LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SERVICES
Ms Elizabeth Lee MLA (Chair), Ms Bec Cody MLA (Deputy Chair)
Ms Nicole Lawder MLA, Mr Michael Pettersson MLA

Submission Cover Sheet

Crimes (Consent) Amendment Bill 2018

Submission Number: 2

Date Authorised for Publication: 28/8/18

Caroline Le Couteur MLA
ACT Greens Member for Murrumbidgee

Thursday, 7 June 2018

Elizabeth Lee MLA
Chair, Standing Committee on Justice & Community Safety

Dear Ms Lee,

RE: *Crimes (Consent) Amendment Bill 2018* Referral to Committee

I write with regards to the recent referral to the Justice and Community Safety Committee of the *Crimes (Consent) Amendment Bill 2018*, tabled in the Assembly on Wednesday 11 April 2018.

I am pleased that the Committee is interested in the issue of consent and how it is understood in our community and the legal system. Since the issues were raised by Australian Law Reform Commission in their recommendations on sexual assault and reiterated to me by stakeholders last year and earlier this year, I have become very aware of what an important issue consent is for respectful and positive relationships in our community. The recent referral of sexual consent laws by the NSW Attorney-General to the Law Reform Commission after the recent case involving Sydney man Luke Lazarus (http://www.abc.net.au/news/2018-05-08/nsw-attorney-general-calls-for-review-of-sexual-consent-laws/9734988) shows the importance of getting consent laws right.

In an effort to reduce work for both the committee and the people who commented on my bill, I would like to let you know what I did to consult about it.

As part of the month-long consultation process, an email was sent to 69 stakeholders inviting them to contribute and drawing their attention to the Discussion Paper, Exposure Draft of the Bill and the accompanying Explanatory Statement. The stakeholders contacted were across all relevant sectors - legal academics and peak bodies, community services, and privacy and domestic violence reform advocates. I have **attached** the list of stakeholders contacted and the discussion paper for your reference.

All stakeholders were advised that their submissions could be shared to enable further consideration of the issues, either during or following the initial consultation process. In recognition of the effort and resources stakeholders have put into preparing their submissions I would like to request, as a courtesy to them, that the submissions received be considered as part of the committee's inquiry into the Bill.

Please find **attached** copies of the 9 submissions received. I note that a summary of the issues raised is included as part of the Explanatory Statement to the Bill.

I would also like to draw attention to the consultation process on the - now withdrawn - *Crimes (Invasions of Privacy) Amendment Bill 2017*. A number of stakeholders provided feedback that their views on consent are unchanged from this consultation. On pages 17-18 of the consent discussion paper there is a comprehensive report on how consent is addressed in the 17 submissions to that earlier Bill.

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If it may assist the Committee's consideration of the current Bill, I am happy to provide copies of the original submissions. In particular, the submission from Women with Disabilities ACT raised additional issues that I have not addressed in the current Bill, and so I **attach** a copy for consideration.

Thank you for your time in considering this correspondence and I hope it may assist the committee's inquiry into the *Crimes (Consent) Amendment Bill 2018*.

Yours sincerely

Caroline Le Couteur MLA
ACT Greens Member for Murrumbidgee
ACT Greens Spokesperson for Planning, Transport, City Services, Housing, Arts, Animal Welfare, Community Services, Women, Seniors and Social Inclusion

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List of attachments:

FIRST NAME	SURNAME	ORGANISATION	EMAIL ADDRESS	RELEASE	ADVANCED	PHONE NUMBER	NOTES
Renuka	Thilagaratnam	*ACT Human Rights Commission*	Renuka.Thilagaratnam@act.gov.au	ADVANCE	SENT 25/01	(02) 6205 2168	
Marcia	Williams	*ACT Women's Services Network*	ceo@wsn.org.au	ADVANCE	BOUNCE		forwarded to Frances Crimmins at YWCA
Eliza	Moloney	*ACTCOSS*	eliza.moloney@actcoss.org.au	ADVANCE	SENT 25/01		on extended leave - forwarded to craig.wallace@actcoss.org.au
Ruth	Ragless	*ACTCOSS*	ruth.ragless@actcoss.org.au	ADVANCE	SENT 25/01		
Craig	Wallace	*ACTCOSS*	craig.wallace@actcoss.org.au	ADVANCE	SENT 25/01		
Philippa	Moss	*AIDS Action Council*	philippa.moss@aidsaction.org.au	ADVANCE	SENT 25/01		
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Chrystina	Stanford	*Canberra Rape Crisis Centre*	chrystina@crcc.org.au	ADVANCE	SENT 25/01	(02) 6287 3618	
William	Wang	*Greens - ACT Greens Policy Coordinator*	william.1987.wang@gmail.com	ADVANCE	SENT 25/01		
Marcia	Williams	*Women's Centre for Health Matters*	ceo@wchm.org.au	ADVANCE	SENT 25/01		
Laura	Vines	*Aboriginal Family Violence Prevention & Legal Service*	lvines@fvpls.org	PUBLIC	N/A		Unlikely able to make a formal submission due to resources and no presence in the ACT
		Aboriginal Legal Centre (NSW/ACT)	Canberra@alsnswact.org.au	PUBLIC	N/A	(02) 6249 8488	
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Kristine	Klugman	*Civil Liberties Australia*	secretary@cla.asn.au	PUBLIC	N/A		
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Joanne	Sheehan-Paterson	*National Association of Services Against Sexual Violence*	joannesp@msau-mdvs.org.au	PUBLIC	N/A		cc Chrystina Stanford
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ACT Greens Discussion Paper

Consent in Sexual Violence Laws

A proposal to reform the ACT's criminal law to adopt a new definition of consent in the *Crimes Act 1900* (ACT).

Caroline Le Couteur MLA
ACT Greens Member for Murrumbidgee

February 2018

Consultation Period: 19 February 2018 to 23 March 2018

Contents

Consultation Arrangements

Caroline Le Couteur MLA, ACT Greens Member for Murrumbidgee, invites your feedback and submissions on the proposals in this paper and the exposure draft of the *Crimes (Consent) Amendment Bill 2018*.

We would like to hear feedback from all relevant sectors of the community, including community and legal services specialising in violence against women and the LGBTIQ+ community, law reform and enforcement advocates, and the general public.

The discussion paper is to be read in conjunction with the exposure draft and explanatory statement of the *Crimes (Consent) Amendment Bill 2018* available from:

http://www.legislation.act.gov.au/ed/db_57578/

Submissions and comments should be sent to:

The Office of Caroline Le Couteur MLA
ACT Legislative Assembly
196 London Circuit
CANBERRA ACT 2601

PH: 02 6205 1941
EM: *lecouteur@parliament.act.gov.au*

The consultation period is from 19 February 2018 to close of business on 23 March 2018.

Important note regarding your privacy:

Please note that if you are providing a submission on the exposure draft Bill you should clearly indicate whether any or all of the submission is confidential. In the absence of a clear indication that a submission is intended to be confidential we will treat the submission as non-confidential.

Non-confidential submissions may be made available to any person or organisation on request during or following the completion of the consultation period.

Confidential submissions may include personal or sensitive information where privacy is required.

Anonymous submissions may be accepted, but we reserve the right not to publish or refer to a submission whose author is not reliably identified.

Foreword

We are barely into 2018, and it has already been a big year for talking about consent. The #MeToo Movement is moving forward worldwide, and the recent allegations against actors James Franco and Aziz Ansari have made "what consent means" a dinner conversation all across Australia.

But no-one's really talking about solutions. We will though.

In many ways, consent and how it is understood determines the outcome of a sexual assault matter. Not only on a purely legal level, in determining whether the crime happened at all, but on a more conceptual level, in giving the community an understanding of what consent and assault are, and hopefully preventing those cases occuring in the first place.

In 2010, the Australian Law Reform Commission (ALRC) made a number of relevant recommendations in their *Family Violence—A National Legal Response* report ("the 2010 ALRC Report"). These recommendations are the product of over a year of intense, widespread and rigorous inquiry. I believe the recommendations relating to the definition of consent should be fully adopted. We can combat this sexual assault crisis with a simple affirmative definition of consent.

At the last election, the ACT Greens promised to prioritise the implementation of the recommendations from the 2010 ALRC Report and ensure they aren't left to time and chance. This is an opportunity to take a step forward toward achieving this goal.

The Australian Women Against Violence Alliance summarised this need in their recent issues paper:

> *"The historical treatment of sexual offences, and particularly consent, is often said to epitomise the justice systems inherent bias against women, in which the justice system continues to draw on rape myths and preconceived ideas ... This exacerbates the feelings of self-blame, guilt, and unworthiness that is often representative of the impacts of sexual violence. It also contributes to the low reporting of sexual offences to the police."*[1]

What we need is to reflect on the idea that 'if it's not yes, it's no'. A logical, clear-cut and affirmative definition of consent would paint a well-defined picture about what sexual assault is and is not, and what consent is not.

I am releasing this discussion paper and draft legislation for community discussion before I introduce it to the ACT Legislative Assembly. I value and look forward to reading your feedback and meeting with you over the next few months. I want to ensure that the ACT gets the best possible legislation, and that our community feels safe and their voices are being heard.

Caroline Le Couteur MLA
ACT Greens Member for Murrumbidgee

[1] Australian Women Against Violence Alliance, "*Sexual violence: Law reform and access to justice*," 12.

Executive Summary

Despite considerable reform to family violence and sexual assault laws over the past few years, inadequacies of the system continue to undermine and restrict survivors' ability to access protection, redress and justice.[2] The system re-traumatises survivors, while low reporting and conviction rates persist.[3]

The definition of consent has a central function in determining what is relevant to a sexual assault case. In the majority of cases, there is no physical evidence or witnesses, and the focus of the trial is thus on the competing evidence of the complainant and defendant about whether the sexual activity was consensual.

The *Crimes Act* (ACT) is the standard to which community members are held. It is the responsibility of the ACT Government to proactively define consent and send a strong message that disrespectful relationships and non-consensual sexual activity will not be tolerated.

At present, the *Crimes Act* (ACT) fails to define consent. Instead it lists "negating factors" – behaviours such as duress, intoxication or fraud – that would negate consent.

We believe that defining something by what it is not does not make good law. This is an opportunity to consider the way society approaches the concept of consent.

The 2010 ALRC Report made a very clear and categorical recommendation:

> *Federal, state and territory sexual offence provisions should include a statutory definition of consent based on the concept of free and voluntary agreement.*

That report, at clause 25.76, specifically refers to the situation in the ACT:

> *With the exception of the ACT, every Australian jurisdiction has a statutory definition of consent based on one of the following formulations: free agreement; free and voluntary agreement; or consent freely and voluntarily given.*

The report further notes that the ACT Law Reform Commission recommended in 2001 that the ACT enact a statutory definition of consent – with the support of the Government at the time.[4]

ALRC did extensive consultation in preparing their report, and the submissions they received were very clearly in support of this recommendation. Submissions from the community sector, including the Canberra Rape Crisis Centre, were overwhelmingly in favour of the change.

The submissions that were concerned that the recommendation would create uncertainty about the law were in a minority, even amongst legal services responding.

The proposed legislation goes further than the ALRC recommendation. We believe that the obligation should be on the defendant to prove that consent was given and, as a society, we should

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[2] Australian Women Against Violence Alliance, "*Sexual violence: Law reform and access to justice*," 2.

[3] Daley, Kathleen, and Brigitte Bouhours, "*Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*."

[4] ACT Law Reform Commission, *Sexual Offences, Report No 17*, 71.

never 'assume' consent. A number of Australian jurisdictions have considered this reform,[5] typically in reference to the defence "where belief in consent not a defence" in section 273.2 of the Criminal Code (Canada).[6]

The Canadian construction has proven popular among health and victims services, feminist activists and victims' rights activists.[7] Domestic violence advocates have repeatedly highlighted that a positive obligation for a person to take a positive action and get a positive response from another person is essential to ensure victims are protected.

The construction we have adopted in the Crimes (Consent) Amendment Bill 2018 reads as:

> *For a sexual offence consent provision, consent of a person to an act mentioned in a sexual offence consent provision by another person means—*
>
> *(a) the person gives free and voluntary agreement; and*
>
> *(b) the other person—*
>
> *(i) knows the agreement was freely and voluntarily given; or*
>
> *(ii) is satisfied on reasonable grounds that the agreement was freely and voluntarily given.*

This draft legislation also seeks to extend the "2-year rule" to child sex offences and clarify child pornography offences to ensure that images consensually shared by young people will not result in prosecution. This is an issue because, from a plain English reading of the offences, the definition of "child exploitation material" could include intimate images consensually shared between two young people, who, for example, may be in a sexually-active relationship.

This adds an exception to address concerns from family violence and human rights advocates over the risk of young people who consent to the sharing of sexual material between each other but are nonetheless under the age of majority being prosecuted. The exclusion operates in a similar manner to the "similarity of age" defence at clause 5.2.17 of the Model Criminal Code.

This discussion paper draws heavily on the 2010 ALRC Report, which investigates in great depth the issues raised in this paper and likely to be of concern to stakeholders seeking to prepare a submission.

The paper addresses this issue through a sociological, criminological and gendered lens. To gain a better understanding of the history and legal technicalities of the issues discussed in this paper, we recommend reading this discussion paper in conjunction with Chapter 25 of the 2010 ALRC Report, with a specific focus on clauses 72 to 183. This chapter can be accessed by this link:

https://www.alrc.gov.au/sites/default/files/pdfs/publications/25.%20Sexual%20Offences.pdf

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5 New South Wales Attorney-General's Department. 2007. *The Law of Consent and Sexual Assault.* Discussion Paper. Page 29-30.

