

Response to Discussion Paper Volume 2: Offences and Maximum Penalties

Prepared by Women's Legal Service Western Australia (WLSWA)

Women's Legal Service Western Australia

Women's Legal Service Western Australia (**WLSWA**) is the only specialist, gender-specific community legal centre in Western Australia. For over twenty five years we have delivered state-wide specialist legal assistance to women in the areas of family law, protection and care, family and domestic violence and criminal injuries compensation. Our tailored, needs-matched legal services model ensures continuity in support and mitigates against re-traumatising clients that present with complex and multiple legal and social challenges. WLSWA prioritise women who experience intersecting disadvantages.

Through our community legal education and evidence-based advocacy on law and policy, we are working towards the redress of inequalities, promotion of human rights and legal and social change for women.

WLSWA do not advise on criminal sexual offences. However, most of our clients have experienced sexual violence within a family and domestic violence and coercive control context. WLSWA has an insight into the sexual violence experiences of women at both individual and collective levels, including experiences when reporting to police and interacting with the justice system.

Acknowledgments

WLSWA acknowledge the Traditional Owners of the country on which we live and work, the Whadjuk people of the Noongar nation, and pay respects to their Elders past and present. We support the ongoing work of First Nations specialist women's organisations and advocates who have been working to unravel and heal the injustices imposed on First Nations women and communities since colonisation. We recognise the strength and foresight of the First Nations women who are leading the sexual violence response work.

WLSWA also recognise the strength and resilience of the women with whom we work. It is essential that any response to family, domestic and sexual violence is informed by the nuance and reality of their lived experience.

Introduction

WLSWA welcome the opportunity to make this submission to the Law Reform Commission of Western Australia (**LRCWA**) in response to the Sexual Offences reform – Volume 2: Offences and Maximum Penalties Discussion Paper (**Discussion Paper**). WLSWA has also submitted to the LRCWA's Volume 1: Objectives, Consent and Mistake of Fact Discussion Paper (**Volume 1 Discussion Paper**). In our response

to the Volume 1 Discussion Paper we advocated for an affirmative consent model, greater recognition of intimate partner sexual violence (**IPSV**) including the development of clear IPSV and family violence provisions in consent law, codified jury directions and for urgent and significant reform to improve the justice system experience for victim-survivors of sexual violence.

This submission will focus on IPSV and our concerns about the lawful marriage defence.

IPSV co-occurs with family and domestic violence (**FDV**) and coercive control and is therefore perpetrated in the context of what should be a trusted relationship. It is a profoundly violating experience, yet because it is inherently private our understanding of its impact is weak. Our lack of literacy on IPSV is reflected in a justice system that is not adequately equipped to respond to FDV and sexual violence.

IPSV includes a range of sexual behaviours from rape, indecent assault, non-consensual strangulation, reproductive coercion to forced consumption of pornography. Psychological abuse and coercive control are used concurrently to create an environment of fear and control such that refusing to engage in sexual activity risks triggering an escalation of violence or abuse.¹

We routinely hear from clients that their perpetrators use tactics such as emotional blackmail, guilt and threats to obtain sex. For example, by telling the victim-survivor that it is their sole duty in the relationship to please the perpetrator, which without, the victim-survivor has failed as a 'wife' and the relationship is under threat. Or by telling the victim-survivor that if they do not have sex with them, they will be forced to obtain sex elsewhere.

Laura Tarzia and Kelsey Hegarty (2023) describe coercive control and IPSV as interacting in a "bi-directional way".² Coercive control often leads to a victim-survivor of IPSV feeling worthless, with low self-esteem and carrying deep shame. These feelings are compounded by being treated like a 'sexual object' which, in turn, makes the victim-survivor more likely to believe the insults and stay in the relationship. IPSV is an "[effective] weapon of psychological destruction".³

In our response to the Volume 1 Discussion Paper, we noted that shame and low self-esteem contributes to underreporting of IPSV.⁴ Normative understandings of 'real rape' also affect how IPSV is viewed and often leads to its minimisation.⁵ Misconceptions that rape is typically perpetrated by strangers who use physical force only detracts from conversations on IPSV or sexual violence in intimate relationships, and the need to ensure affirmative and ongoing consent in all contexts. That the 2021 National Community Attitudes Survey (**NCAS Survey**) confirmed nearly 1 in 5 (18%) Australians still believe that rape is more likely to be perpetrated by a stranger and 1 in 10 (12%) Australians are unsure, should be reason enough to spotlight IPSV and respond with urgency.⁶

