

3 June 2022

The Hon. Lindy Jenkins

Chair, Law Reform Commission of Western Australia

By email: lrcwa@justice.wa.gov.au

REVIEW OF SEXUAL OFFENCES AND THE LAW RELATING TO CONSENT (PROJECT 113)

Introduction

Women's Legal Service of Western Australia (WLSWA) thank the Law Reform Commission of Western Australia for an opportunity to contribute feedback towards the preliminary review (review) of Chapter XXXI, and related sections, of the *Criminal Code* Compilation Act 1913 (sexual offences).

As the only specialist gender-specific community legal centre in Western Australia, WLSWA has delivered statewide legal assistance to women for more than twenty years. Legal practice areas include family law, child protection and care matters, family and domestic violence and criminal injuries compensation. The specialised legal services provided by WLSWA ensure that clients, the vast majority of whom present with multiple legal issues, access a single legal service, that is responsive to their needs.

Our tailored, needs-matched legal services model ensures continuity in support and mitigates re-traumatising clients that present with a high complexity of legal and social issues. WLSWA prioritises women who experience disadvantage across multiple areas, including because of their cultural, social and economic circumstances.

WLSWA also promotes and advocates for women's human rights to be upheld, redresses inequalities experienced by women and fosters legal and social change through a range of strategic activities, including community legal education and evidence-based law and policy reform advocacy.

WLSWA recognises the essential need for consent law reform to deliver justice to victims, and our work informs our knowledge about the unacceptable prevalence of sexual violence towards women and children in Western Australia. Our work shows us that many women do not report sexual violence for fear of being disrespected, dismissed, and disbelieved, leaving women further vulnerable and with high level mistrust and apprehension about the justice system. For these reasons, WLSWA consider that delivering consent law reform in WA is imperative.

The legal assistance provided by WLSWA does not extend to criminal sexual offences. However, most of our clients have experienced sexual violence, predominately within a family and domestic violence context. WLSWA therefore is privy to an informed understanding about the experience of women, at individual and collective levels, of sexual violence, including experiences when reporting these crimes to police and intersecting with the justice system. WLSWA provide information and support to our clients,

to empower them to make informed choices about whether to report offences to the police. We assist women to understand what is involved in reporting, the legal process and pathways to connect women with victim support, or therapeutic services, and we advocate on their behalf in relation to compensation or other entitlements.

Should the concept of affirmative consent be reflected in the legislation?

Yes. WLSWA strongly supports affirmative consent law, reflecting the positive act of communicating consent rather than the absence of communicating no.

The *Criminal Code* defines consent as having to be ‘freely and voluntarily given’. This definition must be amended to provide for parties to give and obtain consent at the time of the act. Affirmative consent law aligns with and reflects community standards and an accepted understanding that every person has a right to choose whether to engage in a sexual activity.

Affirmative consent law places the responsibility for and onus on the alleged perpetrator to demonstrate how he proactively confirmed consent was freely and voluntarily given for the sexual activity. The current law affirms the myths and stereotypes about women, including that a woman will fight back, resist or otherwise be able to defend an act of sexual violence perpetrated against her.

Affirmative consent law recognises the right of all people to agency and bodily autonomy, and mitigates the risk posed when victim’s ‘freeze in fear’ during an act of sexual nature, which is often relied on in defence by the alleged perpetrator.

Our experience working with women highlights the multitude ways women will act to protect their safety or the safety of children, during a sexual assault, such as to become submissive, and which is often relied on in the legal process to argue that a women consented.

For women with impaired capacity or other vulnerabilities, including where a person lacks the ability to consent (refer incapable persons under the s 330 *Criminal Code*) a more detailed analysis and consideration of the application of affirmative consent law is necessary.

How does Section 24 of the Code (dealing with mistake of fact) apply to the offences created by the above-mentioned provisions?

WLSWA uphold the principle of a fair and balanced justice system and acknowledge the rights of an accused to a fair trial.

Notwithstanding this, WLSWA is very concerned about the way in which a s 24 Mistake of Fact defence is used to argue an ‘honest and reasonable but mistaken’ belief, places the onus on the victim to prove that consent was not given to the alleged sexual offence(s).

Affirmative consent law would reverse the onus from the victim to the alleged offender to demonstrate, to a sufficient standard, that consent was freely and voluntarily given. Furthermore, affirmative consent law expands consideration at law of the meaning of ‘reasonable’, which WLSWA considers is a concept tantamount to a weakness at law, as it is often used to leverage prevailing community attitudes (jury members) that minimise or dismiss sexual violence that occurs within a family and domestic violence relationship.