6 *Criminal Code* (Canada) (R.S.C., 1985, c. C-46), s273.2. Note: the "meaning of consent" at section 273.1(1) is "the voluntary agreement of the complainant to engage".

7 New South Wales Attorney-General's Department. 2007. *The Law of Consent and Sexual Assault.* Discussion Paper. Page 29.

Objectives of proposed changes to the Crimes Act (ACT)

1. Create a clearer, stronger definition of consent more in line with national standards by:
    a. outlining that consent is a "free and voluntary agreement", which is in line with the 2010 ALRC Report;
    b. expanding the definition of consent to include a positive action element; and,
    c. being more consistent in the application and understanding of consent across criminal law in the ACT.
2. Apply the "2-year rule" as a defence to young people engaging in consensual sexual activity, including sexting, more consistently across the *Crimes Act* (ACT).

Specific Feedback Questions

This discussion paper is specifically seeking feedback on a number of key questions below, as well as any other issues you believe are important and relevant to the discussion paper and our draft legislation. Ideally, submissions would canvass the following items:

1) What reforms to our criminal justice system are necessary to give effect to the relevant consent-related recommendations in the Australian Law Reform Commission's *Family Violence — A National Legal Response* Report ("the 2010 ALRC Report")?
2) Is the current approach taken by the ACT regarding consent in sexual offences (both in legislation and at common law) adequate and effective?
3) Reflections on the exposure draft of the Crimes (Consent) Amendment Bill 2018 including:
    a. which elements of the proposed Bill that would be effective at preventing sexual assault, supporting victims and guiding sexual assault cases;
    b. how effective the proposed reforms would be;
    c. if the proposed reforms would achieve their stated objectives;
    d. whether alternative reforms would be more appropriate in the ACT; and
    e. any potential issues, loopholes, problems or unforeseen consequences the proposed reforms could result in.
4) Does this legislation comply with the ACT's human rights obligations? If not, what changes can be made to address infringements on human rights whilst strengthening the law?
5) How will this legislation impact on other groups, especially young people and marginalised or disadvantaged communities?
6) Are there other civil reforms or common law considerations in relation to this legislation?
7) Is the current approach to consent adequately communicated or given social effect?
8) How best should these changes be communicated to the public?
9) Are there further reforms relevant to the aims of this legislation that should be included in the final Bill?

National Context

The purpose of this discussion paper is to engage the community in a discussion and reflect on the need to reform consent in the ACT, with the aim of selecting and implementing an appropriate and effective definition of consent into the *Crimes Act* (ACT).

In 1999, when the Standing Committee of Attorneys-General were reviewing the Model Criminal Code, their Model Criminal Code Officers Committee recommended the creation of a clear, consistent, statutory definition of consent in the soon-to-be-harmonised Crimes Acts. The ACT was the first jurisdiction to work toward adopting the Model Criminal Code. While the ACT did not fully implement the Code and the national harmonisation project did not eventuate, the recommendation to implement a clear definition was implemented in some way or another by every state and territory – except the ACT.

More recently, the 2010 ALRC Report contained 187 recommendations for reform in the area of family violence and sexual violence, including recommendations to amend consent definitions.[8]

Recommendation 4 in chapter 25 of the report called on state and territory governments to harmonise their definition of consent as a "free and voluntary agreement". At the time of the report, each state and territory except the ACT had a definition of being "free agreement", "free and voluntary agreement" or "consent freely and voluntarily given". It is reasonable to assume therefore that this recommendation is relevant to the ACT, as the only jurisdiction without a positive definition of consent in our key crimes legislation.

Other states and territories have made progress in this area in recent years, which is briefly summarised below.

Victoria

Consent is defined in the Victoria *Crimes Act 1958* as a "free agreement". There is also a non-exhaustive list of circumstances which negate consent, which notably includes: "the person does not say or do anything to indicate consent to the act" and "having given consent to the act, the person later withdraws consent to the act taking place or continuing." A "reasonable belief in consent" is also defined as being negated by the aforementioned list of circumstances and dependent on the person taking "steps … to find out whether the other person consents or … would consent to the act."[9]

New South Wales

The New South Wales *Crimes Act 1900* dictates that "a person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse." In addition, a person is said to know the other person doesn't consent if they are "reckless" in seeking consent or have "no reasonable grounds" for believing consent exists. A non-exhaustive list of circumstances which negate consent are also included.[10]

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8 Australian Law Reform Commission, 2010, *Family Violence: A National Legal Response*, clause 25.76

9 *Crimes Act 1958* (VIC), s55-56.

10 *Crimes Act 1990* (NSW), s61.

South Australia

South Australia's *Criminal Law Consolidation Act 1935* dictates that a person consents if they "freely and voluntarily" agree to the sexual activity. A non-exhaustive list of circumstances which negate consent is also included. In addition, "recklessly indifferent" is defined as being "aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility" and "fail[ing] to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed".[11]

Northern Territory

In the Northern Territory's *Criminal Code Act 1983* consent is defined as a "free and voluntary agreement". A list of circumstances which negate consent is also included. In addition, in the *Criminal Code Act 1983* it outlines that "a person is guilty of an offence if the person has sexual intercourse with another person … without the other person's consent … or being reckless as to the lack of consent", and that reckless can mean "not giving any thought to whether or not the other person is consenting".[12]

Western Australia

In Western Australia's *Criminal Code Act Compilation Act 1913* consent must be "freely and voluntarily given" and is "not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means".[13]

Queensland

In Queensland's *Criminal Code Act 1899*, consent must be "freely and voluntarily given by a person with the cognitive capacity to give the consent." A non-exhaustive list of circumstances which negate consent is also included.[14]

Tasmania

In Tasmania's *Criminal Code Act 1924* consent is defined as a "free agreement". A non-exhaustive list of circumstances which negate consent is also included.[15] Interestingly, Tasmania is the only jurisdiction in Australia that has implemented a "reasonable belief" clause. In Tasmania, per section 2A(2)(a) of their Criminal Code, there is "no consent in the absence of verbal or physical communication to as free agreement"[16]. This is achieved though their approach to negating or vitiating factors, slightly different to the approach taken by this paper.

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11 *Criminal Law Consolidation Act 1935* (SA), s27-28.

12 *Criminal Code Act 1983* (NT), s148-149.

13 *Criminal Code Act Compilation Act 1913* (WA), s183.

14 *Criminal Code Act 1899* (QLD), s228-229.

15 *Criminal Code Act 1924* (TAS), s5.

16 *Criminal Code Act 1924* (TAS), s5, and Australian Law Reform Commission, 2010, *Family Violence: A National Legal Response*, clause 25.105

ACT Law as it stands

Since the 1970s, there has been significant law and policy reform across Australian states and territories to better address the disadvantages that sexual assault survivors face within the criminal justice system.

In the ACT, we have come a long way with reforms like[17]:

- eliminating the witness corroboration rule, which required judges to advise juries that complainants were an unreliable class of witnesses;
- jury instructions on the reasons a complainant may have for not reporting an assault;
- jury instructions on implied consent: that a person is not to be regarded as having consented to a sexual act just because they didn't say anything to indicate non-consent, protest or physically resist, or sustain an injury, or because they consented on an earlier occasion;
- requiring judges (where relevant) in a sexual offence proceeding to inform the jury that when deciding whether the defendant was under a mistaken belief that the complainant consented, the jury may consider whether this mistaken belief was reasonable;
- introducing 'rape-shield laws', which deal with the admission of evidence and are designed to prohibit a complainants' sexual reputation going against their character;
- banning direct cross-examination of the complaint by an unrepresented defendant; and,
- excluding good character as a mitigating factor in sentencing for child sex offences where that good character facilitated the offending (and whether it is appropriate to extend this to all sexual offences).

However, in the *Crimes Act* as it stands, consent is defined by what it is not, in that only a non-exhaustive list of circumstances which negate consent is included.

As a matter of interest, in the Oxford English Dictionary, consent is defined as "permission for something to happen or agreement to do something".

Consent is referred to on seven occasions in the *Crimes Act* in relation to sexual offences, and the reference should function to give each and every one of these offences meaning. As it stands, however, the 'non-definition' of consent makes these offences ambiguous at best and crime-facilitating at worst.

It is hard to imagine how judges and juries are expected to make just decisions without a statutory definition of consent to guide them.

We need to introduce a strong and easy-to-understand definition of consent into the *Crimes Act* so that each of these seven offences are clear.

An affirmative definition of consent will fairly cater to the needs and rights of both the complainant and defendant. It is only with clarity in our legislation that we can expect members of our community to clearly understand what consent means and engage in respectful and consensual sexual relationships.

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17 *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), s33, 77-78.

Rationale

Introducing an affirmative definition of consent into the *Crimes Act* will not be a quick fix, but it will be an extremely meaningful first step in tacking the sexual assault crisis at force in our community. An affirmative definition of consent will achieve the following outcomes.

A balance of rights

Our criminal justice system must be fair to the defendant. Defendants of sexual assault charges are entitled to the presumption of innocence. Convictions for sexual assault will have life-changing consequences for the defendant – such as prison time and a life-long stigma.[18] It is vital that convictions are based on reliable evidence.

However, our criminal justice system must also be fair to the complainant and the community – both of whom have a vested interest in seeing reporting rates increase and perpetrators being convicted for their crimes. It is also worth noting that the definition of consent must provide equal protection to those who are more vulnerable to sexual assault as well as those who may be or appear to be less vulnerable.

While it is important to note that the rights of the complainant and the defendant are not necessarily rights in contest,[19] it is fundamentally important that our legal reform addresses the current misbalance in rights at play. Every person has the right to have criminal charges, rights and obligations recognised by law, and decided by a competent, independent and impartial court after a fair and public hearing.[20] As it stands, complainants in sexual assault cases often do not have access to these rights. The findings of previous studies have shown that third-party observers will unreasonably scrutinise the behaviour of the complainant as much as, if not more than, the defendant in order to identify how they may have contributed to the sexual assault that followed.[21]

Jurors in a mock study were also found to invoke "acceptable scripts, forged in the context of contemporary socio-(hetero)sexual relationships, against which the conduct of the parties, and the allegations of sexual assault, were measured. These scripts often positioned women as having responsibility to act as sexual gatekeepers, communicating their willingness or refusal clearly and unequivocally, whilst bearing in mind the presumed predisposition of men to push acceptable boundaries as sexual initiators."[22]

Complainants too have a right to a "competent, independent and impartial court or tribunal". Juries are struggling with decisions because they have no choice but to bring their own definitions of consent – which are often products of ingrained rape myths – into the jury room. Instead, we need to provide jurors with a legal definition of consent and a standard with which to hold the defendant to.

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18 Victorian Law Reform Commission, "*Sexual Offences Final Report*," 81.

19 Australian Law Reform Commission, "*Family Violence—A National Legal Response*," 1117.

20 *Human Rights Act 2004* (ACT), s10.

21 Ellison, and Munro, "*Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations*," 311.

22 Ellison, and Munro, "*Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations*," 302.

No person should have their right to consent blindly neglected or purposefully ignored. Every person should have the right to decide with whom, when and how they engage in sexual relationships. An affirmative definition of consent supports the right of every person to sexual autonomy and self-determination. It is fundamentally important that we take this step – by implementing a definition which is just, egalitarian and affirmative in nature.

A definition of consent based on fact, not myth or misconception

A range of interconnected and undetectable myths and misconceptions exist which continue to influence court proceedings and outcomes, public perceptions, objections to sexual assault-related legal reform and the *Crimes Act* in particular.

These myths are a prescriptive framework which guide expectations about what is and isn't sexual assault. These expectations, therefore, determine the way jurors interpret evidence in sexual assault trials – members of the jury will readily accept evidence which fits with their expectations, ignore evidence that doesn't fit, and may make assumptions in line with their expectations where information is missing.

Some such myths and misconceptions include:

- *That women and children are inherently unreliable and lie about sexual assault*.[23] This is an outdated myth which, although evidently sexist, ageist and blatantly untrue, continues to influence the *Crimes Act*in that the complainant (who is statistically most likely to be a woman) is forced to prove non-consent beyond any reasonable doubt, as opposed to requiring the defendant to prove how they sought consent.
- *That the accusation of rape is easily made, but difficult to challenge*.[24] Statistics show that sexual assaults are under-reported, under-prosecuted and under-convicted. In Australia, victimisation surveys show that 12-20 percent of sexual assault victims report the offence to the police, and of these, only 20 percent have their case judged in court, and of these, just 6.5 percent see a conviction.[25] Conviction rates, generally, for sexual offences have actually decreased over time – from 17 percent in 1970–1989 to 12.5 percent in 1990–2005.[26] The ambiguity surrounding consent almost feels designed to make sexual assault accusations extremely easy to challenge and convictions notoriously hard to attain.
- *That sexual assault is most likely to be committed by a stranger*.[27] Despite being completely false, this is one of the most prevalent and powerful rape myths. Studies show that juries are extremely influenced by this belief and find it difficult to reach a verdict when the complainant and defendant are acquaintances. Six out of 10 of the negating circumstances listed in the *Crimes Act* (ACT) mention violence or threats which fit in with the violent stranger rape myth.
- *That real sexual assault victims would sustain injuries, perpetrators typically use force before and during sexual assaults, and real sexual assault victims would resist and fight off the*

[23] Australian Law Reform Commission, 2010, "*Family Violence—A National Legal Response*," 1112.

[24] Australian Law Reform Commission, 2010, "*Family Violence—A National Legal Response*," 1112.

[25] Daley, and Bouhours, "*Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*," 6.

[26] Daley, and Bouhours, "*Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*," 43.