¹ Australia's National Research Organisation for Women's Safety (2019), Intimate partner sexual violence: Research synthesis (2nd Ed.; ANROWS Insights, 08/2019). Sydney, NSW: ANROWS, p. 1 < <https://anrowsdev.wpeneginepowered.com/wp-content/uploads/2019/04/IPSV-Research-Synthesis-2ed.pdf> >.

² Laura Tarzia and Kelsey Hegarty (2023), "He'd Tell Me I was Frigid and Ugly and Force me to Have Sex with Him Anyway": Women's Experiences of Co-Occurring Sexual Violence and Psychological Abuse in Heterosexual Relationships, *Journal of Interpersonal Violence*, Vol. 38(1-2), 1299–1319, p. 1300.

³ Ibid, p. 1312.

⁴ Women's Legal Service Western Australia, Submission to Law Reform Commission of Western Australia Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact, 6 April 2023, p. 6 and Peta Cox (2016), Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey (ANROWS Horizons, 01.01/2016 Rev. ed.). Sydney, NSW: ANROWS < [PSS_2016update.pdf \(anrowsdev.wpeneginepowered.com\)](https://anrowsdev.wpeneginepowered.com/PSS_2016update.pdf) >.

⁵ Women's Legal Service Western Australia, Submission to Law Reform Commission of Western Australia Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact, 6 April 2023, p. 6.

⁶ Christine Coumarelo, Shireen Bernstein and Nicole Weeks et. al., (2023), The 2021 National Community Attitudes towards

We need to understand the key characteristics that distinguish the experience(s) of IPSV from other forms of sexual violence. As we said in our response to the Volume 1 Discussion Paper: “[sexual] violence in intimate partner relationships often occurs within the context of sexual routine, previous consensual activity and a presumption of ongoing consent. This can create situations where victim-survivors agree to unwanted sex or where asking for sex to stop is not felt as a possibility”.⁷ There can be at times will to consent by victim-survivors of IPSV, but as the International Criminal Court in 2016 opined, “coercive control [can] make consent impossible”.⁸ Therefore, any definition of consent needs to include the range of sexual behaviours that also occurs in the context of FDV and coercive control.

Only with increased literacy can we create consent law that can capture the totality of experiences of IPSV, encourage greater reporting and effective justice system responses. We direct the LRCWA to our response to the Volume 1 Discussion Paper for a more substantive discussion on affirmative consent and the nuance required.

Reverting to the Term Rape and Penalties for Perpetrators of Sexual Violence

WLSWA recommends the use of the term rape as opposed to ‘sexual penetration without consent’. WLSWA consider that using the term rape will create momentum to increase penalties for sexual violence offences and to align with other Australian jurisdictions.

Penalties for sexual violence offences in Western Australia should be increased to align with other Australian jurisdictions.⁹ In Western Australia, a person who sexually penetrates another person without consent or compels another to engage in sexual activity via coercion is liable for up to 14 years imprisonment.¹⁰ The penalties are higher in other states such as Victoria (25 years), Tasmania (21 years) and the Northern Territory, Queensland and South Australia (life imprisonment).¹¹ Notably, jurisdictions where ‘sexual penetration (or ‘intercourse’) without consent’ is termed ‘rape’ impose higher penalties.

We understand that the LRCWA have said in the Discussion Paper that “... it is not possible to directly compare maximum penalty levels across jurisdictions. This is because sexual offence definitions and related sentencing rules (for example, the minimum periods of imprisonment to be served before an offender is eligible for parole) vary widely between jurisdictions”.¹² The current terminology (and definition) is not serving victim-survivors in Western Australia. Reverting to the term rape may encourage greater reporting of sexual violence and, with this momentum, demand higher penalties.

Violence against Women Survey (NCAS), Findings for Australia, Sydney, NSW: ANROWS p. 175 < [NCAS 21 Main Report ANROWS f.pdf \(cdn-website.com\)](#)>.

