

Committee Secretary  
Legal and Constitutional Affairs References Committee  
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## Inquiry into current and proposed sexual consent laws in Australia

### Who we are and why we are making a submission

WESNET is Australia's national peak body for specialist women's domestic and family violence services, with almost 350 eligible members across Australia. WESNET represents a range of organisations and individuals including women's refuges, shelters, safe houses, and information/referral services.

WESNET thanks the committee for the opportunity to make a submission to this inquiry.

### Intersection of sexual violence and domestic and family violence

Many victim-survivors of domestic and family violence (DFV) have also experienced sexual violence. Cox (2015) characterises these women's experiences in two key ways: re-victimisation – when a woman, over her lifetime, experiences both sexual assault and DFV; and intimate partner sexual violence (IPSV) – when the sexual violence is perpetrated by an intimate partner, often as part of a pattern of various forms of abuse.

The concept of consent is particularly fraught in the context of DFV, due to a number of often overlapping dynamics.

- DFV involves the exertion of power and control, and the exploitation of power imbalances, enabling the more powerful to drive and develop relationship parameters which may involve sexual violence. As Tarzia (2021) notes, “the complex dynamics of consent within an intimate relationship are also poorly understood. There is a lack of knowledge around how coercive tactics, blackmail, and implicit threats can be used as strategies to force women into having sex without the perpetrator having to utilise physical force”.
- The nature of DFV and the coercive control inherent within it, blurs the lines between ‘normal’ and not. This, combined with the effect of trauma on diminishing self-worth, self-esteem and autonomy, can render people more likely to enter into and stay within an abusive relationship. A University of Melbourne study (2021) found that over a third of the IPSV victim-survivors in the study had a previous history of sexual assault, child abuse or

family violence, “...this led many of them to have poor self-esteem and they often couldn’t recognise a healthy relationship versus an unhealthy sexual one”.

- Community perceptions based on the historical patriarchal notion of women – and particularly wives – being sexually available and subservient to men continue to exist. These perceptions can exist within relationships as well as being felt as external societal pressure on individuals within relationships. As the Australian Law Reform Commission noted in 2010, up until the 1980s it was “not possible for a man to be charged with, and prosecuted for, raping his wife or, in some cases, de facto partner”. These attitudes are slow to change, with the National Community Attitudes Survey (2017), for example, showing that almost one in five respondents did not understand that it is a criminal offence for a man to have sex with his wife without her consent, and 1 in 3 Australians are unaware that a woman is more likely to be sexually assaulted by someone she knows than by a stranger.

These factors inform WESNET’s keen interest in this inquiry, particularly in advocating for legislative and policy settings that drive and support a holistic approach to achieving gender equality and eliminating violence against women and children.

#### WESNET’s overarching policy position

WESNET has a clear policy position supporting affirmative consent.

- Consent - and how it is defined and defended - goes to the heart of upholding women’s rights to bodily autonomy, agency and self-determination. Without control over their own bodies and selves, women are far less likely to be able to access broader legal, political and economic rights.
- Personal agency includes the right to decide freely when and with whom to have sex.
- While the definition of consent varies from state to state in Australia, the emphasis has historically been on when consent is not given or not obtainable, rather than when it is. Consent may be deemed to be absent, for example, if the victim-survivor was asleep or unconscious. Complex considerations can exist around the accused’s ‘honest belief’, with this approach often reflecting existing power imbalances.
- In contrast, *affirmative consent* means that consent is actively sought and actively communicated. This switches the emphasis from the actions of the victim-survivor to the actions of the perpetrator, and from a ‘no means no’ standard to ‘yes means yes’.
- This is fairer and more balanced, in that an individual seeking to have sex with another person must obtain clear, expressed consent from them before (and while) engaging in a sexual act. It circumvents some of the complexities and subjectivities associated with contemplation of the perpetrator’s beliefs and the victim’s behaviour.

#### Impacts of social inequalities

WESNET represents specialist services that specialise not only in preventing and responding to domestic and family violence, but also on how it impacts particularly within

their own communities, including with respect to First Nations women, migrant and refugee women and women with disabilities. While all communities are affected by sexual violence, research shows that the impacts of violence fall more heavily on certain communities and individuals because of marginalisation experienced as a result of historic and current power imbalances between social groups.

Women who live at the intersections of multiple marginalised identities – like women living with disabilities (ABS, 2016), or Indigenous women (McCalman, 2014) – experience sexual violence at higher rates. For example, Indigenous women are particularly at risk of violence, being 12 times more likely to be the victims/survivors of assault than non-Indigenous women; in rural and remote Western Australia Indigenous women are 45 times more likely to be assaulted by their spouse or partner than non-Indigenous women (Keel, 2004).