[27] Australian Law Reform Commission, "*Family Violence—A National Legal Response*," 1112.

perpetrator.[28] Most perpetrators of sexual assault know their victims and, therefore, do not have to use violence. Perpetrators typically have power over their victims and 'groom' them over time – it is important to remember that both children and adults can be 'groomed'.[29] The *Crimes Act* (ACT) does note that "a person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse."[30]

- *That memory of sexual assault should be clear, coherent, detailed, specific and not contain any inconsistencies or omissions*.[31] This myth contributes to high attrition rates of sexual assault cases. In reality, however, fragmented, inconsistent and unspecific memories are the norm for everyone, particularly if the offences took place decades previously and on numerous occasions.[32]

Increased legal protections for those in relationships

The myth that someone cannot be assaulted by a current partner remains pervasive. This myth was reinforced by common law until the 1980s – and while reforms to rape in marriage have taken effect and it is no longer legally true, it continues to influence the way the community understand sexual assault, which in turn, influences reporting, prosecution and conviction rates.[33]

Given that the vast majority of all sexual assaults are perpetrated against acquaintances and family members, consent must be relevant and applicable to intimate social contexts. The 'no means no' approach requires the targeted individual to protest, but there are any number of reasons why a person targeted by someone known to them in a space familiar to them would not resist. They might fear for their personal safety, fear for their children's safety, think their partner has the right to their bodies,[34] think it will only happen once, it has happened so many times they have given up, think they can handle it themselves, or they think nobody will believe them.

Speaking about sexual assault in the context of Canada, Lucinda Vanderdort wrote:

> *"A wide variety of interpersonal relationships, familial and non-familial, may serve to disable or disempower one or more parties, either emotionally or in other practical respects, rather than affirm their equality. Within the dynamic of an interpersonal relationship, assaultees may find themselves to be expected or pressured to waive the right of refusal under a "'no' means 'no'" standard because assertion of a right to sexual integrity would express discord, defiance of the existing distribution of power in the relationship, or repudiation of the relationship itself. Under these conditions, abuse of*

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[28] Victoria Police, and Australian Institute of Family Studies, "*Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners*," 6-7.

[29] Victoria Police, and Australian Institute of Family Studies, "*Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners*," 6.

[30] *Crimes Act 1900* (ACT), s64.

[31] Victoria Police, and Australian Institute of Family Studies, "*Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners*," 8.

[32] Hohl, and Conway, "*Memory as evidence: How normal features of victim memory lead to the attrition of rape complaints*."

[33] Australian Law Reform Commission, "*Family Violence—A National Legal Response*," 1113.

[34] Parkinson, Debra, "*Raped by a partner: A research report*," 18.

> *power is easily normalized. An assailee may not believe it is either possible or practically feasible to terminate or repudiate the social relationships that render him or her vulnerable to assault. Those social relationships then function as a prison."*[35]

An affirmative definition of consent would prohibit sexual activity in the absence of the communication of voluntary agreement. This definition would support the sexual autonomy of every person, no matter what the basis of their relationship to the perpetrator.

Increase in reporting rates

There are a number of reasons why the reporting rates of sexual assault are so low. Some possible reasons are that victims have a lack of confidence in the criminal justice system, they have had prior negative experiences with reporting; they fear that they will not be believed, or they lack an understanding of how to report and how the criminal justice system works. It could also, unfortunately, be attributed to the unwillingness of police to file a case or to take it seriously.[36]

An affirmative definition of consent will not remedy low reporting rates overnight - but it will be a positive and powerful first step to ensuring victims have confidence in the criminal justice system and feel they will be believed. An affirmative definition of consent should positively impact the attitudes and understanding of police officers, prosecutors and juries.

More is necessary if we are to see reporting rates increase, not least of which is concerted community education campaigns and respectful relationships education in schools that address the issue of consent – but this is at least a start.

More just outcomes

The vast majority of adult sexual assault cases come down to consent. More often than not, there is no physical evidence of the assault or witnesses to the assault. The focus of the trial is on the competing evidence of the complainant and defendant about whether the sexual activity was consensual.[37] Many perpetrators walk free because the complainant was unable to prove, beyond a reasonable doubt, that they did not consent. These outcomes, in turn, reinforce rape myths and perpetuate patterns of non-enforcement of sexual assault laws by police, prosecutors and trial judges in subsequent cases.[38]

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[35] Vandervort, "*Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*," 404-405.

[36] Australian Women Against Violence Alliance, "*Sexual violence: Law reform and access to justice*," 17.

[37] Australian Law Reform Commission, "*Family Violence—A National Legal Response*," 1116.

[38] Vandervort, "*Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*," 406.

Anticipated Concerns

The process of developing this draft legislation revealed a number of possible problems that will need to be addressed.

This sets an unreasonable standard for sexual conduct

One of the most vocal criticisms of an affirmative communicative model of consent asks if this new standard sanitises sex and amounts to moralising erotic behaviour. The recent allegations in the media against US actors Aziz Ansari and James Franco generated endless thinkpieces about the death of intimacy and end of sexuality. The question remains: is requiring individuals to seek out and gain consent every time they engage in sexual intercourse too much to expect?

The miscommunication model of acquaintance rape posits that sexual assault is the product of men misunderstanding the supposedly ambiguous sexual signals given by women. This model implies that men and women use different styles of communication, which results in unavoidable misinterpretations of signals of sexual willingness, which ultimately leads to rape. A believer in the miscommunication model of acquaintance rape would likely argue that requiring an individual to seek out consent every time they engage in sexual intercourse is not only too much to expect, but literally impossible anyway.

In reality, however, these are just excuses. A 2010 study published in *Sexuality Research & Social Policy* found that young men in their focus groups both used and understood normative styles of refusal that didn't explicitly involve the word "no". What is significant is that these same men then drew on the miscommunication model of acquaintance rape to "collaboratively work up claims not to know what constitutes sexual refusal when performed by women, and to excuse male sexual aggression."[39]

While we cannot take one focus group as an absolute representation of how men interact with the miscommunication model of acquaintance rape, it is undeniable that some men are using this model to excuse sexually-predatory behaviour. What's worse, is that this is an excuse which is actually enabled by the lack of clarity in the *Crimes Act* (ACT).

The law should impose a high standard of care and respect in sexual circumstances. A defendant should not be able to avoid culpability when they did not give any thought at all as to whether the complainant was consenting or not.[40] Nor should they be able to avoid culpability by falsely accusing the complainant of being ambiguous.

It is possible for someone to seek and gain consent with very minimal effort, while having sexual intercourse with someone without consent is to do them great harm. Requiring individuals to seek out and gain consent every time they engage in sexual intercourse is completely reasonable and a standard that we should expect as a society.

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[39] Hansen, O'Byrne, and Rapley, "*Young Heterosexual Men's Use of the Miscommunication Model in Explaining Acquaintance Rape*."

[40] Australian Law Reform Commission, "*Family Violence—A National Legal Response*," 1164.

This will result in an increase in false allegations

An increased awareness in the law, especially a stricter law, tends to result in higher reporting rates and a resulting increase in prosecutions. A related concern, therefore, is that there will be an increase in false sexual assault allegations. We recognise the very serious consequences of being convicted of sexual assault, and understand that our criminal justice system needs to be able to effectively test the evidence that is presented in the case against the defendant.

Significantly, a concern about false allegations is already at play in our community. It is a prevalent rape myth that there is a high rate of false allegations and that many people fabricate and lie in their reports of sexual assault. National studies have proven this assumption untrue, as we saw above. Between 2000 and 2003, a Victorian study analysed 850 rapes reported to the police and found that only 2.1% were false. In those instances, the complainant was either charged or told that they would be charged unless they dropped the complaint.[41]

It is important to note that even official statistics on false reporting of sexual violence can be inflated by other factors such as police recording a case as "no crime" or "unfounded" when they cannot find insufficient evidence. There is a big difference between the inability to demonstrate in court that an offence took place and claiming that the allegations were false.

It is also worth noting that false allegations rates for sexual offences are no higher than those reported in other categories of crime. It is fair to say that victims of other crimes (such as theft or burglary)[42] are not so routinely treated with suspicion as are the victims of sexual violence.

This is an inappropriate burden on human rights

Section 22 of the ACT *Human Rights Act 2004* outlines that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty.[43] An infringement upon this right is a concern we have carefully considered.

In order to keep the defendants' human rights intact, any burden placed on them must relate to matters that they are able to prove.

On balance, we believe the proposed legislation does not unduly burden the right to be presumed innocent and provides appropriate safeguards to ensure people are not convinced merely because they are unable to overcome an unreasonable burden of proof.

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41 Australian Law Reform Commission, "*Family Violence—A National Legal Response*," 1119.

42 Kelly, L. 2001. *Routes to (in)justice: a research review on the reporting, investigation and prosecution of rape cases*. University of London p 16: https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2014/04/Rapelitrev.pdf

43 *Human Rights Act 2004* (ACT), s10.

Summary of Previous Consultation

In July 2017, the ACT Greens took our discussion paper, *Invasions of Privacy & Technology-Facilitated Abuse,* out for consultation. The paper sought comment on our proposed Crimes (Invasion of Privacy) Amendment Bill 2017, which included similar consent reforms proposed by this discussion paper and accompanying draft legislation.

Seventeen formal submissions were received through the consultation, many of which touched on the topic on consent. A number of changes were made the Bill as a result of those comments, and those changes have carried forward into the new Bill.

Detailed information regarding the results of the consultation are available from page 6 here: http://www.legislation.act.gov.au/es/db_56609/current/pdf/db_56609.pdf

Relevant community feedback included:

- The ACT Human Rights Commission was concerned that the structure of the consent provision in the exposure draft placed a legal burden on the defendant to prove that the other person consented to the distribution of the image, beyond a reasonable doubt, and that this would be incompatible with section 22(2) of the Human Rights Act 2004 (ACT).[44] They recommended that an evidential burden in line with section 2 of the Abusive Behaviour and Sexual Harm Act 2016 (Scotland) would be more appropriate.
- Nine further submissions support an appropriate construction where the legal burden is placed upon the defendant in proving consent was received. A submission from Drs Asher, Flynn and Powell noted that "like all forms of explicit or communicative consent, it is important that the focus in the legislation and in practice (as applied by police, lawyers, judges and the community) is on what actions the perpetrator took to actively gain the victim's consent to observe, capture or distribute the intimate document, as opposed to the actions (or inactions) of the victim".
- Legal Aid ACT wrote in support of a construction consistent with other jurisdictions, being: "free and voluntary agreement".
- No submission was received opposed to reform to consent in principle nor against implementing recommendation 25-4 of the 2010 ALRC Report.
- The ACT Human Rights Commission and Drs Asher, Flynn and Powell proposed that consent remain a defence to offences where the victim was of or above 16 years old or where the alleged offender is no more than two years older than the victim where the victim was under 16 years old.
- Legal Aid ACT, Toora Women Inc and Drs Asher, Flynn and Powell recommend an explicit provision that clearly demarcates that the provision of consent to one person, at one time, by one means, or for one purpose, cannot be assumed to give consent to any other person, or at any other time, by any other means, or for any other purpose. This was included in the previous Bill but has been removed from this draft on Government advice that the provision would have essentially no legal effect.

[44] ACT Human Rights Commission's submission is available online at http://hrc.act.gov.au/wp-content/uploads/2017/06/Caroline-Le-Couteur-MLA-Crimes-Invasion-of-Privacy-Amendment-Bill_HRC-comments.pdf

- Eleven submissions highlighted concerns across the community that the impact of child sex and pornography offences on consenting young people are out-of-step with community expectations. One submission welcomed the amendments to the child pornography offences as addressing "long-standing concerns that young people who engage in consensual, and non-predatory and non-exploitative behaviour, such as sexting", were at risk of inappropriate criminalisation in the ACT. Another welcomed "specific measures to avoid criminalising young people and to recognise their autonomy", and another noted a "need to focus more on harm-minimisation principles rather than promotion of abstinence' when talking about consensual intimate image sharing amongst young people.

- The Australian Privacy Foundation addressed a perceived inconsistency in ACT legislation regarding young people, consent and its relationship with the Gillick Competence Standard. The Standard is the test that determines whether a person under 16 years of age is capable of consenting to their own medical treatment without parental intervention, established in *Gillick v West Norfolk and Wisbech Area Health Authority [1985] UKHL 7* and adopted in Australia in *Marion's Case (1992) 175 CLR 218 at 237*). It recognises that there are substantive differences in capacity and vulnerability among people in the same cohort. The submission recommended reviewing all legislation affecting children's autonomy, including consent in sexual offences, to align them with this Standard.

- The ACT Human Rights Commission noted that the application of consent as a general defence or exception, irrespective of a child's age, is consistent with a best practice approach under the *Human Rights Act 2004* (ACT).

- The Women's Centre for Health Matters and the ACT Women's Services Network recommended that additional guidance be provided to defendants to understand the new definition of consent, and creating a "clear understanding of the type of positive actions" that fall under revised provisions.

- The ACT Women's Services Network emphasised for a single, consistent definition of consent across the criminal law in the ACT.

ACT Case Study

R v Harlan Agresti

Summary

A female ADFA cadet was out drinking and realised she was extremely intoxicated and needed to go home. She attempted to text her friend but couldn't type properly, so she asked a fellow cadet, Harlan Agresti, to take her home. The two caught a taxi with one other cadet and when they were back on campus she vomited in the garden and Agresti escorted her to her room.

A witness testified to seeing the woman struggling to climb the stairs to her room before Agresti followed her inside and shut the door.