⁷ Women’s Legal Service Western Australia, Submission to Law Reform Commission of Western Australia Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact, 6 April 2023, p. 3 and Australia’s National Research Organisation for Women’s Safety, Submission to the New South Wales Law Reform Commission on: Consent in relation to sexual offences (draft proposals), 18 November 2019, p.6 < [CO67.pdf \(anrowsdev.wpenginepowered.com\)](#)>.

⁸ The Prosecutor v Jean-Pierre Bemba Gombo (Judgement) (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) in Melissa Callanan (2021), Defining Rape: Developing Jurisprudence, Submission to Law Reform Commission Inquiry: Sexual Offences – Project 113, p. 12.

⁹ Women’s Legal Service Western Australia, Submission to Law Reform Commission of Western Australia Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact, 6 April 2023, p. 5.

¹⁰ *Criminal Code Act Compilation Act 1913 (WA)*, s 325.

¹¹ *Crimes Act 1958 (VIC)*, s 38(2), *Criminal Code Act 1924 (TAS)*, s 389, *Criminal Code Act 1983 (NT)*, s 192(3), *Criminal Code Act 1899 (QLD)*, s 349(1) and *Criminal Law Consolidation Act 1935 (SA)*, s 48.

¹² Jamie Walvisch and Amanda Blackburn (2022), Project 113 Sexual Offences: Background Paper, Law Reform Commission of Western Australia, p. 119 < Law Reform Commission - Project 113 - Sexual Offences (www.wa.gov.au)>.

‘Sexual penetration without consent’ suggests that it is possible for sexual intercourse to be in some sense ‘non-consensual’ but short of amounting to a sexual violence offence. This reinforces the myths and stereotypical assumptions society still hold about rape – that if the woman did not communicate her refusal clearly the man cannot be held responsible. Evidence of this is seen in the low conviction rates for sexual penetration without consent in Western Australia – according to the Personal Safety Survey (2021-22), 233,400 women in Western Australia have experienced some form of sexual violence since the age of 15 years.¹³ 3.3% of women in Western Australia have experienced sexual violence in the past two years, which is greater than the two-year prevalence rate in 2016.¹⁴ At the same time, the conviction rate for sexual violence offences fell between 2019-20 and 2021-22.¹⁵ Sexual offences continue to have the lowest conviction rate compared with other offences.¹⁶

WLSWA agree with the Scottish Law Commission that concluded in 2007: “there was a danger that by not using the term rape, the seriousness of the offence became downgraded. We therefore took the view that Scots law should continue to have a crime known as rape. The stigmatic effects of this word have important functions in labelling a particular form of wrongdoing”.¹⁷ Rape is a “harsh vowel sound and single syllable [word], and because rape isn’t primarily a legal term, the word is in no way a euphemism”.¹⁸ The term rape (even where qualified with ‘alleged’) sends an unequivocal message that a profoundly violating, dehumanising and heinous crime has been committed.¹⁹ We refer to Alex Obote-Odora (2005) – a Legal Scholar and Prosecutor at the International Criminal Tribunal – who has said that “The victims of these atrocious crimes feel ignored and invisible. If these crimes are not severely punished the message ... [the] legal community sends is that impunity and grave injustice will be tolerated ... The perpetrator should bear the shame and stigma that society now attributes to the victim”.²⁰

The gravitas of the word rape was also confirmed by a study on the influence of behavioural labels in assessing men’s attitudes toward rape.²¹ The researchers found that asking men whether “[they have] ever coerced somebody to intercourse by holding them down?” versus “have you ever raped somebody?” yielded different responses.²² Around 32% of survey participants acknowledged they would have “intentions to force a woman to sexual intercourse [if] nobody would ever know and there

¹³ Australian Bureau of Statistics (2021-22), Personal Safety, Australia, ABS Website < [Personal Safety, Australia, 2021-22 financial year | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/Personal-Safety)>.

¹⁴ Ibid.

¹⁵ Stella Tarrant, Heather Douglas and Hilde Tubex (2022), Project 113 Sexual Offences: Background Paper, Law Reform Commission of Western Australia, p. 48 < [Law Reform Commission - Project 113 - Sexual Offences \(www.wa.gov.au\)](https://www.lawreform.wa.gov.au/projects/113-sexual-offences)>.

