

ANROWS

AUSTRALIA'S NATIONAL RESEARCH
ORGANISATION FOR WOMEN'S SAFETY
to Reduce Violence against Women & their Children

13th July 2018

The Law Reform Commission

New South Wales Law Reform Commission
SYDNEY NSW 2001

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

Re: Submission on review of the sexual consent provisions in the *Crimes Act 1900* (NSW)

Dear Commissioner

Australia's National Research Organisation for Women's Safety ("ANROWS") thanks the NSW Law Reform Commission ("the Commission") for the opportunity to make a submission on the review of consent and knowledge of consent in relation to sexual assault offences in s 61HA of the *Crimes Act 1900* (NSW) ("the Act").

ANROWS is an independent, not-for-profit organisation established as an initiative under Australia's National Plan to Reduce Violence against Women and their Children 2010-2022 ("the National Plan"). ANROWS is jointly funded by the Commonwealth and all state and territory governments of Australia. ANROWS was set up with the purpose of establishing a national level approach to systematically address violence against women and their children.

Our mission is to deliver relevant and translatable research evidence which drives policy and practice leading to a reduction in the incidence and impacts of violence against women and their children. Every aspect of our work is motivated by the right of women and their children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and their children and we are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

ANROWS commends this call for preliminary submissions and suggests that it would be useful for a full consultative process to be articulated and an advisory group or taskforce to be established to support the Commission in their work on this important reform.

This submission identifies the relevant evidence from the research produced or commissioned by ANROWS that informs the way in which the legislative consent provisions in the Act and the criminal justice system more broadly can be improved to better respond to and protect victim-survivors of sexual offences. We would be very pleased to further assist the Commission, if required.

Yours sincerely



Dr Heather Nancarrow
Chief Executive Officer

13 July 2018

Issues relating to the practical application of s 61HA of the *Crimes Act 1900* (NSW), including the experiences of sexual assault survivors in the criminal justice system

1. ANROWS research highlights that the application of s 61HA of the *Crimes Act 1900* (NSW) to sexual assault and violence in the context of domestic violence and intimate partner relationships is particularly problematic on the basis that:
 - consent within intimate partner relationships where domestic violence is present is complex;
 - sexual assault and violence within intimate partner relationships is often violent and repetitive; and forms part of a larger pattern of coercive control within a relationship that is intended to dominate, humiliate and denigrate the other partner.
2. Although s 61HA(4)(c) and (d) of the Act as currently drafted confirm that consent is negated where there are threats of force or terror, or the person is unlawfully detained, it fails to explicitly identify domestic and intimate partner violence as a circumstance that vitiates consent.
3. ANROWS recommends that the Commission consider reflecting the seriousness and circumstances of sexual assault and violence in intimate partner relationships in s 61HA of the Act by explicitly recognising:
 - sexual assault and violence within an intimate partner relationship as a circumstance in which there is no consent;
 - intimate partner violence as a situation that constitutes 'threats of force or terror' and 'intimidatory or coercive conduct or other threat that does not involve a threat of force'.
4. ANROWS proposes that the Commission incorporate the definition of sexual assault set out under Australia's National Plan to Reduce Violence against Women and their Children 2010-2022 ("the National Plan"), as it reflects a relationship-based approach that is more broadly focused on the victim's self-identified experiences and is intended to appropriately inform the provision of support and other service responses (Breckenridge et al., 2015). The National Plan's definition of sexual assault and violence also emphasises the nature and dynamics of the relationship of victim to perpetrator (Breckenridge et al., 2015). ANROWS encourages the Commission to reflect this approach in s 61HA of the Act as it:
 - focuses on the victim's self-identified experiences;
 - recognises the use of power and control occurring within intimate partner relationships as central tenets; and
 - recognises the seriousness and unique circumstances of sexual assault and violence occurring within intimate partner relationships.
5. Violence against women is a significant social and public health issue, with domestic and family violence and sexual assault identified as the most prevalent forms of violence experienced by women in Australia (Mitra-Kahn et al., 2016). In addition to ineffective legislative responses, ANROWS research highlights that current criminal justice processes and practices are not victim centered. The prevalence of victim-survivor blaming, rather than holding the perpetrator to

account at a broader societal level, is also reflected in criminal justice police and court service responses. ANROWS studies on the experiences of sexual assault survivors evidence the impact of a response that is not victim focused or trauma informed (Hegarty et al., 2017). In addition to legislative reform, there is a need to increase education, training and monitoring of police who may hold beliefs that have the effect of undermining the victim following experiences of sexual violence, including understanding how serious these acts are as criminal offences (Hegarty et al., 2017).

