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# Legal and Constitutional Affairs References Committee

## **Inquiry into current and proposed sexual consent laws in Australia**

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### **Authorisation**

This submission has been authorised by the NFAW Board

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## Submission to the Legal and Constitutional Affairs References Committee on the inquiry into current and proposed sexual consent laws in Australia

This submission is being made by the National Foundation for Australian Women (NFAW).

NFAW is dedicated to promoting and protecting the interests of Australian women, including intellectual, cultural, political, social, economic, legal, industrial and domestic spheres, and ensuring that the aims and ideals of the women's movement and its collective wisdom are handed on to new generations of women. NFAW is a feminist organisation, independent of party politics and working in partnership with other women's organisations.

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.

In recent years, many states and the Australian Capital Territory have moved, or are proposing to move, towards an affirmative consent model. This represents a significant divergence from the historical emphasis on when consent is not given or *not* obtainable, rather than when it *is*. Consent can be deemed to be absent, for example, if the victim-survivor was asleep or unconscious. Complex considerations 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'.

### Recommendations:

**Recommendation 1:** It is NFAW's strong view that affirmative consent 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.

**Recommendation 2:** National harmonisation to ensure that all Australian women are protected in similar terms, regardless of where they live, should be pursued. Affirmative consent should be the clear and unambiguous national standard.

**Recommendation 3:** The harmonisation process must include requirements for jury directions aimed at helping jurors to better understand the nuances and complexities of consent.

**Recommendation 4:** NFAW supports the development and delivery of education programs regarding clear and unambiguous consent and respectful relationships.

**Recommendation 5:** Programs and policies must recognise the specific needs of vulnerable groups including women with disabilities and women at risk of family or domestic violence

## 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 2021 however, Tasmania was the only jurisdiction to put the onus on both participants to ensure the other is actively consenting. Since then, New South Wales, Victoria and the Australian Capital Territory have passed reforms to of sexual consent laws in line with affirmative consent. Queensland has come some way, but the Queensland Women's Safety and Justice Taskforce is recommending further reform in line with New South Wales. In Western Australia, the Law Reform Commission is currently undertaking public consultation on changes to its consent laws, with both an affirmative consent model and the criminalisation of stealthing under review.

Looking abroad, 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. An *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. At the time of printing, only 12 of 31 European countries had a definition of rape that included consent, with the others focussing on rape as by force or threat of force.

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'.

### The operation of consent laws in each jurisdiction

NFAW 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 could be 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 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**

NFAW 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 had 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 lawmakers to work together to clarify and establish a standard of ongoing communication expected before and during sex.

### **The findings of any relevant state or territory law reform commission review or other inquiry**

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) which 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 somewhat dated, this report was important in informing Australia's first and subsequent National Plans aimed at ending violence against women and children, but neither

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

## **Other relevant matters**

### **Impacts of social inequalities**

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).

Indigenous 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 increase the likelihood of exposure to stressful life events (McCalman, 2014). 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 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.

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

Many victim-survivors of domestic and family violence (DFV) have also experienced sexual violence. ANROWS (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, blends the lines between ‘normal’ and not. Combined with the effect of trauma on diminishing self-worth, self-esteem and autonomy, this 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. In the [National Community Attitudes Survey \(2017\)](#) 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.

We understand that WESNET (Women’s Services Network) are making a submission to the inquiry and we have drawn from their work to inform our submission. We commend the WESNET submission to the committee.

## References

Amnesty International (2018). [Right to be free from rape: overview of legislation and state of play in Europe and international human rights standards.](#)

Australian Women Against Violence Alliance (2022). [Young Women’s Report.](#) Canberra, WESNET.

Australian Bureau of Statistics (2016). [Personal Safety, Australia.](#)

ANROWS (2017). [‘Are we there yet? Australians’ attitudes towards violence against women & gender equality: Summary findings from the 2017 National Community Attitudes towards Violence against Women Survey \(NCAS\)’.](#)

Cassidy, C (2021). 'What do the affirmative sexual consent law reforms passed in NSW and proposed in Victoria mean for each state?', *the Guardian*.

Commonwealth of Australia (2022). National Plan to End Violence against Women and Children 2022-2032.

Cox, P (2015). 'Sexual assault and domestic violence in the context of co-occurrence and re-victimisation: State of knowledge paper', ANROWS.

Crowe, J and Hill, G (2022). 'It's time we aligned sexual consent laws across Australia – but this faces formidable challenges', *The Conversation*.

Crowe, J and Sveinsson, L (2017). 'Intimidation, consent and the role of holistic judgements in Australian Rape Law', *University of Western Australia Law Review*, Vol 42:136.

Goldsworthy, T (2018). 'Yes means yes: moving to a different model of consent for sexual interactions', *the Conversation*.

Keel, M. (2004). Family violence and sexual assault in Indigenous communities: Walking the talk (Briefing No 4., pp. 1-31). Melbourne, Victoria: Australian Centre for the Study of Sexual Assault.

McCalman J, Bridge F, Whiteside M, Bainbridge R, Tsey K, Jongen C (2014). 'Responding to Indigenous Australian sexual assault: a systematic review of the literature'. SAGE Open.

National Council to Reduce Violence against Women and their Children (2009). Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children 2009–2021.

O'Flaherty, A (2021). 'Queensland women's taskforce to consider whether further changes to consent laws are needed', *ABC News*.

Pullar, J (2021). 'An affirmative YES. New South Wales just passed the Affirmative Consent Bill', *Marie Claire*.

Rose, S, Cusworth, S and Hook, L (2022). 'A change in consent laws: The adoption of an affirmative consent model in Victoria', Moores.

Singh, A (2022). 'Explained: New Sexual Consent Laws in NSW', Astor Legal.

SBS (2021). 'Affirmative sexual consent laws are set to be introduced in Victoria'.

Swinburne University (2021). NSW adopts affirmative consent in sexual assault laws. What does this mean?

Tarzia, L. (2021). 'Toward an Ecological Understanding of Intimate Partner Sexual Violence', *Journal of Interpersonal Violence*, 36(23–24), 11704–11727.  
<https://doi.org/10.1177/0886260519900298>

Tarzia, L (2012). 'What drives intimate partner sexual violence?', *Pursuit*, University of Melbourne.

WESNET (2023). 'Affirmative consent: policy position'.