¹⁶ Ibid, p. 49.

¹⁷ Scottish Law Commission (2007), Report on Rape and Other Sexual Offences, Report No. 209, para. 3.13 < [Report on rape and other sexual offences \(SLC 209\) \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk/reports/209)> in Jamie Walvisch and Amanda Blackburn (2022), Project 113 Sexual Offences: Background Paper, Law Reform Commission of Western Australia, p. 21 < [Law Reform Commission - Project 113 - Sexual Offences \(www.wa.gov.au\)](https://www.lawreform.wa.gov.au/projects/113-sexual-offences)>.

¹⁸ Emily Bazelon, ‘The word you are searching for is rape’, *The Washington Post* (Online, 15 February 2014) < <https://www.sbs.com.au/news/article/the-word-you-are-searching-for-is-rape/bxw3jig5t>>.

¹⁹ See also: Law Reform Commission of Victoria, Discussion Paper on Rape and Allied Offences: Substantive Aspects (LRCV No 2 (1986), p. 51.

²⁰ Alex Obote-Odora (2005), Rape and sexual violence in international law: ICTR contribution, *New England Journal of International and Comparative Law*, Vol. 12, 135, p. 157 in Melissa Callanan (2021), Defining Rape: Developing Jurisprudence, Submission to law Reform Commission Inquiry: Sexual Offences – Project 113, p. 14.

²¹ Sarah Edwards, Kathryn Bradshaw and Verlin Hinsz (2014), Denying Rape but Endorsing Forceful Intercourse: Exploring Differences Among Responders, *Violence and Gender*, Vol. 1(4) < <https://www.liebertpub.com/doi/abs/10.1089/vio.2014.0022?journalCode=vio>>.

²² Ibid.

wouldn't be any consequences".²³ Only 13.6% admitted they would force a woman into sexual intercourse when the question was re-framed to include the word rape.²⁴

The Victorian Law Reform Commission (VLRC) in 2021 acknowledged that the way sexual offences are termed and defined sets the standards for behaviour and boundaries for what sexual interactions are acceptable in society.²⁵ Having sexual offences that are defined well supports an effective justice system response to sexual violence. Whereas ambiguous language unintentionally creates leeway in admitting to sexually coercive behaviours or rape without consequence. In the Rayapen trial, the perpetrator had been given a suspended sentence despite admitting to raping the victim-survivor.²⁶ It was reported that Rayapen messaged a friend after the rape confessing "we are blokes, we have urges, I'll make it up to her".²⁷ We cannot continue to excuse and rationalise men's non-consensual sexual behaviour. It is unjust to expect women to continue to be the sole gatekeepers of sexual propriety.²⁸ We refer to Catherine MacKinnon (2007) – a Law Professor and Activist – who has said that the abuse of "women as women' rarely fits neatly in to the law books, where the more abuse escalates the less it fits and 'man's inhumanity to women' continues to be silenced by the operation of the law".²⁹

In reforming consent laws in Western Australia, the LRCWA must create the kinds of social commentary that acknowledge and validate the experiences of victim-survivors instead of minimising violence. To this end, WLSWA strongly believe that saying the word and naming the crime carries profound weight for victim-survivors. For victim-survivors of IPSV, there is also the "redistribution of shame" that comes with establishing criminal liability that "...acts as a healing agent in the process of giving voice to the stigmatised".³⁰

WLSWA consider that the term 'rape' must be reintroduced into Western Australia to create momentum in penalising sexual violence offences consistently across jurisdictions. As noted in our response to the Volume 1 Discussion Paper: "Victim-survivors in Western Australia should not feel that their experiences are any less than victim-survivors in other jurisdictions. Maximum penalties should reflect the long-term impact of sexual violence on not only the victim-survivors but their family networks".³¹

This must be supported by adequate training for magistrates to identify the coercion that underlies IPSV, assess the intensity and frequency of sexual violence and hand down the appropriate penalty. As the Rayapen trial has demonstrated, magistrates are not immune from falling-back on their own subjectivities even to the extent of overlooking a confession in sentencing because the perpetrator had

²³ Ibid, p. 190.