6. This is highlighted by the following extracts in which two victims of rape describe the lack of acknowledgement, support or assistance they received from police following their experience and the impact this had:

Rape survivor 1

She was gang-raped and was aged 16/17 at the time of the event. The men held her captive in an old warehouse. She eventually escaped and ran to a neighbouring house. The police were called. She was interested in pursuing legal action, however, after some time the police told her that there was nothing that they could do because it was “my word against theirs”. She said that “the police have never been really very helpful to me”. After that experience she said that she decided that she “would never talk to anyone anymore and keep my mouth shut”. She thought she would “just have to try and forget the whole experience”. To do this, she started smoking marijuana regularly and continued to drink alcohol to excess to cope with her feelings. She felt depressed and had frequent thoughts of wanting to die. Not long after the gang rape she tried to kill herself. (Hegarty et al., 2017).

Rape survivor 2

She was drunk after an office party and was vomiting outside in an alleyway near her office when she was attacked and raped by a co-worker at the age of 22. She was taken to hospital. The police called and she said that they did not take what occurred seriously and “were not helpful”. She later told her boyfriend, who immediately blamed her because she was drunk. He called her a “slut”. The lack of acknowledgement of the violation she suffered—from the police and then her boyfriend—led to her “feeling very depressed”. She remembers really wanting comfort from her boyfriend, but instead he was verbally abusive. She lost confidence in herself and the world around her and she lost trust in “others who were meant to be supportive”. She became so depressed that she wanted to kill herself. (Hegarty et al., 2017)

7. These examples underscore the importance of a trauma informed response to disclosures of sexual assault (Hegarty et al., 2017; Blagg et al., 2018; Maher et al., 2018; Vaughan et al., 2016). ANROWS more broadly supports the call for a criminal justice system that is victim centered and trauma informed, including a continued need for specialist courts which adopt trauma embedded practice across the criminal justice response and support framework. This includes an understanding of complex trauma, the impact of sexual violence, the dynamics and impacts of intimate partner sexual violence, cultural competency and disability awareness (Maher et al., 2018; Blagg et al., 2018; Kaspiew et al., 2017).

Diverse experiences of sexual assault and violence

8. Although women from all cultures, ages and socio-economic groups are affected by sexual assault and violence, ANROWS research suggests that the extent, nature and impact of such violence is not evenly distributed across communities in Australia (Mitra-Kahn et al., 2016). Women from diverse backgrounds are disproportionately affected by violence, particularly Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, women with disability, women living in regional/remote parts of Australia and LGBTQI women (Mitra-Kahn et al., 2016). Further, the varied nature and impacts of this violence is often compounded by numerous forms of marginalisation, which is reflected in their experiences as survivors of sexual assault or violence within the criminal justice system (Mitra-Kahn et al., 2016). The diversity of these experiences are outlined in further detail below, and it is recommended that the Commission take this into account in their review.

Aboriginal and Torres Strait Islander women

9. For Aboriginal and Torres Strait Islander women “the incidence of violence... is disproportionately high in comparison to the same types of violence in the Australian community as a whole” (Mitra-Kahn et al., 2016) and intergenerational trauma, dispossession, dislocation and colonisation play an important role in the experience and perpetration of violence (Mitra-Kahn et al., 2016). In fact, in the 12 months prior to the 2016 Australian Bureau of Statistics survey, one in seven Aboriginal and Torres Strait Islander women had experienced physical assault. Of these, approximately a quarter indicated that their most recent incident was perpetrated by a partner they have lived with (ABS, 2016).
10. Further, almost every incarcerated Aboriginal or Torres Strait Islander woman in Australia is a victim of long-term sexual violence, and those with a disability are more likely to be in prison for negligible matters and face gender, disability and racial discrimination (Maher et al, 2018). This finding is significant given that Aboriginal and Torres Strait Islander women comprise two percent of the adult female population and 34 percent of the adult female prison population (Maher et al., 2018). ANROWS research identifies historical fear of law enforcement, “shame, silence and the experience of community sanctions” as significant factors deterring Aboriginal and Torres Strait Islander women from disclosing sexual assault or violence and seeking legal redress via the criminal justice system (Mitra-Kahn et al., 2016). Consequently, these factors significantly impact their experience as survivors of sexual assault or violence within the criminal justice system, and it is recommended that the Commission take this into account in their review.