Affirmative consent law dispels the perception that consent, once given, is absolute and cannot be withdrawn. That a woman may consent to one sexual act does not mean ongoing consent to other sexual acts, which is often the basis for a legal defence, particularly in cases involving intimate partners.

How may consent be vitiated, including through coercion, fraud or deception?

The law as it applies in WA must provide for circumstances where consent is 'forced' as a result of the act itself or by intimidation or threats, and where force, or the fear of force or harm, is used to manipulate consent. This includes circumstances where threats and intimidation can be overt or implied.

It is an all-too-common scenario in our work that our clients tell us of their experiences, often multiple, of rape and sexual assault within a domestic and family violence dynamic. Our clients share that they are reluctant to report these offences due to fear of further harm to themselves or others, including children, relatives, or pets. They also tell that, conversely, the cumulative fear which is produced in a coercive control dynamic means that fear in relation to sexual violence may not be discernable, since fear is constant and enduring.

There are many other scenarios where consent may be vitiated including where:

- There are communication and language barriers
- A person is unaware of their rights
- A person impersonates another
- A power imbalance exists in a relationship based on authority, trust or dependence
- The person has been isolated or segregated
- There is a false premise of payment offered in return for consent

Should special verdicts be used?

As set out above, WLSWA support the importance of a fair and just criminal justice system. However, WLSWA caution against the use of 'special verdicts', where an offender is not held criminally responsible on the basis of 'unsound mind.'

We are concerned about circumstances where, for example, a Court may find that an offence occurred, but that the perpetrator failed to ascertain consent because of a cognitive or mental health impairment. WLSWA considers that this aspect of the law allows for circumstances where the criminal history report of an offender may not subsequently show a conviction. Special verdicts may be therefore be a potential loophole for recidivist offending.

WLSWA urges that a strong evidence base, including the assessment of expert witnesses, must be a fundamental aspect of any submission for a special verdict.

Should there be any change to the terminology used in and the scope of the existing offences and, if so, what changes should be made?

WLSWA observe that in other jurisdictions, sexual violence is used an umbrella term to refer to a wide range of unwanted sexual acts. We note that in many of these jurisdictions, the importance of using the term 'violence' is highlighted, given it aptly conveys the violent nature of sexual offences perpetrated

against others. This includes rape, sexual assault, sexual harassment, unwanted touching, sexual coercion, sex trafficking, female genital cutting, child sexual abuse, child marriage, forced pregnancy, enforced sterilisation and indecent acts.

Our laws need to reflect community values and the expectations held by a community about how people conduct themselves and, importantly how they treat others. The law must provide that where acts of sexual violence are perpetrated against another an alleged perpetrator be held to account. Moreover, victims must be entitled to seek redress and justice, through legislation that defines and enshrines at law the act that has been perpetrated against them. This contributes to changing the perceptions and negative stereotypes about sexual offences which continue to exist in our community.

National consistency in sexual offence legal terminology is also essential. Currently, ‘sexual penetration without consent’ as defined in the *WA Criminal Code*, is called ‘sexual assault’ in New South Wales legislation and ‘rape’ in the Queensland, South Australian, Tasmanian and Victorian laws. The Australia Capital Territory and Northern Territory refer to this as ‘sexual intercourse without consent’.

WLSWA supports terminology and definitions that separate an act from a person’s identity, and which also conveys that recovery from the sexual violence is possible and even likely.

The use of gendered pronouns is something to be considered in the review too, given that sexual violence is not gender neutral, it is mostly perpetrated by men against women.

Are there any omissions in the existing sexual offences that should be remedied by the addition of new sexual offences and, if so, what offences should be added and why?

WLSWA notes and applauds the recent *Criminal Law Amendment (Intimate Images) Act 2019 (WA) (CLA Act)* which outlines penalties for the sharing of an image of a person ‘which the person would reasonably expect to be afforded privacy.’ This includes technology facilitated and image-based abuse such as revenge porn.

This current review is an opportunity to consider a range of statutes, including the CLA Act and research on this area, to identify areas for reform that align with the review objectives, including to provide at law, for other acts of sexual violence that are not currently reflected in legislation.

Are there other changes that should be made to Chapter XXXI and the other offences the subject of the Terms of Reference?

Whether in the *Criminal Code* or accompanying Practice Directions, WLSWA recommend the introduction and use of person centred and trauma informed approaches. The current under-reporting of sexual violence tells us that the criminal justice system does not adequately respond to the needs of women who experience sexual violence.

The high rates of attrition of sexual offences, at multiple stages of the criminal justice process, evidences the inherent challenges and barriers for victims, 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.