²⁴ Ibid, pp. 190-191.

²⁵ Victorian Law Reform Commission (2021), Improving the Justice System Response to Sexual Offences: Report, Chapter 14. Legal Definitions of Sexual Violence, p. 291 <[VLRC Improving Justice System Response to Sex Offences Report web.pdf \(lawreform.vic.gov.au\)](https://www.lawreform.vic.gov.au/vlrc-improving-justice-system-response-to-sex-offences-report-web.pdf)>.

²⁶ Cassidy Mosconi and Bryce Luff, Advocates for sex assault victims reveal concerns after Luigi Rayapen spared jail despite admitting student attack, 7News (Online, 9 December 2022) <[Luigi Rayapen spared jail in WA court despite admitting sexually assaulting student at Rottnest | 7NEWS](https://www.7news.com.au/news/luigi-rayapen-spared-jail-in-wa-court-despite-admitting-sexually-assaulting-student-at-rotnest-7news)>.

²⁷ Ibid.

²⁸ Women's Safety and Justice Taskforce, Hear her Voice: Report 2, Volume 1, Women and girls' experience across the criminal justice system, pp. 5 and 212 <[WSJT Discussion Paper 2 \(womenstaskforce.qld.gov.au\)](https://www.womenstaskforce.qld.gov.au/ws-jt-discussion-paper-2)>.

²⁹ Catharine MacKinnon, Are Women Human? (Harvard University Press, Kindle Edition, 2007), p. 142 in Melissa Callanan (2021), Defining Rape: Developing Jurisprudence, Submission to law Reform Commission Inquiry: Sexual Offences – Project 113, p. 7.

³⁰ Melissa Callanan (2021), Defining Rape: Developing Jurisprudence, Submission to law Reform Commission Inquiry: Sexual Offences – Project 113, p. 14.

³¹ Women's Legal Service Western Australia, Submission to Law Reform Commission of Western Australia Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact, 6 April 2023, p. 5.

a “strong sense of civic duty” and “[showed] deep and genuine remorse”.³² WLSWA are pleased that the Court of Appeal has overturned the previous decision, although the sentence remains grossly inadequate.³³ Victim-survivors who report sexual violence need assurance that there will be commensurate validation of their experiences. As our Chief Executive – Jennie Gray – said of the previous outcome in December 2022: “This sends a real message to women that actually it’s not worth reporting their experience to police [...] women who choose to report sexual assault face enormous barriers to achieving justice”.³⁴

Rape must be taken more seriously and understood more accurately to encourage reporting. WLSWA direct the LRCWA to our Volume 1 Discussion Paper response for a more substantive comment on judicial training and codes of conduct for magistrates.

Lawful Marriage Defence

WLSWA recommends repealing the lawful marriage defence. Marriage should not be a defence to charges involving sexual activity with persons of or over the age of 16 years.

WLSWA understand that lawful marriage is a defence to sexual activity with a person of or over 16 years in Western Australia.³⁵ This is because a person may legally marry in Australia at 16 or 17 years of age with appropriate consents (usually parental), if a judge or magistrate is satisfied that the circumstances of the case are so exceptional and unusual as to justify the authorisation of the marriage.³⁶ However, certain provisions in the *Criminal Code* have been repealed so that marriage is no longer a defence for, amongst other offences, sexual penetration of a child under 16 years.³⁷ WLSWA welcomed these amendments in 2020, and reiterate that sexual crimes against children – including child marriage – should be punishable by the full force of the law.

Marriage should not be a defence to sexual violence at any age. We disagree with the Office of the Director of Public Prosecutions of Western Australia, which said in their preliminary submission to the Discussion Paper that “...it might be appropriate to extend the defence of marriage to other types of relationships”.³⁸ The recent NCAS Survey confirmed that close to 20% of Australians still don’t know that non-consensual sex in marriage is a criminal offence, despite women being three times more likely to be assaulted by someone known to them, including by their husband.³⁹ Misperceptions about the ambiguity

³² Joanna Menagh, UWA law student Luigi Rayapen handed two-year suspended jail term for Rottneest sexual assault, *ABC News* (Online, 7 December 2022) <[UWA law student Luigi Rayapen handed two-year suspended jail term for Rottneest sexual assault - ABC News](https://www.abc.net.au/news/2022-12-07/uwa-law-student-luigi-rayapen-jailed-for-rottneest-sexual-assault/102149530)>.