Culturally and linguistically diverse women

11. The research indicates that “experiences with multi-perpetrator family violence, and the impact of violence and abuse exacerbated by immigration policy, visa status and the stressors of the migration experience” (Vaughan et al., 2015, p. 2) add complexity to these women’s experiences of sexual assault and violence, including family and domestic violence (Mitra-Kahn et al., 2016). Further, of all the women who had experienced sexual assault, many did not seek legal redress via

the criminal justice system or report their experience to police due to “cultural or language reasons” (Mitra-Kahn et al., 2016).

Women with disability

12. A growing body of evidence shows that, across their lifetime, women with disabilities are more likely to experience violence from multiple perpetrators compared to women without disabilities (Maher et al., 2018). Further, women with disabilities may have particular vulnerabilities specifically to sexual assault, from the following three categories of perpetrators:
 - male residents in residential settings (Mitra-Kahn et al., 2016);
 - staff in residential care facilities or disability support services (Mitra-Kahn et al., 2016); and
 - as with all women, family members, intimate partners and ex-partners (Mitra-Kahn et al., 2016).
13. In terms of their experiences as victims of sexual assault within the criminal justice system, many in institutional residential settings reported that their disclosure of the offence was minimised by not being treated as a crime, but rather a workplace or service issue (Mitra-Kahn et al., 2016). Further, where the perpetrator also lives with a disability the sexual assault or violence is often excused as behaviour associated with the perpetrator’s disability (Mitra-Kahn et al., 2016).
14. In addition, many women—particularly those experiencing intellectual disabilities, cognitive impairment or mental ill-health—reported being disbelieved or being unable to exercise legal rights (Mitra-Kahn et al., 2016). This is in part due to the lack of ability of police officers to identify disability, and the specific and complex barriers that women with disability face in reporting crime (Maher et al., 2018). According to our research, these women are at times disbelieved by police or service providers and may not be seen as credible witnesses to their own experiences of sexual victimisation (Mitra-Kahn et al., 2016). Experts argue that urgent work is needed to improve access to justice for women with disability because they are too often not believed when reporting sexual assault to police and frontline service providers (Mitra-Kahn et al., 2016). When a rare disclosure occurs, women and girls with disability feel police question their credibility (Mitra-Kahn et al., 2016).
15. Other issues identified by women with disabilities in seeking redress for sexual assault or violence via the criminal justice system include:
 - Being assessed as legally incapable to give evidence (Mitra-Kahn et al., 2016);
 - Being unable to access communication aids or interpreters when making a statement (Mitra-Kahn et al., 2016);
 - Having perpetrators of serious crimes against them going unprosecuted (Mitra-Kahn et al., 2016); and
 - Discrimination and exclusion as a result of an interaction of their impairments with environments not designed to accommodate their needs, which in turn leads to being marginalised and disempowered (Mitra-Kahn et al., 2016).

Lesbian, gay, bisexual, transgender, intersex and queer women

16. While findings vary on the experiences of violence for people who identify as LGBTIQ, they demonstrate significant rates of victimisation compared with heterosexuals (Mitra-Kahn et al., 2016). This is due to a lack of understanding of what constitutes domestic and family violence and sexual assault within the LGBTIQ community, including a lack of knowledge about available services, which is arguably due to the dominance of normative understandings and paradigms of gendered power dynamics (Mitra-Kahn et al., 2016). For example, lesbian and bisexual women in particular may struggle to identify experiences of sexual violence as violence due to dominant understandings of women being considered incapable of committing rape (Mitra-Kahn et al., 2016). However, with respect to their experiences as victims of sexual assault and violence within the criminal justice system, fear of heterosexist responses from police and/or services was consistently raised by LGBTIQ women (Mitra-Kahn et al., 2016). A fear of police occurs in the context of homosexuality having been illegal in Australia in the living memory of many people who identify as LGBTIQ (Mitra-Kahn et al., 2016).

Women in prison

17. Research has shown that there is a strong connection between being a female offender and being a victim of crime or domestic and family violence, and sexual assault (Mitra-Kahn et al., 2016; Day, et al., 2018 forthcoming). Further, a study of the sexual health and behaviour of prisoners in New South Wales in 2008 found that almost one in six of the 199 female participants had experienced sexual coercion or sexual violence in their lifetime (Mitra-Kahn et al., 2016). A review of the limited literature on this topic supports this, indicating high rates of abuse with many prisoners reported as having a history of sexual assault traumatisation, child sexual abuse, physical abuse and adult re-victimisation (Mitra-Kahn et al., 2016). While there is a paucity of Australian research on the female prison population and their experiences of victimisation and perpetration of violence, it is known that mental illness, substance abuse and trauma have complex impacts on the nature of female offending and victimisation (Stathopoulos et al., 2012).