The female cadet testified that Agresti helped her into bed and she fell asleep. She recalled waking to find Agresti kissing her, and then again to find him having sex with her. She described her state as "barely conscious".

Agresti testifies that she consented and was an active participant.

Other witnesses testified that Agresti told them that she was a bad root and just laid there "star-fishing". They also testified that vicious rumours about the evening spread around campus, coinciding with the time the female cadet reported the incident.

Outcome

This was the second time Agresti faced an ACT Supreme Court trial over these allegations, and for the second time, the jury was unable to reach a verdict.

The jury deliberated for seven hours on Thursday 16 November 2017, and then returned for further deliberation the following day. On Friday morning, the jurors asked the judge to "address them again on the law around consent and intoxication", but were still unable to reach a unanimous decision.

This case illustrates why we need to introduce an affirmative definition of consent into the *Crimes Act* (ACT). It is possible that the jury could not reach a verdict because they didn't have the information they needed to analyse the facts of the case. They needed a definition of consent to use as a lens through which to assess whether Agresti's belief in consent was reasonable.

An affirmative definition of consent would enable juries to reach more just decisions.

An affirmative definition would reduce the high rates of hung juries and retrials which are common for sexual assault cases.

An affirmative definition would simplify and strengthen our criminal justice system.

Possible Further Reforms

Jury Direction

As it stands, the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) requires the jury to be informed of certain consent-related facts in sexual assault cases.

These are:

> *72 Directions about implied consent – where the judge must inform the jury that a person is not to be regarded as having consented to a sexual act just because they did not say or do anything to indicate non-consent, they did not protest or physically resist, they did not sustain a physical injury, or they had consented on an earlier occasion.*[45]
>
> *73 Directions about mistaken belief about consent – where the judge must inform the jury that when deciding whether the defendant was under a mistaken belief that the complainant consented to a sexual act, the jury may consider whether the belief was reasonable in the circumstances.*[46]

Judges should also be required to inform the jury of the legislative definition of consent in the ACT. While it is likely that both the definition of consent and negating factors will be mentioned by the complainant, defendant and their representatives throughout the case, this will be in a way that attempts to make their own case. It is fundamentally important this information also comes from an impartial judge, to ensure transparency, to allow the jury to fully understand the evidence, and to ensure the jury understand they must use the definition of consent as outlined in the *Crimes Act* (ACT) to determine the outcome of the case.

Dedicated Courts for Sexual Offences

When a sexual assault case goes to trial (which is a rarity), the complainant and the defendant will often be the only witnesses, and the prosecution's entire case will be largely built on the complainant's testimony. The time between filing the charge and the trial is often long, and can have a serious impact on the complainant given it is highly likely the defendant will be an acquaintance and that they will share mutual family members or friends. This lengthy time period between reporting and trial also makes it understandably difficult for the complainant to recall the specifics of the assault, which can damage their credibility as a witness. Complainants will also most likely be cross-examined on their evidence at length by the defendant's representation, which has been described by many as akin to a second rape. The criminal justice system needs to be improved to better address the needs and rights of complaints in sexual assault cases.

There is evidence that some judges apply outdated attitudes and assumptions, which interferes with jury deliberation and decisions. Some studies, for example, have shown that some judges continue disregard legislation by informing juries that it is reasonable for a defendant to believe they have consent if the complainant doesn't explicitly say "no" or struggle.[47]

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[45] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s78.

[46] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s78.

[47] Cockburn, "*The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials*," 201.

In Queensland, the Court of Appeal has set aside rape convictions in a series of cases which involved significant power disparities, coercion, repeated assaults and often explicit force or violence, on the basis of honest and reasonable belief in consent.[48] The criminal justice system needs to be improved to require judges to be aware of ingrained rape myths and educated on the nuances and complexities of sexual assault.

There is a huge body of evidence to suggest that juries are the major obstacle to securing convictions for those guilty of sexual assault. Research indicates this is because jurors are more influenced by the non-legal factors – such as personal assessments of the complainant's and defendant's characters, and 'gut reactions' to the facts – than by the judicial directions and definitions.[49] There is also social psychological research which shows that women assaulted by acquaintances are more likely to be blamed by third party observers (including jurors) than women who are sexually assaulted by strangers, especially when there is a history of sexual intimacy."[50] A key reservation is that, without strict legislative guidance or jury education, determinations of a reasonable belief in consent will be informed by the same socio-sexual scripts of seduction or miscommunication and the same victim-blaming attitudes that have long underpinned thinking about an honest belief in consent."[51] The criminal justice system needs to be improved to ensure juries are educated on the nuances of sexual assault, with a specific focus on the facts surrounding acquaintance rape, where relevant.

New Zealand is facing the same sexual assault crisis as we are: complainants are not being fairly treated in the criminal justice system, judges and juries are susceptible to the rape myths that plague the community and juries find it extremely difficult to analyse the facts in acquaintance rape cases.

In response to this, the New Zealand Law Commission conducted an independent investigation into sexual assault and the New Zealand criminal justice system and made recommendations on how improvements could be made in these three areas without compromising the trial rights of defendants. A key recommendation was for the creation of specialised sexual violence courts.

The New Zealand Law Commission recommended that the core aims of this court should be to: "bring specialist judges and counsel together in a venue that enables robust fact-finding without re-traumatising the complainant; and to facilitate a coordinated and integrated approach among the various organisations and people who deal with complainants."[52]

They also recommended that every judge who sits on a sexual assault case should be required to have a designation to do so, which would involve the completion of a special training course. These judges should also have access to detailed and up-to-date guidance on the instances in which

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48 Crowe, "*Consent, Power and Mistake of Fact in Queensland Rape Law*," 25.

49 Gunby, Carline, and Beynon, "*Alcohol-related Rape Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and Its Impact on Practice*," 595.

50 Ellison, and Munro, "*Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations*," 301.

51 Larcombe, Fileborn, Powell, Hanley, and Henry, "'*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*," 614.

52 New Zealand Law Commission, "*The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*," 12.

guiding judicial directions to the jury may be appropriate in sexual assault cases, with examples of how those directions should be framed.[53]

They also recommended that every prosecutor involved with a sexual assault cast should be required to be accredited,[54] and that administrative court staff should receive training on what constitutes good practice when dealing directly with complainants.[55]

Court specialisation in the ACT, whether through specialist judges or a specialist court or specialist lists would allow cases to be handled more consistently, more efficiently, or more appropriately, and would address many of the failures of the criminal justice system with regards to sexual assault cases. Moreover, it would send a message to victims that what constitutes sexual assault is understood by the judicial system.

Educational Campaign

Legislation alone is not enough to effectively inform community understandings, attitudes and beliefs about appropriate and respectful sexual relationships. Kathleen Daley notes that educational campaigns about gender and respectful sexual relationships are likely to be more effective in preventing sexual assault than criminal law and justice system sanctions.[56] Campaigns are also essential if we are to challenge, at a community level, the prevalent rape myths which continue to stand in the way of reporting and conviction outcomes.

An ACT-wide consent-related campaign should immediately follow legal reform. This campaign must be targeted at young people and those beginning to engage in in relationships.

Specifically, the Respectful Relationships education occurring in ACT schools must address the issue of consent, how it is negotiated and how it can be refused. Ideally these education programs should have a whole of school approach that addresses the drivers of gender based violence, using age appropriate, interactive and participatory methods to ensure attitudinal change.

The law holds huge influence over how our community members view relationships, so we must ensure that the implementation of an affirmative definition of consent into the *Crimes Act* (ACT) is complemented by community education.

[53] New Zealand Law Commission, "*The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*," 13.

[54] New Zealand Law Commission, "*The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*," 12.

[55] New Zealand Law Commission, "*The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*," 13.

[56] Daley, Kathleen, "*Conventional and Innovative Justice Responses to Sexual Violence*."

Appendix 1: Relevant Recommendations in the 2010 ALRC Report

Three of the recommendations made in the ALRC *Family Violence—A National Legal Response* report are particularly relevant to the ACT with regards to the definition of consent in our *Crimes Act*.

These are as follows:

Recommendation 25–4

Federal, state and territory sexual offence provisions should include a statutory definition of consent based on the concept of free and voluntary agreement.

Recommendation 25–5

Federal, state and territory sexual offence provisions should set out a non-exhaustive list of circumstances that may vitiate consent including, at a minimum:

- *lack of capacity to consent, including because a person is asleep or unconscious, or so affected by alcohol or other drugs as to be unable to consent;*
- *where a person submits because of force, or fear of force, against the complainant or another person;*
- *where a person submits because of fear of harm of any type against the complainant or another person;*
- *unlawful detention;*
- *mistaken identity and mistakes as to the nature of the act (including mistakes generated by the fraud or deceit of the defendant);*
- *abuse of a position of authority or trust; and*
- *intimidating or coercive conduct, or other threat, that does not necessarily involve a threat of force, against the complainant or another person.*

Recommendation 25–6

Federal, state and territory sexual assault provisions should provide that it is a defence to the charge of 'rape' that the defendant held an honest and reasonable belief that the complainant was consenting to the sexual penetration.

For your convenience, here is a link to Chapter 25 of the Report:

https://www.alrc.gov.au/sites/default/files/pdfs/publications/25.%20Sexual%20Offences.pdf

Appendix 2: Further Reading

Legislation

Crimes Act 1900 (ACT)

Court Procedures Rules 2006 (ACT)

Evidence (Miscellaneous Provisions) Act 1991 (ACT)

Human Rights Act 2004 (ACT)

Criminal Code Act 1899 (QLD)

Criminal Code Act 1983 (NT)

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Crimes Act 1990 (NSW)

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From: Patricia.Easteal < >
Sent: Thursday, 22 February 2018 9:55 AM
To: LE COUTEUR
Subject: reviewing the law of consent
Attachments: PDF of Shades of Grey.pdf; CH07.PDF; laws- White and Easteal.pdf

Hi Caroline

I thoroughly support your ideas for reform. Over the years have written and published about consent and the law. I attach a few of these as my submission in the hope that some of their content may be used to strengthen your arguments.

I attach my 2014 book (with Anna Carline) and would suggest that chapter 8 might be helpful and pretty current. I also attach chapter 7 from my (personal favourite) book 2001, Less Than Equal: Women and the Australian Legal System.

Also with IPSV there are of course extra issues/considerations. I have co-edited a few books on IPSV but not easy to send so will send an article published in 2016 with Jessica White in journal Laws.

If you or a staff member skims through and has any questions, please don't hesitate to email.

Patricia

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Article

Feminist Jurisprudence, the Australian Legal System and Intimate Partner Sexual Violence: Fiction over Fact

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Abstract: In this paper we briefly focus on intimate partner sexual violence (IPSV) and the Australian legal response, using recent Court judgements and Heather Wishik's feminist jurisprudence framework for inquiry to guide investigation. The key questions being asked are: (1) What have been and what are now all women's experiences of IPSV addressed by the substance and process of rape law? (2) What assumptions, descriptions, assertions and/or definitions of consent, corroboration and reporting does the law make in IPSV matters? (3) What is the area of mismatch, distortion or denial created by the differences between women's life experiences of IPSV coercion and the law's assumptions or imposed structures? (4) What patriarchal interests are served by the mismatch? The paper concludes with consideration of the limitations and benefits of law reform by reflecting on the findings of the paper.

Keywords: partner rape mythology and law; IPSV myths and law

1. Introduction

According to the feminist jurisprudence framework of Heather Wishik: "...legal definitions, assumptions, or assertions—especially those which claim to be either gender specific or gender neutral—reveal what the law is saying about women and how the law operates politically and socially in relation to women's lives" ([1], p. 73). Borrowing that lens of inquiry, this paper focuses on a particular form of Intimate Partner Sexual Violence (IPSV)—rape—and how it is mythologised, extending to how this is reflected in the comments of the judiciary and the type of IPSV rapes that are prosecuted.

This paper operates from a default conceptual position attributing two key elements to the range of behaviours that constitute IPSV:

(1) a sexual act without consent [which is]
(2) perpetrated by a past or present intimate partner ([2], p. 17).

As the legal system has been intent on focusing on rape that occurs outside of the home, we believe feminist perspectives are essential to a holistic understanding of the substance and process of rape law, particularly with respect to rape where the offender is, or has been, an intimate partner as it brings the private into the public. Law is not reformed or even interpreted in a vacuum though which is why, regarding IPSV rape, a feminist legal theory lens is useful in deconstructing this particular cultural context ([3], pp. 1–20). Law, being indeterminate, equates, in our view, to being both subjective and open to interpretation. This, in turn, means the law is vulnerable to manipulation and/or the interpretation could be infected with bias ([4], pp. 484–86).

The shortcomings of the feminist jurisprudence project must be noted as a proverbial footnote to this discussion as there may not be one overarching conceptual approach to examining law that will encompass the experience of *all* women. In the words of Wishik, at its most general, feminist jurisprudential inquiry focuses "...on the law's role in perpetuating patriarchal hegemony...it is grounded in women's concrete experiences", however, there is inherent risk as the assumption underpinning this assertion is that feminist jurisprudence has the ability to capture the *whole* of female experience ([1], p. 69). In fact, there is a very real diversity and plurality of female voices. When you drill down to the experience of IPSV, other differentiation becomes apparent ([5], p. 41). This is to say, the experience of IPSV rape is not homogenous for all women. This cannot be understated; however, it is also not an objective of this paper to canvas this plurality in great detail. What is important to note at this stage is that this differentiation of experience extends to who can actually be considered a victim of sexual violence:

> Outside of those contexts where male property in female sexuality has been asserted, the law of rape has proved to be of limited application. The case of rape in marriage has been emblematic: how can a man be guilty of violating his own property in the eyes of the law (as compared with *her* eyes)? If a woman has no owner (husband/father), far from the law recognising her as a sexually autonomous being, often it has seen her as someone whose violation is virtually impossible, not to be recognised ([6], pp. 16–17).

