



**National Women's
Safety Alliance**

**TEACH.US.
CONSENT.™**

Submission to the Inquiry into current and proposed sexual consent laws in Australia, by the Senate Legal and Constitutional Affairs References Committee

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Submitted by

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The National Women's Safety Alliance and Teach Us Consent acknowledge the Traditional Owners of the land on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and future, and we value Aboriginal and Torres Strait Islander Elders past, present and emerging. We value Aboriginal and Torres Strait Islander histories, cultures, and knowledge.

About NWSA

The **National Women's Safety Alliance** brings together a diversity of voices, expertise, and experience to inform and guide national policy on women's safety. The NWSA, established in August 2021, connects the sector, experts, government, and victim-survivors with a shared vision to end violence against women. This will be achieved through consultation, research, and the collaborative development of expert policy advice to government.

More information about NWSA is available on our [website](#).

About Teach Us Consent

Teach Us Consent began as a campaign which called for a more comprehensive approach to sexual consent education across Australia. Since it began, over 44,000 people have signed a petition, which resulted in ministers of education voting unanimously to mandate holistic, and age-appropriate consent education in every school across Australia, from foundation until year 10. Teach Us Consent believes that by educating the next generation about sexual consent, that we can prevent normalised sexual violence, and demolish rape culture.

The organisation now continues to provide, and lobby for, consent and sexuality education. It is a space where people can share their stories of sexual assault, with more than 6,600 people having shared their testimonies.

More information about Teach Us Consent is available on our [website](#).

Overarching Considerations

This inquiry into the potential harmonisation of Australia's consent laws coincides with a period of immense social change and reform. The NWSA has recently advised the Australian Government on a suite of policy and legislative reform proposals including the Family Law Act, *Respect@Work*, Parents Next and the proposal for a National Framework for Universal Access to Sexual and Reproductive Healthcare, among others. Likewise, Teach Us Consent was an active contributor to the review of the National Curriculum review (2021) and public discussions and youth engagement on issues of sexual consent.

The significant reform agenda of this government regarding women's safety and wellbeing is welcomed; however, we are compelled to advise that where the discussion zeroes in exclusively on legislation, there is a risk that we become distracted from larger issues of social reform and complement law reform, that are intrinsic to meeting the objectives of the National Plan in both preventing gender-based violence and responding to it.

While NWSA and Teach us Consent acknowledge the Terms of Reference that the Committee has applied to this inquiry, our response does not limit itself to those Terms. Rather our submission proposes a broader approach, reflective of social progress, in order to improve the prevention and adequacy of institutional responses to sexual violence and improve survivor outcomes. For this reason, among other recommendations, we also call for a National Roundtable focused exclusively on sexual violence responses and outcomes to be considered in any effort to pursue harmonisation and achieve broader social reform.

Katherine Berney
Chanel Contos

Consent and Sexual Violence in Australia

The 2017 National Community Attitudes towards Violence against Women Survey (NCAS) surveyed 17,500 respondents aged 16-24 years on their understanding of violence and consent.¹ The data revealed that while there was, in general, a strong understanding of the forms of sexual violence among young people, there is still cause for concern.

- 28% of total respondents agreed with the statement “If a woman sends a nude image to her partner, then she is partly responsible if he shares it without her permission” (30% of male respondents and 26% of female respondents).
- 17% of total respondents agreed with the statement “Since some women are so sexual in public, it’s not surprising that some men think they can touch women without permission” (18% of male respondents and 16% of female respondents).
- 28% of total respondents agreed with the statement “When a man is very sexually aroused, he may not even realize that the woman doesn’t want to have sex” (30% of male respondents and 27% of female respondents).

It is particularly concerning that of the responses above, there was negligible recorded difference in the opinions of young men and young women that apportion a level of blame to survivors. This should not be surprising, when considered alongside the perceptions of consent that permeate Australian public discourse, institutional frontline response services such as policing, and media landscapes.