³³ Joanna Menagh and David Weber, Former UWA student Luigi Rayapen jailed for Rottneest Island sexual assault following appeal, *ABC News* (Online, 12 April 2023) <<https://www.abc.net.au/news/2023-04-12/ex-uwa-student-luigi-rayapen-jailed-for-rottneest-sexual-assault/102149530>>.

³⁴ Brittany Hoskins, Prosecutors appeal UWA law graduate's suspended sentence, *Nine News* (Online, 28 March 2023) <[WA news: Prosecutors appeal UWA law graduate's suspended sentence \(9news.com.au\)](https://www.9news.com.au/news/wa/news-prosecutors-appeal-uwa-law-graduate-s-suspended-sentence/102149530)>.

³⁵ Jamie Walvisch and Amanda Blackburn (2022), Project 113 Sexual Offences: Background Paper, Law Reform Commission of Western Australia, p. 50 < Law Reform Commission - Project 113 - Sexual Offences (www.wa.gov.au)>.

³⁶ *Marriage Act 1961* (Cth), s 12(2)(b).

³⁷ *Criminal Code Amendment (Child Marriage) Act 2020* (WA) ss 4 and 5.

³⁸ Office of the Director Public Prosecutions, Preliminary Submission 16, p.6 in Jamie Walvisch and Amanda Blackburn (2022), Project 113 Sexual Offences: Background Paper, Law Reform Commission of Western Australia, p. 50 < Law Reform Commission - Project 113 - Sexual Offences (www.wa.gov.au)>.

³⁹ Kim Webster, Kristin Diemer and Nikki Honey et. al., (2018), Australians’ attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (Research report), Sydney, NSW: ANROWS, p.9 <[anr001-NCASreport-WEB-1019.pdf \(anrowsdev.wenginepowered.com\)](https://www.anrowsdev.wenginepowered.com/anr001-NCASreport-WEB-1019.pdf)> and Christine Coumarelo, Shireen Bernstein and Nicole Weeks et. al., (2023), The 2021 National Community Attitudes towards Violence against Women Survey (NCAS), Findings for Australia, Sydney, NSW: ANROWS p. 175 <[NCAS 21 Main Report ANROWS f.pdf \(cdn-website.com\)](https://www.ncas.gov.au/ncas-21-main-report-anrows-f.pdf)>.

of consent in different relationships (intimate, domestic, de facto) contributes to its occurrence. We need clarity and consistency in the law for all age groups and demographics.

By not repealing the lawful marriage defence we are sending a message to victim-survivors of IPSV that their claims of abuse will be dismissed.

Lawful Marriage Defence Can Protect Perpetrators of IPSV in Forced Marriages

WLSWA are concerned that the lawful marriage defence inadvertently protects perpetrators of IPSV in forced marriages. The lawful marriage defence may also be a shield for family members and religious and community leaders who facilitate these marriages. As forced and child marriage are criminalised in Western Australia, it is logical that the lawful marriage defence should be repealed. The hidden and criminal nature of forced marriage inevitably means that the majority of these marriages will not be legally registered and IPSV committed in these marriages will largely go undocumented.

There is no consent in forced marriages. Many culturally and linguistically diverse (**CaLD**) women with whom we work report being coerced, threatened or deceived into entering their marriages. Subtle coercion is often experienced through psychological and emotional pressure that makes the victim-survivor feel guilty or obliged to accept the marriage.⁴⁰ Alternatively, women may consent to marriages that later become exploitative and violent. It is telling that the Federal Attorney-General's Department uses the terms servile and forced marriages "interchangeably".⁴¹

It is our experience that some victim-survivors of forced marriage may also be unwilling or unable to report violence, including IPSV. Reluctance to incriminate family members, concerns for child safety (such as transnational abduction) and threats to personal safety – including the escalation of violence and (un)availability of appropriate short and long-term accommodation and support services – are reasons why forced marriage (and victimisation within forced marriage) is grossly underreported.⁴² Disclosures of forced marriage to WLSWA are made when victim-survivors seek assistance for other forms of abuse, and only after our lawyers have developed trusting relationships with the victim-survivor over a prolonged period of time.