Therefore, IPSV survivors arguably have their experience minimised by the criminal justice system because of its insidious nature and propensity to go un-named (let alone prosecuted) [7–11]; this is perhaps demonstrated by the judicial commentary drawn from the case sample for this paper. In asking how and why there is a difference in the same criminal act being treated differently dependent on its context, it is important to note that legislation has been largely written, interpreted and applied by and for men ([12], pp. 407–23). This makes it extremely personal and, consequently, political for the criminal justice system. Its actors—male parliamentary members, male policy-makers, male law enforcers—have drawn on their personal experience of society, consciously or subconsciously influencing their politics, and consequently law ([1], p. 73; [11], pp. 13–27). For this paper, the actors are the judges from the case sample. Using a feminist lens to examine the legal response to IPSV rape is necessary because the survivor is engaging with an essentially patriarchal system where gender biases are deeply embedded in the substance: survivor experience may be obscured and minimised by the perpetuation of fiction over fact to the extent that it might not even be heard ([1], p. 66; [13], p. 1287). Perhaps this is because rape of a past or current intimate partner is a policy quandary too difficult for a masculinist legal system to confront. Maybe it's a vestige of spousal exemption fiction ([11], pp. 208–10; [14], pp. 763–65)? Or, perhaps IPSV rape continues to retain this unique status because it challenges too much of the stereotypical status quo (the fiction perpetuated by systemic influences and actors)—a predicament compounded by a cultural landscape that demonstrates a fundamental lack of understanding concerning the motivations behind all sexual offences generally (the facts; [2], pp. 48–49; [4], pp. 486–87; [11], pp. 13–40; [15], pp. 3–4). IPSV rape can be perceived as an 'illegitimate' rape because there may be no physical injuries, no resistance or witnesses, and reporting can be delayed. These characteristics directly contradict community attitudes concerning what constitutes "real" rape and directly *infect* the interpretation and application of the law—such as how consent is interpreted and applied. Criminal justice system actors are drawn from the community: consequently reflecting the symbiotic relationship between law and society [1–4,14–18].

2. Collection and Analysis of Rape/Sexual Assault Judgments

The case sample was obtained with the Australasian Legal Information Institute database, using the District Court of New South Wales and County Court of Victoria databases, and the search terms "rape" for the former and "sexual assault" for the latter, timeframe 30 June 2013 to 30 June 2015 [19].

This date range was selected because amendments to the statutory definition of consent came into effect in Victoria on 1 July 2015 and it also reduced the case sample to a workable size for our purposes.

We identified 11 County Court of Victoria and three District Court of New South Wales matters in which a person was tried or pled guilty to rape or sexual assault of a person with whom they had been or were currently in an intimate relationship. Of these, one procedural hearing was excluded. Two of the 13 defendants in our sample were found not guilty of the original charge of rape [20,21]. Of the remaining 11 guilty convictions, one was overturned on appeal to a higher court and returned to the lower court for sentencing on a lesser charge during the nominated date range. The sentencing remarks on the lesser charge are not one of the 13 [22,23].

The following criteria were recorded for each case: citation, charges and convictions, previous consensual sex, whether the victim was injured, whether the victim physically or verbally expressed non-consent, whether the assault was severe (involved some level of threat or force, weapon use including actual use of force) and whether there was additional evidence linking the defendant to the assault. Relationship status and living circumstances were also recorded: six offenders were living in the same property as the person they offended against [20,22,24–27]. Where the accused and complainant were still living together and offending occurred, the relationship had ceased in three matters [20,22,27]. Of the remaining though in only one matter was the relationship current/ongoing and two had very recently reconciled after periods apart [24–26]. This is not surprising in light of what has been found about women's disinclination to report whilst still cohabitating [9].

Although our sample was too small to collect sociodemographic data, we do recognise that "...legal systems may be insensitive not just to differences based on sex but also to variations in race, disability, ethnicity, sexual affinity and 'others'..." ([11], pp. 230–50). Again, the plurality of female experience is important to bear in mind throughout as the intersectional woman is often not acknowledged. Of the case sample, two of the most violent matters involved relationships where one or both parties are Indigenous [24,25].

The judicial material was thematically analysed to identify the persistence of rape mythology, such as expression of non-consent, presence of physical injury and violence.

3. Holistic Context of IPSV: The Fiction of "Real Rape"

Wishik's framework for feminist inquiry starts by asking about the context of the law to be analysed ([1], pp. 72–73). Why does mythology persist? The feminist perspective sees it as intertwined holistically with the ideational and structural components of the culture. Picture a daisy.

> The flower is...connected to its roots—its antecedents, the agrarian-level society of England and the early industrial revolution. When we look at that historical legacy, we find marked sexual stratification, the seclusion of females within the private sphere, high incidences of violence against women, male dominated political and legal organisations, division of labour by gender with male activities more valued and male control of resources, separation between the public and private which underlies the universal cultural devaluation of women, religious systems that reflect male dominance and certain views of sexuality, and many other cultural attributes which have been found to correlate with the low status of women ([28], pp. 1–2).

Rape law—both the legislation and its implementation—must be seen within this context.

> The law does not adjudicate impartially on the question of rape but rather participates in social constructions of what counts as sex, what counts as rape, who will be recognised as a rapist and whose violation amounts to rape. These constructions run deep in legal history and legal culture. They both form and are formed by the wider context of Australian colonial history and culture in which the shape and meaning of sexuality and sexual coercion continue to be intensely debated ([28], pp. 1–2, 24–25).

Not surprisingly then, both the substance and process of Australian rape law have ignored IPSV [10]. For example, in a recent High Court of Australia case, the experience of women raped within the private domain of marriage was effectively erased and decades of suffering dismissed on paper [10,29]. The collision of the public with the private sphere seems to have influenced the development of legal responses to rape in Australia, culminating today in a cultural hangover linked to a time almost a thousand years ago:

> A licence to rape—the "alleged" spousal exemption from sexual assault charges—evolved from at least the days of William the Conqueror, when rules allowed victims to "forgive" their "seducer" by consenting to marriage. This immunity went on to be officially sanctioned in medieval England with marriage rights and duties directed by Church law and rape laws existing solely to protect virginity ([1], p. 67; [11], pp. 208–10).

This is despite the reality that rather than a stranger in a dark alley, Australian women are more likely to experience sexual violence perpetrated by somebody they know [6,9]. IPSV is "a significant social problem" [8,30–32]. However, we can observe the persistence of nuanced fiction permeating the criminal justice system that significantly affects rape law and the naming of the act as an offence and its reporting ([33], pp. 121–23). This impacts on how a complainant experiences the law; for example:

> Changes to the law relating to corroboration, recent complaint, along with introducing and/or amending definitions of consent, mens rea and rules pertaining to the vitiation of consent, have all taken place in order to update the law and challenge mistaken assumptions and myths regarding rape and sexual assault. Despite such reforms...the number of cases reported to the police remains very low and the overall attrition rate for rape is exceedingly high ([11], p. 155).

Mythology operating in the criminal justice system cannot be understood without an understanding of the broader relationship between laws, myth and society—an example: community attitudes and jury biases. In 2014, VicHealth released its National Community Attitudes towards Violence against Women 2013 Survey which had a sample size of 17,500 people [34]. The findings were troubling and reflect damaging attitudes towards violence against women, including an increase in Australians believing rape is the result of men "not being able to control their need for sex" [34]. Consider correlates with attitudes identified years ago:

> In part due to the mythology about female sexuality, and in part due to the erroneous beliefs about male sexuality and the nature of rape, perceptions of rape are not usually congruent with the victims' experience. Instead, myths about sexual violence are generated. Male sexual activity is seen not only as admirable and a reflection of virility, but sexual violence is also understood as an effect or consequence of a libido which is seen as uncontrollable if aroused. Rape, by this account, is about sex (not power) ([28], p. 9).

The work by VicHealth also found that "nearly 8 in 10 agree that it's hard to understand why women stay in a violent relationship" and "nearly 2 in 5 believe that a lot of times women who say they were raped led the man on and later had regrets" [34]. Of interest is the differentiation between attitudes based on the circumstances of the respondent. Those "most likely to endorse violence supportive attitudes and who have the poorest understanding of what constitutes violence against women" include "men, especially young men and those experiencing multiple forms of disadvantage", "younger people (16–25)", and those from non-English speaking countries of origin (especially new arrivals) [34].

Given what is known of community attitudes towards violence against women, it becomes little wonder how these perceptions could affect juror attitudes and biases in rape cases.

> [m]yths and stereotypes about rape and sexual violence are common within the general community. Since jurors are members of the general public and are randomly drawn

> in order to represent the views of the community, attitudes they bring with them into the courtroom will, to a large degree, reflect the attitudes and beliefs of the wider community ([35], p. 2).

The jury is often, by its very presence, the linkage between what is taking place in the courtroom to the society outside its doors: a reflection of the symbiotic relationship between law and society.

This symbiosis also extends to other criminal justice system actors—including judges and prosecutors—because it would be illogical to assume that any of the players perform their functions disconnected from the community in which they belong. Regarding sexual assault matters generally, a matter might be more likely to proceed to trial where: the victim was injured; the victim physically or verbally expressed non-consent; the assault was severe (involved some level of threat or force, weapon use); there was additional evidence linking the defendant to the assault; the defendant used force; and the defendant was a stranger ([35], p. 2). Heath puts it this way:

> In the law's rather fictional account, the "victim" that the rape law recognises is a woman, preferably a clean, chaste, white, respectable, woman. The "real rape" involves her being overpowered, in spite of her loud and consistent protests, by the rapist, a stranger who is preferably neither clean, respectable, nor white. In the final act, the legal system ensures that justice is done. The apparent completeness of the script and the justice of the ending ensure that no further inquiries into the human costs of this fiction, or the lives of those whose stories were written out of the script, will be contemplated or entered into ([6], p. 18).

Heath's account of rape fiction is important to bear in mind as we examine IPSV rape. Gender is essentially a cultural construct—an illusion that is attributed with values and often aligned with stereotypes—and in no other area of law is this more omnipresent than sexual violence ([3], p. 36). Consider that, despite attempts at reform:

> [c]oncerns remain with regards to the extent to which notions of "real rape" and false allegations continue to pervade the public and legal imagination, impacting upon all of those who are involved in or come into contact with the law—from legislators and judges, to complainants to jurors ([11], p. 155).

Let us look at judges as an example. Previous research has identified judicial officers using phrases like "little short of rape" and "special relationship" to describe violent marriages and sexual assault [28,36]. Additionally, a study of Victorian sentencing language illustrated some judges' perception of the greater harm of rape by a stranger [37]. Consider the following judicial commentary:

> ...the facts in this case are most serious. They are disturbing in that they occurred in circumstances where you did not know the victim prior to this assault. It is also disturbing that this offending occurred in her bedroom at the university premises, and that she was entitled to feel safe. Your behaviour was totally unacceptable [38].

> It was a horrific experience for your victim to return to her home to be confronted by you, a complete stranger armed with a bread knife, and then be subjected to your degrading and humiliating behaviour for a sustained period. It was every woman's worst nightmare [39].

> ...an extremely serious example of the offence of rape...Such conduct was craven and despicable...She was unknown to you, taken from the street where she had the right to feel safe. She was attacked without explanation and suffered extremely serious injuries [40].

At the other end of the socially constructed continuum are the more common assaults, which occur at the hands of a person known to the victim. These are generally seen to be "less severe" or even acceptable. For instance Hulme J, in his decision in regards to a case of sexual assault against a women who was once in a consensual sexual relationship with the defendant, stated:

> Although fearful of the Appellant the Complainant at least knew him and no doubt was capable of making some assessment of the situation. Also relevant is the fact that while the Appellant gave the Complainant cause to fear him, the situation was not one where she had to endure the terror of an unknown kidnapper. The case was not one where a victim walking through a lonely street or park at night is seized by a complete stranger about whom she knows nothing and who, for all the victim knows, may well kill her when the intercourse is over. There is nothing to suggest that the consequences of the Appellant's conduct included in an unwanted pregnancy or AIDS or other potentially life damaging illness or left the Complainant with any fear of these matters ([41], para. 106).

Let us now see if such judicial comments continue to be articulated as we also verify the presence of "real" rape attributes in the case sample reflecting an alignment between the IPSV rape cases prosecuted and their parallels with rape mythology. Based on the findings of research conducted concerning community and jury attitudes, it is not surprising that IPSV rapes are not the "good" rapes to prosecute in the criminal justice system. Those IPSV rapes that are actually reported, run by the prosecutor and culminate in a judicial determination, represent a minority of IPSV survivors. We will contrast these "good" IPSV rapes with what is known of IPSV survivor experience, the nature of IPSV coercion, and how this collides with legal system assumptions and imposed structures ([2], p. 4; [15], p. 9; [31], pp. 25–39; [42–44]). We start with consent.

4. The "Good" Rape: Consent and Coercion

A victim physically or verbally expressing their non-consent is a key piece of the fiction jigsaw ([35], p. 2). However, IPSV "is usually perpetrated by an individual as part of a pattern of violence and control" ([11], p. 207). Herein lies the first falsehood. At the core of the coercion that negates the IPSV victim's consent are issues of power, control and shaming ([2], pp. 54–64; [7–9]; [11], pp. 182–86). Consider:

> [i]t would seem that the potential for misunderstanding consent and its negation in rape case in general...is magnified with partner rape. Negation of consent is further problematised by the victims' experience of at least four categories of coercion: social coercion; interpersonal coercion; threat of physical force; and physical force...
>
> Other sources of duress include the woman trying to keep the peace, and the man's threat to leave, withdraw his love or to cut off money...Survivors may experience multiple types of coercion both concurrently and over time, in the context of changing abuse patterns ([11], p. 213).