The assumption that consent is as a ‘state of mind’ rather than a communicative process emerges from the patchwork of state and territory legislation which, at various points, has allowed respondents to hold an *honest* or *reasonable* belief in consent, grounded in demonstrably *unreasonable beliefs* in sexuality and rape-myths.² This legal framework went on to influence police responses, public perceptions of victimhood and jury deliberations,³ all of which are significant factors affecting survivor decisions to report. Upending these harmful beliefs cannot be achieved through law reform alone,

¹Politoff, V., Crabbe, M., Honey, N., Mannix, S., Mickle, J., Morgan, J., Parkes, A., Powell, A., Stubbs, J., Ward, A., & Webster, K., (2019). ‘Young Australians’ attitudes to violence against women and gender equality’ <https://www.anrows.org.au/wp-content/uploads/2019/12/2017NCAS-Youth-SubReport.pdf>

² Faulkner, J (1991) ‘*Mens Rae in rape: Morgan and the inadequacy of subjectivism*’: Melbourne University Law Review vol 18, p. 62. “The majority of Australia’s population [was] still effectively subject to the law as shaped by the *Morgan* decision - by way of sexual assault legislation” <http://classic.austlii.edu.au/au/journals/MelbULawRw/1991/3.pdf>

³ Larcombe et al (2016) ‘*I Think it’s Rape and I Think He Would be Found Not Guilty*’: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law’, Social & Legal Studies vol 25(5), 611-629.

particularly when frontline response services are reported to be concentrated pockets of sexism, harassment, and unhealthy assumptions about women and power dynamics.⁴

Harmonisation

In principle, the NWSA and Teach Us Consent support the proposal of consent harmonisation. We see this uniformity as one of a multitude of steps that, if undertaken, would contribute to a less ambiguous understanding of consent, deliver a consistent justice response, and facilitate a national consent education campaign.

Uniformity, however, is not a panacea in and of itself and must be approached cautiously to avoid gaps, errors, or unforeseen outcomes that, when harmonised, would compound. Furthermore, even where uniformity is achieved, there is a risk that it may effectively be undone through unilateral amendments by state and territory legislatures, non-cooperation, political cycles, or radical societal change, such as that which prompted the Women's March and the reform agenda that followed it.

We appreciate that harmonisation has been achieved across the federation in respect of legislation relating to *workplace health and safety*, *counter terrorism* (referred) and *civil aviation*, among others. These journeys however have not been necessarily linear, nor gone unchecked. Typically uniformity is “discussed through forums such as [National Cabinet] and secured by an application or referred structure and a national regulation when further refinement is required”.⁵

Recent jurisdictional progress

To date, attorneys generals have pursued reforms or reviews of existing legislation dealing with sexual consent despite differences of political leadership and values. The justice responses to these reforms have varied and it is most likely still too early to determine their impact on trial practice and case law. However, the momentum towards consent reform is evidently widely felt and reflects the current public discourse on sexual violence. The most

⁴ A call for change, Commission of Inquiry into Queensland Police Service responses to domestic and family violence (2022) <https://www.qpsdfvinquiry.qld.gov.au/about/assets/commission-of-inquiry-dpsdfv-report.pdf>

⁵ Hill, G. (2020) *Categories of the 'art of the impossible': achieving sustainable uniformity in harmonised legislation in the Australian Federation*, *Federal Law Review*: 48(3), 350-381.

recent example of this journey towards law-reform is being adopted by Queensland, which has taken steps to adopt an affirmative consent model and criminalise "stealthing" (the non-consensual removal of a condom during sex) as part of major changes to sexual violence laws.⁶ In this case, legislation is also being used as a tool for setting community standards and to raise public awareness. Whilst the legal system still poses challenges and barriers to sexual violence, the understanding of a general member of the population about consent will be 'only yes means yes', rather than 'no means no'.

The path to this outcome in Queensland, however, has not been linear and follows within two years of an earlier review by the Queensland Law Reform Commission (QLRC) of the state's consent legislation and the excuse of mistake of fact in 2020.⁷ In this report, the QLRC report suggested amendments to the *Criminal Code Act* which were poorly received by the women's sector at the time.⁸ In response to the report, Women's Legal Services argued that the recommendations would do little to address the ambiguity regarding consent, as it was already established in case law that a person does not consent just because they don't actively say 'no', and implied that passivity could amount to defence. Further to this, Women's Legal found that the report seriously ignored issues with the mistake of fact defence. Namely, that there was no mention of the role of a 'freeze' response, despite the mistake of fact defence being raised more often in cases where a victim freezes in response to violence. In the view of Women's Legal, this allowed the defendant to use a freeze response to avoid conviction.⁹ Today, Teach Us Consent has concerns that there is very poor public understanding of, and no account in the courtroom for the 'fawn' response. This is when a victim is placatable in a situation in order to survive an ordeal. This survival instinct is often weaponised against victims in the courtroom and easily misconstrued for consent. This is a regular feature from testimony on the Teach Us Consent website described this, and it is cited as a reason for self-doubt, victim blaming, and a reason not to report.