The VLRC identified forced marriages as an area of concern. It said that "Individuals over the age of 16 years are often considered independent and are therefore rarely prioritised by child protection authorities, depending on the state or territory. Child protection systems are generally more responsive to children younger in age, whereas the risk of forced marriage in minors generally increases with age, with those aged 16 and 17 years old at high risk as they approach adulthood".⁴³ The Australian Institute of Criminology has similarly identified young people between 15 and 17 years as the "age of greatest risk

⁴⁰ Samantha Lyneham and Samantha Bricknell (2018), When saying no is not an option: Forced marriage in Australia and New Zealand, Australian Institute of Criminology, Research Report No. 11, p. 13 < [When saying no is not an option: Forced marriage in Australia and New Zealand \(aic.gov.au\)](https://www.aic.gov.au/publications-reports/research-report-11)>.

⁴¹ Attorney-General's Department (2010), Discussion paper: Forced and servile marriage. Australian Government: AGD, p. 3 < [Discussion paper for Public Release - Forced and servile marriage \(homeaffairs.gov.au\)](https://www.homeaffairs.gov.au/forced-marriage/discussion-paper)>.

⁴² Samantha Lyneham and Samantha Bricknell (2018), When saying no is not an option: Forced marriage in Australia and New Zealand, Australian Institute of Criminology, Research Report No. 11, p. 12 < [When saying no is not an option: Forced marriage in Australia and New Zealand \(aic.gov.au\)](https://www.aic.gov.au/publications-reports/research-report-11)>.

⁴³ Victorian Law Reform Commission (2021), Improving the Justice System Response to Sexual Offences: Report, Chapter 14. Legal Definitions of Sexual Violence, p. 318 < [VLRC Improving Justice System Response to Sex Offences Report web.pdf \(lawreform.vic.gov.au\)](https://www.lawreform.vic.gov.au/publications-reports/improving-justice-system-response-to-sexual-offences-report)>.

for forced marriage ... [and yet] not a priority cohort for child protection, nor are short-term accommodation or longer-term foster care arrangements available for this age group".⁴⁴

The lawful marriage defence adds to existing barriers CaLD women (including between 16 and 17 years) face in reporting violence and fleeing an abusive intimate relationship or family dynamic. In our response to the Volume 1 Discussion Paper, we noted that CaLD women already face structural discrimination in FDV responses. CaLD women are disproportionately misidentified as perpetrators of violence by police, they report that police do not listen when they report violence and often do not arrange necessary interpreters.⁴⁵ There is general disbelief when women report that they are the victim-survivors of forced marriage and the necessary actions to ensure their safety are often not taken.⁴⁶

Despite criminal and civil interventions at state, national and international levels, the Australian Institute of Criminology has described forced marriages as "intractable".⁴⁷ WLSWA believe that this partly because the lawful marriage defence is inconsistent with the preventative work around FDV and sexual violence, and indeed, the response of frontline women's organisations. It can undermine our work. There are strong intersections between the forced marriage, family violence and child protection sectors. The FDV support system is one obvious conduit of support for victim-survivors of forced marriage, but we recognise that there are ways in which the legal assistance sector can collaborate better to identify and respond to forced marriages. WLSWA would welcome the opportunity to work with the LRCWA and Western Australian Government on reforming this area of law.

We reiterate the importance of removing obstacles for women who already face marginalisation and disadvantage in the justice system, rather than adding to their existing barriers.

Consent Education

Consent law reform must be accompanied by a concurrent public awareness and education campaign.⁴⁸ Community education as a primary prevention tool is an essential part of the foundation to address sexual violence.

Current social narratives of both consent and rape myths reflect the broader social and cultural issues of gender inequality in Australian society. If we continue to allow these myths and victim-blaming attitudes to remain unchallenged, sexual violence against women will persist and impact prosecutorial level decision-making. There will be little incentive for victim-survivors to speak up and seek support.

⁴⁴ Samantha Lyneham and Samantha Bricknell (2018), When saying no is not an option: Forced marriage in Australia and New Zealand, Australian Institute of Criminology, Research Report No. 11, p. 94 < [When saying no is not an option: Forced marriage in Australia and New Zealand \(aic.gov.au\)](#) >.