The legal interpretation of consent and negation, however, focuses far more upon physical force. Legally, the construction of consent has objective and subjective fault elements; the latter is integral to proving the charge and not only does it speak to what was in the mind of the offender but what was in the mind of the complainant ([17], pp. 100–3). With IPSV,

> ...the centrality of consent to both the physical and fault elements of the offence of sexual assault is problematic, and these problems seem to be magnified in the context of partner rape. Unsurprisingly in a partner context, proving that the woman did not consent (a physical element) or an absence of consent that the defendant knew of, but chose to ignore (the fault element) is difficult, because of the history of consensual intercourse ([11], p. 212).

As a prosecutor in one study stated:

> As a prosecutor I have a low expectation of conviction on partner rapes. If they're separated but seeing each other, even when they haven't had sex, he'll still claim it was a romantic consensual event [45].

Accordingly, in a 2009 judgment Simpson J concluded:

> It would hardly be surprising in an allegation of sexual intercourse without consent in the context of a marriage, and particularly where there has been explicit evidence of a history of consensual sexual intercourse (and of the kind the subject of one of the charges), if the jury regarded the issue of the state of mind of the accused person as a primary one. That is more particularly so where, as is here the case, the evidence that the complainant did not consent is rather weak. Even weaker is the evidence that the complainant did anything to convey to the appellant that she was not consenting ([46], para. 326).

To illustrate from the current sample: In *Bennett*, the accused was found not guilty. It was not disputed that the sexual intercourse took place but whether the complainant consented. In this trial by judge, a key consideration by Berman DCJ regarding whether the complainant had consented was the timing of a text message and the impact of its contents on the complainant's state of mind:

> The importance of this dramatic change of behaviour towards both the accused and her husband is this: what apparently prompts the change is the accused's confession of infidelity. This tends to suggest that the complainant did not have a belief in the accused's infidelity beforehand. This, in turn is, as I have mentioned numerous times before in this judgement, highly relevant to the likelihood that the complainant would have consented to sexual activity with the accused... ([21], para. 98).

Not surprisingly then, in the Bennett judgment, the judge mentioned previous consensual sex on the day the alleged rape occurred ([21], paras. 28, 48, 91). Consensual oral sex earlier that day was suggested by the defence as a motive to lie about the rape ([21], para. 28). Deliberations were made on the complainant's *mens rea* based on whether the defendant had cheated:

> I regard the complainant's well-established...phobia about disease coupled with her obvious belief that the accused was unfaithful to her whilst overseas, as being particularly significant. That she would voluntarily perform unprotected fellatio upon the accused (he says twice) on the very day he returned to Australia is not a version of events that I consider to be reasonably plausible unless the complainant has for some reason changed her mind about whether the accused was unfaithful to her ([21], paras. 91–92).

4.1. The Victim Physically or Verbally Expressed Non-Consent

Given the preceding discussion regarding rape mythology, it is not surprising that a "good" complainant is expected to have expressed non-consent either physically or verbally ([35], p. 2). The way that the judges in our case sample highlighted the issue of consent then largely aligns with the expectation that a typical rape victim will do so. That the complainant explicitly conveyed her non-consent was reflected in the judge's comments present in 9 of the 13 cases in the sample [22,24,25,47–52]. We do know that such expression is not the norm with the reality of IPSV experience of duress and coercion:

> If represented from the victim's perspective, we can identify many forms of covert intimidation and force used in rape; the range of coercion reflects the nature and the omnipresence of gender stratification. It may be her feelings of powerlessness, her fear of the assault and its outcome that render her passive, but not compliant and consenting ([28], p. 7).

The fact that ten of the 13 cases involved high levels of physical violence may be indicative of who reports their rapes and the legal system actors' failure to recognise that coercion has different guises and filters, affecting which cases are actually prosecuted ([11], p. 213; [20,22,24–27,49–52]). The case of *Cunningham* included the victim physically and verbally communicating their non-consent. Douglas J observed:

> During this time he continued to hold her tightly and she continued to scream at him to get off. She was screaming so loudly her voice became croaky. Further, she managed to get one arm free from his hold and was hitting him with that hand ([22], para. 14).

Thus, not only did that victim protest verbally, but she did all that she could physically to resist. In the same case, two children were witnesses to the rape and could attest to their mother's protestations ([22], paras. 15–18).

In *Gallagher*, physical resistance was again described by Patrick J:

> You then pushed her and threw her onto the bed. The complainant was crying and screaming. You were calling her names. You got on top of her. You had removed her clothes...You held her arms to the bed. She was still kicking and struggling. The physical struggle continued for some time. The complainant was scared and eventually let you have sex with her ([52], para. 6).

4.2. High Degree of Physical Force and Injuries

Rape mythology generally prescribes that the crime involved threat of force, weapon use, or actual use of force and this in turn influences the chance that the matter will be prosecuted ([35], p. 2). This contrasts with forms of IPSV that may meet legal definitions of criminality—for example, calling a partner degrading names such as "slut" or "whore" is also a form of sexual violence aimed at degrading or controlling the victim [11]. Also given that in many IPSV matters, the rape is part of a dynamic of other types of control, the fear of being hurt may act to negate consent.

That antecedent violence does not seem to be recognised. On the contrary, rape mythology that supports the requirement that a victim was non-consenting is the belief that she must have sustained some sort of injury during the crime ([35], p. 2). Not surprisingly, of the 13 cases, additional injuries accompanying the rape were mentioned in six [20,22,25,27,29,51]. For example, in *Marrah*, Hampel J describes a "sustained attack":

> You punched her, picked up by the hair and threw her onto the ground. You stood and kicked her to the head while she was on the ground and stomped on her. You grabbed her legs and tried to open them, saying "open your cunt, you open it up for everyone else". As she twisted to get away from you, you continued to kick her. While she was on her stomach trying to avoid your blows, you got on top of her, prised her legs open, and forcibly and repeatedly showed your fingers into her vagina, all the while continuing to accuse her of allowing other people to touch her there ([25], para. 4).

Hampel J went on to detail the nature of the physical injuries inflicted on the complainant:

> You remained on top of her, restraining her from moving or getting away from you. She was having trouble breathing. You grabbed her by the back of the neck and banged her head into the ground. You grabbed her neck and choked her. She was kicking her feet, trying to indicate that she couldn't breathe. In her statement to the police she said she thought she was going to die because she did not think that you were going to let go. By then she was bleeding from her nose and mouth and spitting blood out of her mouth . . . ([25], para. 5).

The offender did plead guilty to recklessly causing serious injury, rape and threat to kill:

> ...you threatened to kill her if she called the police. You said that by killing her it would only take five years of your life, but would take hers forever. You told her to choose the knife for you to use to kill her ([25], para. 6).

Additionally, he had a previous conviction for assaulting a pregnant partner but a conviction for manslaughter ([25], paras. 30, 54):

> The threat to kill was made in particularly cruel and chilling terms. You told her it would only take five years off your life, whilst taking hers forever...You have been previously convicted of manslaughter and served five years in prison before being released on parole. There could be little doubting your meaning or the seriousness of your threat ([25], para. 19).

In *Ferguson*, the offender not only pleaded guilty to two charges of rape, but also to contravening a family violence intervention order, intentionally causing injury, recklessly causing serious injury, false imprisonment, and recklessly causing injury [24]. Wilmoth J discussed extensive disturbing acts of violence:

> the complainant ran to a neighbour's house to get help. Her eyes were so swollen she could not see and she used her fingers to pry open one of her eyes. The neighbours noted that...she was hysterical and appeared to be totally horrified.
>
> By this time, her ordeal had continued for more than 24 hours and her injuries had remained untreated. The neighbours called the police and an ambulance took her to hospital. Her injuries included a fractured rib, a fractured and displaced mandible which required surgery, nasal bone fractures and extensive facial swelling with a left parietal scalp haematoma. Further injuries were noted upon examination the following day, including facial bruising and swelling, multiple dental injuries, bruising to the chest, arms and back and incised wounds to the fingers and thing. The doctor noted that significant force would have been used to cause the fractures and that there was potential for severe head injury or death ([24], paras. 26–30).

Cases just described and *O'Connor*, in which a jury found the offender guilty of rape and also of two counts of attempting to choke, a "course of conduct during which AF was subject to significant violence and terror and justifiably fought for her life" ([51], para. 18) are indicative of the very high levels of physical force present in those matters that are not victim to the process of attrition from crime to Court. However, as already discussed, we do know that the negation of consent in many IPSV rapes does not mirror this type of vitiation.

5. Corroboration

Corroboration is of course another important element in the effective prosecution of any crime, including rape. For most women raped by a partner though, there are no witnesses to what takes place in the privacy of the home. It may be particularly important in IPSV rape matters because it speaks to a key rape myth, namely that women lie about being raped ([14], pp. 767–68). Rape complainants have been traditionally known as "unreliable as a class of witness" ([35], p. 2) and this fiction has had procedural implications for the legal system ([11], p. 170). The issue of corroboration is significant because it underpins an essential patriarchal bias in the Australian legal system, that is "women (and children) testifying about sexual assault were and still are regarded by judges as especially unreliable and dishonest witnesses" ([53], p. 59). This makes corroboration important because there must be other evidence in existence aside from testimony to prove the crime occurred ([53], p. 65; [54], pp. 179–80). Consequently, in our sample, when the complainant's account can be corroborated, an offender appears more likely to be prosecuted. Additional evidence ties the perpetrator to the crime ([35], p. 2).

Issues of corroboration were considered at length in the only matter in the case sample where the offender was found not guilty by a judge, with Berman DCJ observing:

> It is notorious that offences such as the one alleged in this trial are usually committed in private and so it is commonly the case that the Crown is forced to rely on the evidence of a single witness...offences such as these usually occur in circumstances where no one is present to corroborate the complainant's version ([21], para. 35).

Thus, it seems to become the victim's fault that the crime occurred in private.

Not surprisingly then, the 11 cases that resulted in conviction of rape or sexual assault each had some sort of additional corroborating evidence. For example, in *Ferguson*, the complainant escaped at the first opportunity and raised the alarm with the neighbours [24]. In addition, in *O'Connor*, Haesler J stated:

> AF's evidence was compelling. It was supported by recent and consistent complaint. It was corroborated by medical evidence and crime scene evidence ([51], para. 6).

In *Cunningham*, there was evidence from a child witness that Douglas J highlighted:

> The prisoner's explanation which involved laying blame on [his son] Jake Cunningham and taking no responsibility is erroneous. Jake Cunningham was an 11 year old boy who contacted police because he saw the prisoner naked on top of his mother in circumstances where she presented as being distressed, and in the context that for some time that morning he had heard the prisoner's aggressive conduct and his mother's yelling for help. At that stage he asked her if he should ring the police and she said to do so ([22], para. 29).

6. No Delay in Reporting

The criminal justice system often places a great deal of importance on when a complainant reports a rape but why is this? Is it because the mythology in operation here is related to the perpetrator as stranger? Consequently the fictional rape victim—a reasonable woman—will disclose the crime to police at the earliest possible convenience ([35], p. 2). Disclosing and reporting rape attaches value to the complaint that is made as early as possible, harking back to seemingly objective standards about reasonableness:

> The law attaches different weight to complaints made at the first reasonable opportunity after the alleged incident and those which are delayed...the common law embodies a notion of how a "reasonable victim" should report sexual abuse; and conversely, how delays or a failure to report abuse promptly impacts negatively on the apparent truthfulness of the victim as a witness ([55], p. 43).

However, the reality is that rape and sexual assault are notoriously under reported and those who fall at the 'genuine end' of the covert but omnipresent rape continuum are more likely to report ([11], p. 170). As survivors of IPSV rape do not generally disclose or report the crime promptly, they may end up being put on trial ([11], p. 216). This is reflected in the matter of *Bennett* (in which the offender was found not guilty) where a significant section of the judgment was focused on the actions of the complainant: her credibility as a witness [21].

The issue of disclosing or reporting the crime was mentioned in the majority of the case sample, with emphasis on when and how. Seemingly, this added value to the survivor's account of events [47,51]. Of the 11 matters in the case sample where the perpetrator was found or pleaded guilty to IPSV rape, eight involved the complainant disclosing or reporting the crime promptly [20,22,24,25,48–51]. In one, the police were called because one of the children witnessed the rape occurring [22]. In another matter, despite physical injury not being present (or not mentioned in the judicial commentary), it was noted that the complainant contacted police as soon as possible [48].

There does not seem to be an alternative narrative in the case sample. This is despite what is known about the trauma experienced by complainants:

> The law of recent complaint embodies a paradigmatic experience of sexual abuse in which victims, notwithstanding their trauma, are presumed to be physically and emotionally capable of reporting their abuse to others at the first available opportunity. Failure to conform to this norm renders the complaint suspect ([55], p. 49).

Accordingly, in *Bennett* (in which the offender was found not guilty), the complainant had disclosed to different parties, including to a rape crisis service. However, she did not report the offence to police until a period of time had elapsed ([21], paras. 50–61).