Sexual assault research and expert opinion

18. Over two decades of research confirms that domestic violence and sexual assault present a significant threat to women's health and well-being (Spalding et al., 2015). ANROWS research highlights in particular that sexual violence and assault is located not only in intimate and familial relationship settings but also within a broader range of social relationships and public contexts that are less personal (Breckenridge et al., 2015; Spalding et al., 2015). However, there is a growing body of evidence suggesting that sexual violence and assault can be constitutive of domestic and family violence at a higher rate than previously thought (Breckenridge et al., 2015).

Intersections in domestic and family violence and sexual assault and violence

19. Studies indicate that an overlap exists between different types of violence against women, whereby adult sexual assault can form a constitutive part of domestic and family violence, and child sexual

abuse can co-occur within the broader context of domestic and family violence (Breckenridge et al., 2015). However, sexual assault is perpetrated across a wider range of contexts than just family or intimate partner relationships and as a consequence, cannot be fully located within a domestic and family violence framework (Breckenridge et al., 2015). Despite this, women constitute the majority of adult sexual assault victims (an estimated 85 percent) (ABS, 2016; Breckenridge et al., 2015).

Intimate partner sexual violence and assault

20. While intimate partner sexual violence and assault continues to lack public visibility, prevalence rates for sexual assault perpetrated within intimate partnerships continues to grow, but estimations have been affected by a number of factors (Breckenridge et al., 2015). For example, it is only since 1985 that Australian laws have allowed for the possibility of rape being recognised as a criminal offence when occurring in the context of marriage or an intimate partnership (Breckenridge et al., 2015). Further, women themselves did not often recognise (and therefore did not disclose) their partners' sexually aggressive actions as rape or sexual assault, even in extreme circumstances (Breckenridge et al., 2015). Consequently, normative understandings of what constitutes "real rape" affects the ability of victims, perpetrators and bystanders to interpret experiences of intimate partner sexual violence and assault (Cox, 2015).
21. Evidence produced by ANROWS between 2015 and 2018, shows that the incidence of intimate partner sexual violence and assault is not isolated and is generally linked to other forms of violence, often forming part of a larger pattern of coercive control within a relationship (Cox, 2015). Thus, suggesting that intimate partner sexual violence and assault ought to be treated as a tactic of family and domestic violence, rather than a separate phenomenon. Research also indicates that:
 - Intimate partner sexual violence and assault victims are less likely to seek assistance than victims of other forms of violence (Cox, 2015);
 - Between 24 and 62 percent of women reported intimate partner sexual coercion (Cox, 2015);
 - Between 1.7 and 46 percent of women reported intimate partner sexual assault (Cox, 2015);
 - Women who experience child sexual abuse are more likely to experience intimate partner sexual violence, and assault and domestic violence in their adult relationships than women who have not experienced child sexual abuse (Cox, 2015); and
 - Intimate partner sexual violence and assault perpetration is associated with drug and alcohol abuse, frequent and normalised pornography engagement, and a history of sexual coercion (Cox, 2015).

National Risk Assessment Principles (EMBARGOED until 27 July 2018)

22. ANROWS has developed National Risk Assessment Principles ("the Principles") for victims and perpetrators of violence, based on evidence, including the risks that are present for children and other family members who experience or are exposed to violence. The Principles are appropriate for front-line workers/ first responders assisting victims of domestic and family violence who

operate at different levels in multiple sectors and from multiple disciplines, including the criminal justice system. They are based on the premise that: victims remain the best assessor of their own risk; victims' safety is the core priority of all risk assessment tools; and risk assessment tools should not be used without appropriate service responses and/or treated in isolation when determining risk outcomes.

23. For the purpose of this submission ANROW highlights Principle 8—Intimate partner sexual violence must be specifically considered in all risk assessment processes. Evidence produced by ANROWS shows that the incidence of intimate partner sexual violence and assault is not isolated and is generally linked to other forms of violence, often forming part of a larger pattern of coercive control within a relationship (Cox, 2015). Intimate partner sexual violence is a uniquely dangerous form of domestic and family violence which must be specifically considered in all risk assessment and safety management processes and practices. Survivors who are sexually abused by their partners are at a much higher risk of being killed, particularly if they are also being physically assaulted. Intimate partner sexual violence is a significant indicator of escalating frequency and severity of domestic and family violence.