First Nations women are at significantly higher risk of sexual abuse because they are more likely to have multiple risk factors including being young, female, having a low income, and experiencing housing and job insecurity. Higher levels of disadvantage also increases the likelihood of exposure to stressful life events (McCalman, 2014), and other studies have noted that “for Indigenous women who utilise dating apps, sexism and misogyny are often accompanied by racism and threats of violence” (Carlson, 2020). It is essential to note also that it is not people’s identities that cause vulnerability but is instead systems and practices that have a discriminatory and/or disproportionate impact on certain groups of people.

Factors such as race and ethnicity, socio-economic status, disability and age further complicate consent. These differences, which are indicative of social inequalities, can affect people’s ability to contest or request sexual encounters. While this is – as with experiencing domestic and family violence more generally – due largely to systemic power differentials, the ability to genuinely consent can also be impacted specifically by cultural, physical and language barriers.

We understand that Women with Disabilities Australia (WWDA) are making a submission to you, highlighting the particular impacts and issues relevant to women with disabilities. We commend their submission to you. We ask also that submissions from other organisations and individuals representing oppressed women – including, particularly, Aboriginal and Torres Strait Islander women, young women, older women and migrant and refugee women – be highlighted to the committee.

## **Inquiry terms of reference**

### **Inconsistencies in consent laws across different jurisdictions**

As is well documented in the discussion paper, there are inconsistencies in laws across jurisdictions, but with a significant move towards the affirmative consent model in recent years.

Until very recently Tasmania was the only jurisdiction to put the onus on both participants to ensure the other is actively consenting.

In November 2021, New South Wales became the frontrunner on the mainland passing the affirmative consent bill, which requires people to expressly say or do something to confirm their partner consents to a sexual activity. The laws will also affirm a person's right to withdraw consent at any point. They make clear that if someone consents to one sexual act, it doesn't mean they've consented to other sexual acts. They will clarify that a defendant cannot rely on self-induced intoxication to show they were mistaken about consent. The bill was passed and came into effect on 1 June 2022 (NSW Government, 2022).

One month earlier in May the ACT Legislative Assembly passed reforms of sexual consent laws in the ACT, ensuring that consent to sexual activity must be actively and affirmatively communicated (Australian Capital Territory Government, 2022).

Victoria followed suit shortly afterwards, with the introduction of its own affirmative consent bill which passed in August 2022 (Premier of Victoria, 2022). Minister for Family Violence Ros Spence said, "This new standard of consent in Victoria shifts the focus away from the victim and towards the accused and what actions they took to confirm consent."

Queensland has already modernised some aspects of consent – including enabling its withdrawal. The Queensland Women's Safety and Justice Taskforce (2022) released its second and final report – Hear her voice: Report 2—Women and girls' experiences across the criminal justice system – on 1 July 2022 recommending further reform in line with New South Wales.

In Western Australia, the Law Reform Commission is set to provide advice to the government on changes to its consent laws, with both an affirmative consent model and the criminalisation of stealthing under review. On 10 February 2023, the Commission released Volume 2 (Offences and Maximum Penalties) of a Discussion Paper which outlines options and poses questions about changing Western Australia's sexual offence laws. This follows on from the release of Volume 1 (Objectives, Consent and Mistake of Fact) and Background Paper on 20 December 2022. Public comment is currently invited.

The committee's attention is drawn to the report of the National Council to Reduce Violence Against Women and their Children (Time for Action) (2009) noted variations across Australia in terms of:

- the definition of consent;
- the conditions or circumstances that are seen as negating consent;
- the way in which a defendant's 'honest belief' in consent is dealt with; and
- the use of judicial directions as a way in which to inform and educate the jury about what amounts, or does not amount, to consent.

While this report was released 14 years ago, this report remains pivotal in informing Australia's first and subsequent National Plans aimed at ending violence against women and children, but it is noted that neither the first nor second National Plans have yet

addressed harmonisation of sexual consent laws. This creates further scope for a national approach.

#### International context

The *Amnesty International* (2018) publication Europe: Right to be free from rape – overview of legislation and state of play in Europe and international human rights standards provides a good overview of the state of sexual consent laws internationally.

Sweden, Portugal, Spain and Denmark are considered most aligned to the affirmative consent model. Australia is largely on par with countries such as England, Wales, New Zealand and Canada.

According to the Amnesty report, only 12 of 31 European countries have a definition of rape that includes consent, with the others focussing on rape as by force or threat of force. Worryingly, the report noted, some countries categorise sex without consent as a separate, lesser offence.

Amnesty notes that “consent-based definitions of rape and legal reforms **are not the ultimate solutions to addressing and preventing this ever-present crime, rather they are significant starting points**” [our emphasis].