7. In the Service of the Patriarchy?

Wishik also suggests we ask what patriarchal interests are being served by perpetuating the status quo—in this instance a persistent distortion between systemic assumptions and IPSV survivor reality ([1], pp. 74–75; [3], pp. 1–20). Like the rape in marriage High Court of Australia decision mentioned earlier [29], this puts IPSV in a social, political, economic and cultural context:

> ...the High Court had the opportunity to offer long overdue recognition of marital rape...it is a cruel irony that the legal acknowledgement of the offensiveness of the immunity has been delivered in a form that implicitly denies the law's part in leaving married women for so long without protection, recognition or recourse ([10], p. 807).

This perspective really brings home the message that because of the very "connections between law and society...law is non-autonomous" ([1], p. 67). This harpoons a major theme that has been alluded to earlier: despite the black letter law appearing [gender] neutral, its interpretation and application is far from that:

> ...the words that we use can have a powerful effect on how we construct the world around us. That creation of reality is a part of our learning process in culture, our socialisation. It derives from, and contributes to all of the other parts—the structures and beliefs—that form the culture ([28], p. 4).

Despite the black letter law appearing [gender] neutral, its interpretation and application is far from that.

> ...the many myths about sexual assault are made from building belief blocks of male sexuality, females as a sex and certain ideas about how the reasonable woman is supposed to respond to sexual aggression. Thus, the mythology is not a cultural aberration, but beliefs that fit into the patriarchal fabric of the culture; and they seem to persist despite empirical evidence to the contrary ([33], p. 120).

What judges choose to emphasize and their comments may perpetuate distortion and denial of the victims' reality of rape. A striking aspect to some of the sentencing remarks is what could be interpreted as their relaxed attitude toward the offenders. An example is *Cunningham*: Craig Cunningham was found guilty of rape and acquitted on charges including intentionally causing serious injury, recklessly causing injury and making a threat to kill ([22], para. 1). There was a history of the offender perpetrating violence against his wife ([22], para. 8). The incident of which he was convicted happened on Mother's Day and he continued to rape his wife even when his 11 year old son had come to the aid of his mother ([22], paras. 15–19, 34). The issue that seemed to bother Craig Cunningham the most however was that attending the police interview caused him to miss out on a family meal for Mother's Day and that this was the fault of his 11 year old son ([22], paras. 28–29). After devoting a few paragraphs to community deterrence of domestic violence ([22], paras. 32–33), the judge went on to say:

> I accept that he has a reputation as a reliable and honest man amongst those in his local community with whom he associates and with whom he works ([22], para. 41).

This was despite not having shown any remorse or insight regarding "the seriousness of his conduct" ([22], para. 47).

By the time Craig Cunningham had appealed his rape conviction and was returned to the County Court of Victoria for sentencing (a matter excluded from the case sample as it related to a lesser charge),

this pillar of the community was advised that of the terms of his new Community Correction Order "the most important one is to stay out of trouble" ([23], para. 13).

A similar theme emerged in *Johns*, when the judge described the offender's "character" outside of the home ([27], para. 6). Additionally, in *Warne*, the judge observed:

> Insofar as the circumstances of the summary offences, although a number of the matters which I have perused involve threats, many also indicate an intent or a desire by him to try and get the family together despite what happened ([26], para. 16).

This was the same offender who blamed the rapes, charged as one offence, on his jealousy. He claimed "he loved his wife and that he was very possessive of her" ([26], para. 10). The judge described the rape like this:

> Mr Warne said he had sex with her as part of a—what one might describe—a jealous inquiry process. That is, when he was inquiring about the relationship with this mutual friend he was acting out his questions in the sense of, as he would for example, have fellatio with her he was asking "Did he do that too"? His wife subsequently fled the house. He tried to locate her and indeed waited outside the mutual friend's house, Peter, who they call "Abo", because that's where he thought his wife has gone. He, thereafter, during this period, slashed her tyres, which he had threatened to do earlier ([26], paras. 11–12).

To reduce the rape of a partner's mouth, vagina and anus to these words—a form of inquiry—does minimise the victim's trauma of IPSV. This judge also offered the presence of a past or present relationship with the offender as a mitigating factor:

> ...it is uncharacteristic of his prior relationship with his wife. I find that the culpability in regard to Charges 1 and 2 is mitigated by such circumstances and, indeed, by the relationship ([26], para. 24).

8. Melting the Gender Iceberg

Not all of the judicial commentary in the case sample distorted the experience of women who have experienced IPSV rape. For example, consider the comments of Mullaly J in the matter of *Cook*:

> [r]ape is an expression of power by a violent man over a woman. That plainly was the case here. Ms R was entitled to feel safe in her house with you, her partner. You put any sense of decency well behind your desire to dominate and degrade her, by raping her ([49], para. 23).

There were also some key messages about equality in intimate partnerships, such as in *Johns*: "the position of a husband in a marriage should be that of equal partners, not of domination and inflicting your way on your wife" ([27], para. 9) and in *Cook*:

> It needs to be said publicly that men, like you, who seek to suborn women by rape, will themselves be punished with lengthy terms of imprisonment. Our society values equality, dignity, personal autonomy, and this court will reassert those values when dealing with a violence man who, with cruelty, sexually violate and mentally and physically hurt, another person. Also men with cowardly self-important views need to be deterred from turning on women to degrade and control them. Deterrence will be in the form of lengthy terms of imprisonment. This also validates or vindicates the victim who takes a stand, goes to the police, and comes to court. No easy thing ([49], paras. 56–59).

In the same matter, offending was also referred to as "misogynous" ([49], para. 20). Additionally, the "impeccable character" mentioned above, Sam Johns, was dressed down too:

> You were a member of the Latter Day Saints Christian community here in Melbourne. However, as I remarked during the plea, I very much doubt whether it is within the principles of the Latter Day Saints that a person espouse the principles of Christianity on a Sunday and rapes his wife on other days ([27], para. 6).

Running counter to the mythology concerning rape being about libido, some judges seemed to understand the dynamics of IPSV rape:

> No woman should be subjected to violence at the hands of her partner. No woman deserves to be subjected to violence meted out in jealous rage, or to be subjected to what, on the materials before me, were baseless allegations of engaging in sex with other people used to justify the violence. The rape is properly characterised as a sexualised act of violence, a retaliatory act of gratuitous sexual violence for your baseless belief that your partner had other sexual partners. Such conduct is absolutely unacceptable in a civilised society ([25], para. 19).

> The sexual assault was demeaning and brutal. To inflict such violence and sexual violence on anyone let alone someone who invites you into their life as a lover is inexcusable ([51], para. 23).

> Ms Charleston, can I say to you, that I commend you for your courage in acting as you did in appreciating that this was not something you should just let happen, but having the courage to report it, to understand that you have rights and that you have properly protected and enforced those rights. I appreciate that the whole process must have been very distressing to you, and it must be a really difficult day for you here in court, but to have the courage to come and sit through it, and to see it through and to express yourself the way you did in your victim impact statement, I hope has given you some sense of being able to properly participate in the proceeding and some sense that you have control over your life. You may not have felt in control at the time the rape was happening, but you have shown your courage to take control from the time after that, and I hope that gives you real strength on your path to recovery from now on. I know nothing can turn the clock back, but I hope this has helped a little bit to make your path forward, a little bit easier for you ([50], paras. 47–49).

9. Conclusions

This project has looked at why and how there is such an expansive disconnect between law and society in this particular area of law. This is notwithstanding that there have been many varied attempts at trying to reform the attitudes of criminal justice system actors, procedure and legislation ([6], p. 13; [56,57]). There is value in identifying structural inequalities and whose interests these perpetuations serve. Wishik notes that "...in the act of discovering what we share because of the patriarchal oppression within which all women live, we begin to change our world and ourselves" ([1], p. 75). Thus, the inquiry itself has value as it shines a light on one particular dimension of the female experience of law and society. Ideally, responses to IPSV survivor reality would be multidisciplinary: legal system actors could be truly objective and recognise their own biases.

The nature of the matters prosecuted in the case sample reinforces social constructions about what constitutes "real" rape in the eyes of criminal justice system actors and is demonstrative of the broader relationship between law and society ([14], pp. 762–63; [35], pp. 1–2). One of the most troubling aspects of the case sample is its lack of heterogeneity in consent, corroboration and reporting. It is apparent that "good" victims are more apt to report and that the "good" IPSV cases are more likely to get through the police and prosecutors. Not only do myths about sexual violence against women still occur but rape that occurs within the context of a past or current intimate relationship is often considered "less serious" in the substantive and process of rape law, always qualified by the context although the criminal act remains the same. The IPSV rape cases that are being prosecuted closely align with the mythology.

That those IPSV victims who report are only the tip of the iceberg must be considered against the backdrop of Wishik's inquiry into a woman's actual life experience ([1], pp. 72–73). The focus on

the physical element of consent is troubling and speaks to rape mythology about a defendant's use of force ([35], p. 2). This preoccupation in rape prosecutions with physical force obscures the lived experience of IPSV survivors. The case sample demonstrates that a successful conviction is secured when the complainant has fulfilled her duties as the stereotypical rape victim: she obviously conveyed her lack of consent either physically and/or verbally. To this end, most IPSV rape survivors still remain invisible. Areas of mismatch are created by the very existence of the assumptions and assertions identified—the foundations of the cultural stage—and exacerbated by legal interpretation, impacting how IPSV survivors actually experience the criminal justice system (or alternatively do not engage [with it] at all) ([2], pp. 108–15; [7], p. 3; [56–58]). The perspective that "...unless harm is concrete and visible, we tend to devalue it" continues unabated and directly contradicts the IPSV survivor's experience of trauma which can be multifaceted, such as the psychological impact, for example, where "...the psychological trauma of rape is an invisible harm" ([18], p. 5).

Another disturbing finding is the tendency to minimise the accompanying violence and also to minimise the offending itself, demonstrated by the judicial commentary about the character of different offenders. One wonders whether if those offenders committed the exact same crimes against strangers in the street, the judges would have framed their comments in a different manner.

This overview of a current sample of IPSV judgments has confirmed for us therefore that law reform is limited in what it can deliver. Rape law reform in particular highlights the dilemma inherent in engaging with legal constructs which claim to represent an objective universal truth, yet which continue to negate women's understandings of reality.

> ...the efficacy of reform is limited since the systemic gender partiality, which arises in a cultural maelstrom of intrinsic sexism, is not being confronted or challenged. The system "rewards sameness" with a standard of sameness that is structurally entrenched as masculine to the core. The need to recognise this social context is essential ([59], p. 209).

Cultural change is required to poke holes through the cloak of invisibility worn by the IPSV rape survivor. How realistic though is cultural change when the seemingly gender neutral norms of our criminal justice system are essentially patriarchal? The invisibility of IPSV rape victims should not be surprising. Our findings further the conclusion of Carline and Easteal:

> ...we have seen how the law frequently fails to provide justice, how old norms and stereotypical ways to thinking continue to inform and impact upon the law and work to exclude women's experiences, and how discretion—even when it appears to have been limited by parliament—is frequently read back into the law. More work is necessary. But this is not a failure; more work will always be necessary...No reform can fully anticipate nor encapsulate the future, and neither is it possible to predict in advance how provisions will be interpreted and work in practice, how they will affect the lives of others, and how a range of social and cultural factors will impede their implementation and effectiveness ([11], p. 263).

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Appendix

Citation	Corroboration	Recent Consensual Sex	Not Guilty of Rape Charge	Living Apart, Separated	Living Apart, in Relationship	Living Together but Separated	Living Together, Relationship Ongoing	High Level Physical Violence	Additional Injury Accompanying Rape	Non-Consent Conveyed
R v O'Connor also known as Coble [2013] NSWDC 272	X	X			X			X	X	X
R v Bennett [2014] NSWDC 61	X	X	X		X					
DPP (Vic) v Charleston [2014] VCC 1856				X				X		X
DPP (Vic) v Cook [2015] VCC 895	X				X			X	X	X
DPP (Vic) v Cunningham [2013] VCC 960	X					X		X	X	X
DPP (Vic) v Darmanin [2014] VCC 489			X		X	X		X	X	
DPP (Vic) v Dart [2015] VCC 167	X	X								X
DPP (Vic) v Ferguson [2014] VCC 1993	X				X		X	X	X	X
DPP (Vic) v Gallagher [2015] VCC 761	X							X		X
DPP (Vic) v Johns [2015] VCC 840	X			X	X	X		X	X	
DPP (Vic) v Marrah [2013] VCC 1335	X				X		X	x	X	X
DPP (Vic) v Vacek [2015] VCC 484	X			X						X
DPP (Vic) v Warne [2014] VCC 733					X		X	X		

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7

Sexual Assault Law Reform and Mythology

'But I thought she wanted to …'[1]

In the area of sexual assault, there has also been extensive law reform implemented over the past two decades. This chapter first highlights the plethora of cultural mythology about gender, sexuality and rape itself. I then look at how these beliefs affect much of the implementation of reforms that were intended to redress the reported revictimisation of rape victims in the court.