Link between alcohol use and perpetration of sexual violence

24. The precise nature and function of alcohol use in the perpetration and victimisation of sexual assault, and family and intimate partner violence, is complex and controversial (Noonan et al., 2017). Explanations of the role of alcohol use vary from that of primary cause to a covariant or confounding variable, to that of an excuse to reduce perpetrator responsibility (Noonan et al., 2017). While ANROWS research suggests that there is little evidence that alcohol use is a primary cause of violence against women, findings identify clear associations, and in some instances, strong correlations between alcohol use and violence against women (Noonan et al., 2017).
25. Cross-sectional research has identified that men's beliefs and expectations about the causal role of alcohol in intimate partner violence influenced the relationship between patterns of alcohol use and subsequent aggressive behaviours (Noonan et al., 2017). That is, experiences of perpetrating violence while drinking reinforced men's belief that alcohol was the cause of their violence (Noonan et al., 2017). Furthermore, Leonard (2002) found that believing that alcohol caused violence effectively permitted an offender's disinhibition and sexual assault of women (Noonan et al., 2017). However, the notion that the disinhibiting effects of alcohol produce loss of control in the perpetrator is not entirely accurate, with research indicating that perpetrators are generally in control when using violence (Noonan et al., 2017). For example, such control is demonstrated by the calculated way in which violence is inflicted so as to avoid leaving visible marks upon the victim (Noonan et al., 2017). Our findings also suggest that men perpetrating violence are often not excessively intoxicated at the time of perpetration (Noonan et al., 2017).

Link between alcohol use and women's victimisation

26. There appears to be a clear and reliable connection between the excessive use of alcohol (and other drugs) and the sexual and non-sexual victimisation of women (Noonan et al., 2017). This association includes alcohol as a precursor to, and a consequence of, victimisation (Noonan et al.,

2017). However, there is a complex array of factors that intersect with alcohol use by both perpetrators and victims that influence the level and type of risk of sexual victimisation of women (Noonan et al., 2017). For example, existing research has found that sexual assault victims who had consumed alcohol were more likely to report rape completion (Noonan et al., 2017).

However, in situations where only the offender consumed alcohol, there were worse outcomes from assaults (such as rape completion and physical injury) than in situations where both the victim and offender were consuming alcohol (Noonan et al., 2017). This suggests that prevention programs ought to target men's use of alcohol including their expectations about the sexual availability of women while under the influence of alcohol and other drugs (Noonan et al., 2017).

27. Taking the above into account, alcohol use may be accurately considered as an enabler in the perpetration of sexual assault on women in public social contexts (e.g. places of entertainment) (Noonan et al., 2017). While alcohol use is not a primary cause of sexual assault, in essence it has been found to interact with individual characteristics, gendered social scripts, and expectations within specific settings to reinforce the confidence of perpetrators, reduce victim resistance, infer victim culpability, and decrease perpetrator self-perceptions of responsibility (Noonan et al., 2017).

Concluding remarks

28. Domestic and family violence and sexual assault, with its multiple impacts, is a complex problem that requires a sophisticated, evidence-informed, concerted and integrated approach. Although there is a need for jurisdictional consistency, this is not to say that all instances of domestic and family violence, and sexual assault should be treated the same. Indeed, people who have experienced or are experiencing domestic and family violence and sexual assault have diverse backgrounds and circumstances, and any assistance or attempts by the criminal justice system to meet their needs must reflect this diversity.
29. In essence, ANROWS proposes that in order to better protect victims and survivors of sexual assault and violence s 61HA of the Act must reflect a relationship-based approach that is more broadly focused on the victim's self-identified experiences. This recognises the use of power and control occurring within intimate partner relationships as central tenets, and reflects the seriousness and unique circumstances of sexual assault and violence occurring within intimate partner relationships. As part of this process a broader review of the sexual violence and assault legal process and system is required which must include laws, courts, police, community sectors and attitudes, within a framework that is victim centered and trauma informed.
30. ANROWS remains strongly committed to delivering relevant, accurate and translatable research evidence which drives reforms through policy and practice to reduce the incidence and impact of violence against women and their children.

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