Most likely, in reading shifts in public opinion and the electoral viability of widespread women's policy reform, the Queensland Government has since followed progress elsewhere and is now pursuing a definition of consent that would put forward an 'agreement' model. The proposed reform would also

⁶ 'Stealthing' was criminalised in the ACT in 2021, and to date no case law exists.

⁷ https://www.qlrc.qld.gov.au/_data/assets/pdf_file/0010/654958/qlrc-report-78-final-web.pdf

⁸ <https://static1.squarespace.com/static/5e38a9c3c182ca3ee4fa899d/t/5f2ce6d159a63275f739d94b/1596778195665/Response+to+QLRC+Report+-+consent+and+mistake+of+fact.pdf>

⁹ Ibid

criminalise stealthing, where a condom is clandestinely removed or sabotaged, during an otherwise consensual sexual encounter.

“Perpetrators of sexual violence, by and large, are not ignorant of consent, they know they do not have consent when they assault someone, they also know how to skirt legislation and exercise power” – NWSA member.

Both NSW and the ACT reformed relevant sections of their Crimes Acts throughout 2021 and 2022. In these jurisdictions, it is likely too early to determine with any margin of credulity how the

reforms are working. Feedback from Alliance members who provide advocacy support for survivors of sexual assault in these jurisdictions, have reported that while ‘the legislation is arguably better, the expectations of survivors have still not been met by improvements in conviction rates or handling’. In NSW, latest crime data shows reports of sexual assaults continue to trend upwards.¹⁰ In trial practice, there is not yet enough information from the emerging case law in either the ACT or NSW, to determine how defence counsels will represent against the provisions at 67(5)¹¹ and 61HK(2),¹² respectively, and whether it becomes, effectively, a ‘box ticking exercise’ of steps taken to determine consent. Furthermore, it remains to be seen how these reforms will impact on jury directions and deliberations, as it has been found that juries in rape trials are often influenced by non-legal factors such as likeability of witnesses.¹³

Where it is decided by governments to pursue harmonisation, the NWSA and Teach Us Consent acknowledge this will be a significant administrative and legislative task. We urge that where the practical outcomes of recent consent reforms, as well as those inquiries currently being undertaken such as in Western Australia, which are still only understood at a nascent level, sufficient time is allowed to evaluate the case law and experience of survivors and their advocates.

¹⁰ https://www.bocsar.nsw.gov.au/Documents/Landing_Pages/2022%20Sexual%20offence%20incidents.pdf

¹¹ This provision relates to steps taken to ascertain consent: without limiting the grounds on which it may be established that an accused person's belief is not reasonable in the circumstances, the accused person's belief is taken not to be reasonable in the circumstances **if the accused person did not say or do anything to ascertain whether the other person consented.**

¹² This provision relates to the steps taken to determine consent: Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do **anything to find out** whether the other person consents to the sexual activity.

¹³ Larcombe et al (2016) ‘I Think it’s Rape and I Think He Would be Found Not Guilty’: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law’, Social & Legal Studies vol 25(5) p. 615.

The need for broader reform

In developing this submission, the NWSA consulted with our members who work in legal advocacy and rape support services. Police responses were frequently raised in these discussions.

People are not complaining about the 'law', per se, they are complaining about how the law is executed - NWSA member.

For survivors who choose to report their assault, their experience with police and peripheral frontline services will often be a determining factor in pursuing a formal justice outcome. It was noted by NWSA members that it was not unusual for police services to 'cherry pick' those reports believed to have the greatest chance of prosecution success. It was also frequently fed back to the NWSA that while harmonisation might be helpful in any number of social and legal ways, implementation will be immense. The discussion on harmonisation also cannot be removed from the implicit biases that permeate police services, jury deliberations, and the court system. Without broader social reforms, the impact of harmonisation on the lives of survivors of sexual violence will likely be piecemeal.

'Police are the gatekeepers to the justice system, and their response can reduce or prevent future violence for victim-survivors and their children, hold perpetrators to account and, at times, save lives. If their response is performed poorly, it can embolden the perpetrator and drive the victim-survivor further away from help' – A Call for Change Commission of Inquiry into Queensland Police.