⁴⁵ See also: InTouch (2022), The Causes and Consequences of Misidentification on Women from Migrant and Refugee Communities Experiencing Family Violence (Position Paper), p. 2 < [Position Paper: The Causes and Consequences of Misidentification on Women From Migrant and Refugee Communities Experiencing Family Violence - inTouch](#) >.

⁴⁶ See also: Shakti International, Oral Statement to the CEDAW Committee, United Nations, Geneva (Web Page, 9 July 2018) < [Articles & Submissions - Shakti International](#) >.

⁴⁷ Samantha Lyneham and Samantha Bricknell (2018), When saying no is not an option: Forced marriage in Australia and New Zealand, Australian Institute of Criminology, Research Report No. 11, p. 12 < [When saying no is not an option: Forced marriage in Australia and New Zealand \(aic.gov.au\)](#) >.

⁴⁸ Women's Legal Service Western Australia, Submission to Law Reform Commission of Western Australia Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact, 6 April 2023, p. 17.

Consent is not a standalone topic – it needs to be addressed alongside gender, power, sexual development, sexual communication, pleasure and mutuality.⁴⁹ Consent education must be evidence-based and developed by front line experts and engage the whole of community to increase literacy on sexual assault and consent laws in a culturally appropriate way. In the context of forced marriages, education campaigns cannot simply advise community members that forced marriage is a criminal offence in Australia. Education in these communities is an acculturation process and the changes will not be immediate.⁵⁰ Education campaigns must be able to demonstrate that consent in marriage does not undermine but, rather, promotes family and/or community values.

Lastly, consent education must put IPSV on the agenda. Intimate partner violence remains a key objective of the National Plan to Reduce Violence against Women and Children (2022-23) and the National Risk Assessment Principles specifically identifies IPSV as increasing the risk of intimate partner homicide.⁵¹

Concluding Remarks

WLSWA again thank the LRCWA for the opportunity to provide feedback to the Discussion Paper. We are heartened by the commitment of the LRCWA and Western Australian Government to determine the most appropriate solutions to reform the system for sexual violence matters. The high rates of attrition of sexual offences, at multiple stages of the criminal justice process, evidences the inherent challenges and barriers for victim-survivors, and failings within the existing infrastructure and mechanisms of the system. In its current form the criminal justice system continues to re-traumatise those that do report. The prevalence of rape myths in our society, which results in a focus on the victim-survivor rather the perpetrator, point to the concurrent imperative need for culture change in the system, widespread community education, and victim-survivor access to wrap around support services, early specialist legal advice, and advocacy supports, as well as legal reform.

WLSWA reiterate that reforms to strengthen the definition of consent must capture the harm experienced in intimate partner relationships and in the context of family and domestic violence.

We urge the LRCWA to consider our responses to both Discussion Papers together. Please do not hesitate to contact us if you require additional information.

Kind regards



Dr Jennie Gray
Chief Executive Officer
24 April, 2023

⁴⁹ Women's Safety and Justice Taskforce, Hear her Voice: Report Two, Volume 1, Women and girls' experience across the justice system, Queensland Government, p. 63 < [WSJT Discussion Paper 2 \(womenstaskforce.qld.gov.au\)](#)>.

⁵⁰ Samantha Lyneham and Samantha Bricknell (2018), When saying no is not an option: Forced marriage in Australia and New Zealand, Australian Institute of Criminology, Research Report No. 11, p. 91 < [When saying no is not an option: Forced marriage in Australia and New Zealand \(aic.gov.au\)](#)>.

⁵¹ Cherie Toivonen and Corina Backhouse (2018), National Risk Assessment Principles for domestic and family violence (ANROWS Insights 07/2018), Sydney, NSW: ANROWS < [ANROWS NRAP National-Risk-Assessment-Principles_1.pdf \(anrowsdev.wpenginepowered.com\)](#) > in Centre for Women's Safety and Wellbeing, Preliminary Submission to the Law Reform Commission of Western Australia on the review of sexual offences and the law relating to consent (Project 113), 10 June 2022, p. 7.