#### The operation of consent laws in each jurisdiction

WESNET refers the committee to the submission made by Women’s Legal Services Australia.

The standard of consent being ‘freely and voluntarily given’ creates subjectivities which necessarily creates greater inconsistencies both within and between jurisdictions. Crowe and Sveinsson (2017), for example, examine case law to consider the role of intimidation and threats in undermining legal notions of consent. The research emphasises the significant onus on judges to consider holistically the ‘complex and interlocking’ factors in determining ‘free and voluntary’, as well as noting arguments that the ‘free and voluntary’ standard lacks transparency and consistency.

#### Benefits of harmonisation

The main benefit of harmonisation – with affirmative consent at its core – is that it is an important component of ensuring better, safer and more just outcomes for women and sexual assault survivors regardless of where they live in Australia.

The different laws and definitions relating to sexual consent across the different jurisdictions in Australia causes inconsistencies and confusion. Legal inconsistencies benefit perpetrators who may be aware of them and think about them when perpetrating abuse. They may calculate them into their behaviour or perpetrate abuse in a jurisdiction where it is more difficult to be held criminally responsible.

Legal inconsistency also makes the delivery of consent education complicated and potentially incompatible across state borders. It is difficult to find a nationally agreed

approach to consent education when definitions and legal approaches vary from state to state. It also makes it difficult to develop and communicate strong and clear messages about what is lawful, and what is not.

As noted by Crowe and Hill (2022) harmonisation “would help support educational efforts around sexual consent and reduce confusion about the law”. It would enable educators and lawmakers to work together to clarify and establish “a standard of ongoing communication expected before and during sex”.

Fragmented consent laws undermine our ability as a nation to send a strong message about acceptable and unacceptable behaviour or teach the foundations of respectful relationships.

#### Risks of harmonisation

A potential risk of harmonisation is that it creates a standard that is lower than in some jurisdictions. Crowe and Hill (2022) note this as “what we term the ‘levelling-down’ problem. This occurs when jurisdictions that are progressive and reformist adopt legal principles favoured by less reformist ones to achieve common standards. Harmonisation to the lowest common denominator risks slowing needed reforms”. Harmonisation must be done in such a way that establishes an affirmative consent standard. Rights must be won – or at least maintained – and not lost.

#### How consent laws impact survivor experience of the justice system

WESNET strongly encourages the committee to engage with victim-survivors to address this term of reference. A cross-cutting principle of the National Plan to End Violence Against Women and Children 2022–2032 is that the diverse lived experiences of victim-survivors must inform policies and solutions. This includes the accumulated expertise and wisdom inherent within the specialist services – including women’s legal services, sexual assault support services, and domestic and family violence services – that support victim-survivors of sexual violence.

We also draw the committee’s attention to the Australian Women Against Violence Alliance (AWAVA) (2022) publication Young Women’s Report. The young women and non-binary people involved in this research project repeatedly raise the need for clear and unambiguous consent and respectful relationships education.

#### Efficacy of jury directions about consent

Both New South Wales and Victoria have introduced changes to criminal proceedings, including new requirements for jury directions aimed at helping jurors to better understand the nuances and complexities of consent.

In Victoria, Rose, Cusworth and Hook (2022) note that the new directions “are intended to address common misconceptions about sexual offences that may otherwise lead to flawed decision-making and unjust outcomes, including in relation to the consumption of alcohol, and inferences drawn from whether a person is exhibiting obvious signs of distress when

giving evidence”. These amendments address victim blaming and remind the jury that it does not matter how much alcohol the victim has consumed or how they present in court. These amendments support placing blame on the abuser not on the victim and also dispel the myth of the idea of a ‘perfect victim’.

In efforts to further minimise harmful stereotyping and assumptions, Victoria prohibits statements aimed at undermining the credibility of sex workers and people with diverse gender or sexual identities on the basis of those attributes.

Similarly, under the reformed New South Wales legislation on sexual consent, new provisions regarding jury directions are aimed at giving clearer instructions to jurors to help them understand the nature of the offence of sexual assault more thoroughly. In introducing the new laws, the Attorney-General spoke particularly about the directions dispelling rape myths and “clearer rules of engagement” to “reduce the grey areas” (Singh, 2022).

Standards outlined in the New South Wales and Victorian legislation in relation to jury directions should be considered as part of any harmonisation exercise, as they support the affirmative consent model and will lead to safer outcomes for victims and contribute to a change in national culture around this issue.

#### Impact of consent laws on consent education

As covered in earlier parts of this submission, a key benefit of harmonisation would be the support of educational efforts around sexual consent, and the enabling of educators and the legal profession to work together to develop, clarify and communicate strong and clear messages about what is lawful, and what is not.

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*Signed*



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