The 2022 Inquiry into Queensland Police responses to domestic and family violence provides a timely and visceral insight into police attitudes, at a systemic level, towards women and survivors of violence.¹⁴ We draw upon this resource to illustrate the significant work ahead if we

are to complement legislative harmonisation with institutional reform.

The Commission of Inquiry found that misogyny was an entrenched problem in the service and that in some cases, the values, attitudes and 'general distrust of women' held by serving Queensland police officers, made a discernible impact on their response to domestic and family violence. Furthermore, the Inquiry found that these harmful attitudes did not exist in a vacuum but rather were reinforced through institutional sexism, and workplace sexual

¹⁴ Op. cit p. 17.

harassment of female police officers, as well as feelings of futility and burnout from the domestic and family violence case load.¹⁵ The institutional failings of the Queensland Police Service are broadly representative of the immense cultural and workplace burdens that must be overcome if legislative reform is to have a meaningful impact on the lives of survivors of gender based violence.¹⁶

I went to a party when I was [age]. I had had too much to drink and was moving in and out of consciousness. The day after the party, two older girls who were there told me that had found me with some boys, and that I wasn't conscious or fully clothed. Over the next two days, I started to remember what had happened to me [...]. I told my mum who encouraged me to go to the police. It was the worst decision. The boys were all questioned and admitted to it, but they said it was consensual. The girls who helped me were determined by the police to not be credible witnesses, so it never got to the DPP. No one believed me. I was shamed by others who assumed that because the boys were not charged that I had made the whole thing up. I will forever be affected by what happened – Teach Us Consent anonymoustestimony.

Addressing these shortcomings and institutional hurdles are part of the reason why the NWSA and Teach Us Consent have included a national roundtable on sexual violence as a recommendation in this submission. This would bring frontline responders, advocacy groups, legal practitioners, survivors and attorneys general together to consider how Australia can become develop best practice, trauma informed processes for survivors of sexual violence along with the consideration of other credible options to provide fairer outcomes for survivors and broader community.

Consent Education

In 2022, all education ministers agreed to include consent and respectful relationships education in the National Curriculum from foundation to year 10. This reform follows both a campaign by Teach Us Consent and other relationship advocacy groups on the dynamics of sexual violence and role of early education in prevention.

At the time of the reviewed National Curriculum being released, the inclusion of respectful relationships and consent education in the Health and Physical Education curriculum was positively received by the community. However, it

¹⁵ Op. cit pp. 16-18.

¹⁶ Systemic failings of police practices and the court system were also recorded through the ACT Government's Sexual Assault, Prevention and Response Review (2021)

was also met with concerns regarding workforce capacity, teacher and educator resources, consistency of approaches, qualifications, and delivery.

We support the development of a sufficiently resourced national qualification program to build the workforce of Respect and Consent Educators, co-designed with experts in violence prevention, that would allow every student to receive best-practice instruction in relationships and sexuality education, including consent. Additionally, we would like to pick back up on discussions that Teach Us Consent had with the previous Australian Government and the Department of Education around the Initial Teacher Education Curriculum, and how this nation-wide minimum teacher qualification standard can be utilised to train teachers in how to promote healthy and respectful attitudes and how to address problematic ones.

Embedded early and foundational education in relationships and consent would help facilitate a whole-of-society approach to violence prevention and achieve the prevention objectives of the National Plan. A national planned approach to delivering this education would contribute to prevention through supporting men and boys to develop healthy masculinities and relationships with their male peers.

Key Recommendations

NWSA and Teach Us Consent make the following recommendations:

1. Implement a nationally consistent statutory definition of affirmative sexual consent.
2. The Australian Government host a sexual violence roundtable, to facilitate information sharing, reporting on case law outcomes and front-line practices, as well as just outcomes to develop best-practice and nationally-embedded responses to sexual violence reporting.
3. Sufficiently resource those elements of the National Curriculum which provide for instruction in healthy relationships, including through a strategic investment in workforce development, and updated to the ITE curriculum.
4. Complement legislative reform with a national campaign on consent and sexual violence that includes social, spiritual, psychological, emotional, and biological factors, delivered across mediums in a way that meets diversity of need and awareness.

5. The Australian Government explore the viability of a national survey project to capture the journey of sexual assault survivors from the point of disclosure to any outcome where frontline services or the justice system were involved.