there has been an ongoing pattern of coercive and controlling behaviour, and (b) whether or not there was a threat of harm immediately before or during the sexual activity.*

65. Consistent with Recommendation 8, we recommend *"fear of harm"* be described as "*fear of harm of any type".* As we advocate above this is to more clearly capture non-physical forms of violence such as psychological and financial abuse.

66. We believe this provision would benefit from a definition of family violence to make clear it extends beyond physical violence and that sexual violence is a form of family violence. We believe this will be an important educative tool.

67. We refer to s5 of the *Family Violence Protection Act 2008 (Vic)* for a helpful example of a definition of family violence and the forms of violence which constitute family violence. We refer to s5 of the *Crimes (Domestic and Personal Violence) Act (NSW)* for the definition of *"domestic relationship"* which outlines the relationships in which domestic and family violence can take place in NSW.

68. We further recommend *"coercive and controlling behaviour"* be explained as we do not believe these terms are widely understood.

69. While we understand proposed s292(11)(b) is intended to make clear that the threat of harm need not be immediately present before or during the sexual activity, we believe this needs to be made clearer. We refer to proposed s61HJ(1)(e)(i) which refers to *"regardless of when the force or the conduct giving rise to the fear occurs"* and recommend consideration of similar wording.

70. We also recommend the direction refer to the prevalence of sexual violence within a domestic violence context.

Recommendation 14

"Fear of harm" in proposed s292(11) be replaced with *"fear of harm of any type".*

Recommendation 15

The family violence direction includes a definition of family violence and explains *"coercive and controlling behaviour"*.

Recommendation 16

The family violence direction more clearly states a threat of harm need not be immediate.

Recommendation 17

The family violence direction refers to the prevalence of sexual violence within a domestic violence context.

Will the draft proposals achieve what is intended?

71. The NSWLRC asks in the *Proposals Paper "about the practical effect of our proposals, and whether you think they will achieve what we intend them to achieve"?*

Legislative change of itself is insufficient

72. We acknowledge the importance of legislative reform and welcome the proposals as outlined above. However, we continue to advocate that changes to legislation alone are insufficient to effect real change.

73. Cultural change requires an accompanying extensive evidence-based community 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.[6] One off training is insufficient. Significant investment must be made into primary prevention and it must be ongoing.

74. Specialisation is also key to cultural change. As outlined in our previous submission dated 22 February 2019, the Criminal Justice Sexual Offence Taskforce which was established in December 2004 and reported in December 2005 made several recommendations relating to specialisation.

75. 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 Pubic 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".*

76. There has been a reluctance in NSW to adopt measures that provide for such specialisation. Consistent with these recommendations we call again for an increased focus on specialisation, including specialist sexual and domestic violence judges, prosecutors, support services, police and interpreters. The ALRC and NSWLRC have previously acknowledged the importance of ongoing training for police officers, lawyers and judicial officers.[7] It is vital that all workers in the criminal justice system from police who take the initial report, interpreters and support workers to all workers in the court system including legal practitioners, judicial officers and court staff are domestic violence and sexual violence informed, trauma informed, culturally competent, LGBTQ aware and disability aware.

77. We also recommend 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.

78. It is vital that those who have experienced sexual violence are able to access the support they need when they need it – for example, wrap around services including intensive case management.

79. 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.

Recommendation 18

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. A comprehensive primary prevention strategy is required that includes preschools, schools, tertiary institutions, workplaces, sporting clubs, media and entertainment. Significant and ongoing investment is required.

Recommendation 19

[6] 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.

[7] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response,* Sydney, 2010, paragraph 24.99

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

Recommendation 20

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; LGBTQ awareness; and disability awareness.

Recommendation 21

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 22

People who have experienced sexual violence are able to access the support they need when they need it – for example, wrap around services including intensive case management.

Recommendation 23

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.

Role of further research and ongoing reviews

80. In 1996, *Heroines of Fortitude: The experiences of women in court as victims of sexual assault* was published by the then Department of Women. It examined all sexual assault matters in the NSW District Court over a one-year period. It provided a rare and powerful insight into the experiences of sexual assault complainants and highlighted both gender and racial bias in the legal system.

81. Such research is vital in highlighting how the law and criminal justice system is working in practice and where improvements can be made. We strongly advocate for ongoing research of this kind.

82. Research that involves the testing of jury directions, including to examine if they are adequately addressing misconceptions and rape myths is also vital.

83. We recommend a body such as Australia's National Research Organisation for Women's Safety (ANROWS) with expertise in this area be commissioned to undertake such research.

84. If these reforms effectively acknowledge the prevalence of sexual violence and result in higher conviction rates, another practical issue relates to what evidence-based programs will be offered to those convicted to help reduce further offending in relation to sexual violence? It is vital that any such programs be developed by experts and operate within a gendered and feminist framework. This could be another area of research.

85. We also acknowledge the important role of the Criminal Justice Sexual Offence Taskforce (Taskforce) in examining issues surrounding sexual assault and the criminal justice response. We were a member of the Taskforce.

86. We also acknowledge that we, like many others on the Taskforce, welcomed the introduction of the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007*.

87. As we acknowledged in our submission dated 19 February 2019:

> *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.*

88. This highlights the importance of an ongoing review mechanism, to ensure the law is meeting its policy objectives, including meeting community standards with respect to consent in relation to sexual offences.

89. We therefore recommend the Government include a review mechanism similar to that included in s119 of the *Victims Rights and Support Act 2013 (NSW).* This provides for the first review as soon as possible after 3 years of the legislation receiving assent and thereafter every 3 to 5 years.

90. Noting the important role of a range of experts in advising the Government on changes required to laws relating to sexual offences through the Taskforce established in 2004, we recommend the Government establishes a committee of experts, similar to the Taskforce to oversee each legislative review. The committee of experts should include specialist sexual assault and domestic violence services, specialist women's legal services, academics, those involved at each of the steps of charging and prosecuting a sexual offence, other legal experts, and sexual violence victims-survivors.

91. We note there have been reviews of the laws relating to sexual offences in other jurisdictions and that the Queensland Government recently commissioned the Queensland Law Reform Commission to undertake a review into consent in rape and sexual assault cases. We believe the research we recommend be undertaken would also benefit jurisdictions beyond NSW.

Recommendation 24

The Government when amending the legislation include a review mechanism of these proposals and any legislation relevant to the prosecution of sexual offences similar to that included in s119 of the *Victims Rights and Support Act 2013 (NSW)* that provides for the first review as soon as possible after 3 years of the legislation receiving assent and thereafter every 3 to 5 years.

Recommendation 25

The Government establishes a committee of experts, similar to the Criminal Justice Sexual Offence Taskforce, to oversee each legislative review.

Recommendation 26

The commissioning of research that involves the examination of all sexual assault matters in the District Court over a period of time, such as a year, be undertaken at regular intervals and this research be considered in future legislative reviews.

Recommendation 27

The commissioning of research that involves the testing of jury directions, including to examine if they are adequately addressing misconceptions and rape myths.

Recommendation 28

That a body such as Australia's National Research Organisation for Women's Safety (ANROWS) with expertise in this area be commissioned to undertake such research.

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

Yours faithfully,
Women's Legal Service NSW

Janet Loughman
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