Reforms and levers to improve the experience, from beginning to end, for those who have experienced sexual violence in the criminal justice system include:

- Specialist judicial responses, encompassing specialist courts, with specialist judges and specialist prosecutors
- Specialist support roles in these specialist courts, including police, legal practitioners, judicial officers, interpreters, support services and other court staff who are trained in trauma informed practice, the dynamics and impacts of sexual violence (incorporating sexual violence perpetrated within the context of domestic and family violence), cultural competency and security, and disability and LGBTIQ+ awareness
- Access to wrap around services spanning intensive case management, early specialist legal advice, and advocacy supports
- Fast-tracking sexual violence matters via an earlier listing. Reducing pre-trial delays, between investigation and court proceedings, will not only assist in more expedient resolution of legal issues, but will also limit the number of times story needs to be told which, combined with lengthy waits, can compound trauma
- An enforceable code of conduct, that provides practice guidelines and rules that ensures ethical legal approaches and behaviours that do not re-traumatise the victim. WLSWA is aware that whilst aggressive interrogation of victims is not considered good legal practice within judicial systems, defence counsel do not always abide by this accepted Court acumen
- Other mechanisms to safeguard people who have experienced sexual violence against adversarial cross examination, as needed
- Reconsideration of penalties for sexual assault and consistency with other jurisdictions. 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. This is 25 years in Victoria, 21 years in Tasmania, and life imprisonment in Northern Territory, Queensland and South Australia. Maximum penalties should reflect the long-term impact of sexual violence on not only those who have experienced this, but also their family and friends and other networks. Inadequate penalties are also a disincentive to reporting sexual violence offences
- The development of a Charter of Rights for those who have experienced sexual violence
- Exploration of alternative avenues to hold offenders to account, including civic pathways such as restorative justice, that are preferred by the person who has experienced sexual violence
- Live data consolidation and analysis of the proportion of sexual violence cases reported that proceed to conviction, those that succeed, and the percentage of cases that are unreported

Concluding Remarks

WLSWA again thank the Commission for this opportunity to contribute to this important review. This proposed reform is a critical step towards addressing community attitudes to sexual violence and to achieving respectful relationships. It is however important to acknowledge that legislative reform is only one strategy necessary to redress the issues, and a comprehensive approach is warranted.

The power imbalances embedded in gender stereotypes and inequities propel attitudes and approaches that excuse and enable the perpetuation of sexual violence against women and children. Broad and concurrent education around changes to the law of consent to raise awareness, address community perceptions and advocate ethical sexual practices is crucial.

Our experience with clients demonstrates that there is still a high level need to improve the responses – policing and clinical as well as judicial processes – for people who experience sexual violence and do determine to report these experiences, noting that there remains a significant gap between those that experience sexual violence and those that report.

The prevalence of rape myths in our society, where the focus is on blaming the victim-survivor rather than holding the perpetrator to account, continue despite many decades of law reform, advocacy and community education. This fact alone is a major and ongoing concern to WLSWA.

WLSWS consider that these myths influence and undermine the proper application of the law of consent. Starting from the premise of being believed, having the trauma of these experiences affirmed, and keeping those who are in the system informed about the progress of their matter is central to their safety.

While legislative reform in this area is important, we also consider it is equally important to ensure that such reform does not lead to unintended consequences.

This submission is informed by consultation with our interstate peers and a review of existing legislative reform in other jurisdictions. In addition, our experienced lawyers contributed their insights and knowledge, gained from working directly with women.

The addendum cites the sources reviewed for this submission.

And please do not hesitate if you require additional information.

Kind regards

A handwritten signature in black ink, appearing to read 'Jennie Gray', with a stylized flourish at the end.

Dr Jennie Gray
Chief Executive Officer

Sources reviewed and cited from other Australian jurisdictions

[ACT Crimes \(consent\) Amendment Bill 2022](#)

[ACT Open Government 'Clearer and stronger sexual consent laws' 2022](#)

[NSW Communities and Justice: Sexual consent laws home page](#)

[NSW Government's Bill to reform consent law Fact Sheet](#)

[NSW Government legislation: Crimes Act \(current\)](#)

[NSW Law Reform Commission: Consent in relation to sexual offences 2020](#)

[Qld Law Reform Commission: Review of consent laws and the excuse mistake of fact 2020](#)

[WLC ACT Submission Communicative Consent Laws 2021](#)

[WLS NSW Sex consent law reform media release 2021](#)

[WLS NSW submission in response to the NSWLRC Draft Proposals 2019](#)