INCIDENCE, RELATIONSHIP OF OFFENDER TO VICTIM, AND REPORTING

We now turn to the area of sexual assault or rape. Rates of victimisation gleaned from research such as the Australian Bureau of Statistics (ABS) random sample household Women's Safety Survey 1996 may be conservative (see Chapter 6). Those who have been assaulted may either refuse to participate in the study or fail to disclose during the interview for a number of reasons such as their fear, shame or denial. The ABS found that during the

1. Some of the research material in this chapter was used in my three chapters in P Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture*, Federation Press, Sydney, 1998: 'The Cultural Context of Rape and Reform', pp 1–12; 'Rape in Marriage: Has the License Lapsed?', pp 107–23 and 'Beyond Balancing', pp 203–11. Women's voices come either from P Easteal, *Voices of the Survivors*, Spinifex Press, Melbourne, 1994 or from my ongoing research and contact with survivors. My most heartfelt gratitude goes to Simon Bronitt for his wise observations and generosity.

year prior to participating in the survey, 133,100 women (2.1 per cent) had experienced sexual violence (or its threat) while that was true for over one-fifth (20.1 per cent) some time since the age of 15.[2]

In the *Voices of the Survivors* sample, strangers were the rapists in only one-fifth of the cases. About one quarter of the respondents had been raped by a husband or another relative, whilst for almost 40 per cent, the offender was an acquaintance of some type or someone to whom the victim had turned for assistance, such as a doctor or minister of religion.[3] Results from *The Sexual Assault Phone in Report* (Sydney) were similar: only 14 per cent reported that the perpetrator was a stranger.[4] In both studies, the relationship between the rapist and the victim differed by the age of the latter; women in their 30s and 40s were at the highest risk from (ex)husbands.

As we will see, few are reported and just a small proportion prosecuted. The nature of the relationship has been shown to have an independent effect upon injuries, disclosure, reporting to police and police response. For example, just as in the United States and the United Kingdom,[5] stranger rapes in Australia are far more likely to be reported. This is undoubtedly due, at least in part, to the victim's own subscription to the myth, and/or her belief that the police subscribe to the same myth that stranger rape is 'real' rape whilst other (acquaintance or family member) perpetrator sexual assault is not.

Turn the pages back to **Figure 1.4** and transpose the words 'sexual assault' laws into the central circle. It shows that the perception of rape and how the legal system deals with it are very much affected by the masculocentrism of the cultural institutions and beliefs, including the criminal justice system itself. In this chapter, I would like to discuss just *one* of the lenses that focus the masculocentric kaleidoscope imagery of rape — beliefs.[6] The many myths about sexual assault are made from building belief blocks of male sexuality, females as a sex and certain ideas about how the reasonable woman is supposed to respond to sexual aggression. Thus, the mythology is not a cultural aberration, but beliefs that fit into the patriarchal fabric of the culture; and they seem to persist despite empirical evidence to the contrary.[7]

2. Australian Bureau of Statistics (ABS), *Women's Safety Survey*, Office of the Status of Women, Canberra, 1996, p 14.
3. P Easteal, *Voices of the Survivors*, 1994, p 224, (see note 1 above).
4. New South Wales Sexual Assault Committee, *Sexual Assault Phone-In Report*, 1993, Sydney used a sample of 860.
5. Criminal Justice Newsletter, 'Rape Found Five Times More Common than Earlier Studies Indicated' 23 (1992) *Criminal Justice Newsletter*, pp 6–7; M Gordon and S Riger, *The Female Fear*, The Free Press, New York, 1989; L Smith, *Concerns About Rape, Home Office Research Study #106*, Her Majesty's Stationery Office, London, 1989.
6. That single subject should not be interpreted, however, as denial of the plenitude of other variables (such as many facets of the legal process itself which mute the victim's voice) that play a role in the nexus between sexual assault victims and the law.
7. See ANOP Research Services, 1995, *Community Attitudes to Violence Against Women*, Office of the Status of Women, Canberra; from P Easteal, 'Beliefs About Rape: A National Survey', in *Without Consent: Confronting Adult Sexual Violence*', P Easteal (ed), Australian Institute of Criminology, Canberra, 1993, pp 21–34.

THE MYTHOLOGY

Female sexuality and rape

The paradigm of 'femininity' or femaleness — the personality traits that the culture defines as appropriate for women and girls — is reflected in the cultural and dominant depiction of sexuality. As discussed in Chapter 2, a Madonna–whore duality persists.[8] In fact, some feminist scholars have described women's sexuality in masculocentric societies as only constructed to exist as an 'extrapolation of male desire', since 'Western culture … contains only one sexuality, the masculine'. Consequently, they remain pessimistic about the potential for female sexualities (other than as defined through male need) being constructed by the law and other social structures.[9] Such a male-defined female sexuality is manifest in its continuing to be restricted to heterosexual relations with a phallocentric focus, reflected by the differing penalties for various types of sexual assault, with penetration by the penis assessed as meriting the greatest sanction.

In this model of sexuality, women enjoy being 'co-erced' or persuaded to engage in sexual intercourse. Therefore, the art of 'seduction' allows for any reservations on the part of the woman to be rightfully overcome by the persistence of the man. This false image is nurtured by the media (and in such judicial directions as issued by Bollen J, quoted later). The heroine says, 'no, no', as the man embraces her and it quickly becomes obvious to the audience that her 'no' really means 'yes' as she melts into his arms. If it is 'real' rape, however, probably the woman will end up with an injury since the penetrative/coercive construct of sexuality presents women as submissive, as acquiescing to sexual intercourse *unless* they resist throughout. (There is no longer such a requirement in rape law but as described later in the chapter, it remains significant evidentially and relevant in sentencing.) Several studies have shown that people are more likely to label an act as rape if the victim protested both verbally and physically early in the scenario.[10]

The victim's experience of sexual assault may be very different from what I have just described. Many forms of covert intimidation and force can be used in rape in lieu of, or in addition to, physical force, with no injuries.[11] Plus, female passivity is quite a common response to male violence, in part reflecting both the nature and the omnipresence of gender role socialisation.

8. A Summers in *Damned Whores and God's Police*, Victoria, Penguin Books, 1994 discusses how in early Australia, this was '… totally lopsided. From 1788 until the 1840s almost *all* women were categorised as whores …' (p 313).
9. An in-depth and excellent discussion on key theorists, such as L Irigaray, C Smart and C MacKinnon is found in M Heath and N Naffine, 'Men's Needs and Women's Desires: Feminist Dilemmas About Rape Law Reform' (1994) 3 *The Australian Feminist Law Journal*, pp 33–5.
10. R Shotland and L Goodstein, 'Just Because She Doesn't Want to Doesn't Mean it's Rape: an Experimentally Based Causal Model of the Perception of Rape in a Dating Situation' 46(3) (1983) *Social Psychology Quarterly*, pp 220–32; C Muehlenhard, 'Misinterpreted Dating Behaviors and the Risk of Date Rape', *Violence in Dating Relationships*, M Pirog-Good and J E Stets, Praeger Publishers, New York, 1989, pp 241–56.
11. In the ABS Survey, 1996, (see note 2 above), just over a quarter of those raped since the age of 15 had received physical injuries additional to the rape itself. A higher proportion (47 per cent) in P Easteal, *Voices of the Survivors*, pp 53 and 74 (see note 2 above), for whom this information was known, had incurred injuries. Husband offenders correlated with the highest frequency of additional injuries.

As a female, the victim may have been socialised not to be aggressive or assertive. It may be her feelings of powerlessness, her fear of the assault and its outcome that render her passive, but not compliant and not consenting. This response can be triggered or exacerbated by childhood experiences of incest and other sexual abuses that have taught her how to 'shut down' her emotions and body at the onset of the attack.

According to the dominocentric beliefs, most rape would not actually have serious long-lasting effects on the victim. The list of possible effects from the victim's reality, however, is extensive, including physical, emotional and behavioural symptoms;[12] an overall impact described by some as 'worse than death':

> Rape is not just physical violence, it is also mental violence. It is not easily forgotten.
>
> I can't stand men now. I live alone and don't go out. I hate them … I wish I were dead.

From the dominocentric kaleidoscope, if the assault is committed by a stranger, a potential for severe impact may be seen. But, if the rapist is at the other end of the relationship continuum — someone with whom the victim has had prior consensual sex — then how could it traumatise her? Again, however, the woman's experience is substantially different, with effects for those raped by a spouse identified as actually more severe and longer term. The assault involves betrayal, isolation and living with the rapist,[13] and less disclosure or sympathetic responses.[14] Indeed, non-disclosure in general exacerbates the effects[15] with greater personality disorder, isolation and self-blame.[16] As we see later, those assaulted by someone they know are less apt to report the rape.

Male sexuality and rape

Active male sexuality is constructed by some judges and by many in the community as not only admirable but as a reflection of virility — the (old?) double standard.[17] This is illustrated not only by the paucity of words to describe males who are sexually active (in contrast to females) but also by the positive connotation of those labels (for example, 'he's a real stud'). Within such a context, sexual violence is then understood as an effect or

12. Includes depression, fear, anxiety, lack of trust, shame, self-blame, guilt, humiliation, anger, rage, betrayal, low self-worth, headaches, muscle tension, gastro-intestinal upset, genito-urinary complaints, pregnancy, sexually-transmitted disease, injuries, suicidal ideation, alcohol and drug addiction, isolation, anorexia and other eating disorders, sleeping disorders, phobias and more.
13. D Finkelhor, 'Marital Rape: the Misunderstood Crime' (1985) *National Conference on Domestic Violence: Proceedings*, S Hatty (ed), Australian Institute of Criminology, Canberra, pp 203–14; D Russell, *Rape in Marriage*, Indiana University Press, Bloomington, 1990.
14. S Girelli, P Resick, S Marhoefer-Dvorak, and C Kotsis-Hutter, 'Subjective Distress and Violence During Rape: their Effects on Long-term Fear' 1(1) (1986) *Victims and Violence*, pp 35–46; J Schwartz, H Williams and F Pepitone-Rockwell, 'Construction of a Rape Awareness Scale' 6 (1–4) (1981) *Victimology*, pp 110–19; D Scott and L Hewitt, 'Short Term Adjustment to Rape and the Utilization of a Sexual Assault Counselling Service' 16 (1983) *The Australian and New Zealand Journal of Criminology*, pp 93–105.
15. G Wyatt, M Newcomb and C Notgrass, *Rape and Sexual Assault III: a Research Handbook*, A Wolbert Burgess (ed), Garland Press, New York, 1991.
16. P Peretti and N Cozzens, 'Characteristics of Female Rapees Not Reporting and Reporting the First Incidence of Rape', 11 *Indian Journal of Criminology*, 1983, pp 119–24.
17. C O'Kelly, *Women and Men in Society*, D Von Nostrand, New York, 1980.

consequence of a libido that is uncontrollable if aroused. The poor man is driven by his desperate need to orgasm once his penis has been aroused by the other person's attire, manner, or placement at a certain time — messages often unknown to the woman — and of course by other intimate behaviours which the woman has permitted (given the 'whore' part of every woman).[18] Rape is about sex (not power).

> ... women are often understood to be guardians of what men most want, but of which they have little understanding. (Take, for example, the warnings issued to girls and women that they must be careful lest their behaviour unwittingly inflames the desires of men.) This in turn constructs sexual encounters or relationships in terms of how men can gain control of, or access to, their pleasure which is inconveniently located in women's bodies … It is within this dominant regime of meanings that law presides over contested accounts of rape and seduction.[19]

Claims to truth — empirical research on male sexuality

I have conducted empirical research on the subject of male sexuality. Wait — before you picture me out there 'in the field', so to speak, remember that 'empirical' according to the *Oxford Dictionary* means 'based or acting on observation and experiment and not on theory'. Need I say more? I am sure that many of you have also engaged in such empirical research by experiencing both heterosexual relations and parenting of young children. Like me, you know well how fallacious such a perception of the male sex drive is.

'Mummy, I just threw up', the toddler calls while her parents are in the middle — yes, the *middle* of the sexual act. Or, there's the little one who walks into the room, with a look of curiosity, inquiring, 'What is Daddy doing on top of you Mummy?' Or for the less traditional and more adventurous, 'What are you doing on top of Daddy, Mummy?'

The activity ceases. It stops instantly. Coitus interruptus!

The male, once aroused, does not therefore seem to be an insatiable being unable to control his manhood.

Now, the problem with such experiential research as I have just described is that the ethical positions that underlie claims to truth are repressed (although they remain covertly influential). The ethical foundation of my claim to truth is a powerful, normative claim that the law should not structure itself around a model of passive female sexuality and empirically unproven notions of irrepressible male sexuality.

18. A Young, 'The Wasteland of the Law, the Wordless Song of the Rape Victim' 22 (1998) *Melbourne University Law Review*, pp 445–6. Young writes that woman's 'signal quality exists through the projection of femininity from her bodily surfaces' and that this idea is conveyed to, or through, the law in rape trials. Empirical research of juries has shown that evidence of apparently precipitating conduct on the part of the complainant as well as jurors' perceptions of her sexual character can be crucial in their decision-making: see, for instance, H Kalven and H Zeisel, *The American Jury,* Little, Brown & Co, Boston, 1966, C Jones and E Aronson, 'Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim', 26 *Journal of Personality and Social Psychology,* 1973, p 415.
19. C Smart, *Law, Crime and Sexuality,* Sage Publications, London, 1995, p 80.

We must remember that within our culture, women as well as men can share (and desire) the view of female passivity and irrepressible male sexuality.

After all, the culture enculturates both males and females about appropriate and 'normal' sexuality. What is essential, however, is the recognition of how these models shape the present laws of sexual offences. As we will see below, they either legitimate some forms of coercive sex ('rough handling' for persuasion) or alternatively regard some rapes as less serious because the man has been sexually provoked to the point of loss of control.

Forming a continuum for the community (including the victims)

Within the context of the various myths discussed (and others), an extremely powerful continuum emerges of what is perceived as 'authentic' rape, at one end, and not quite legitimate assault at the other: see **Figure 7.1**. *If* the rapist was a stranger, *if* the assault took place in the woman's home which the rapist had broken into and *if* the woman was beaten seriously enough to be injured, then maybe she will be seen as not having precipitated the rape and the reaction will be supportive. 'Since it was my husband, (boyfriend, date, neighbour, uncle) it wasn't really rape'. For instance, in a national survey, one-quarter disagreed that 'women are more likely to be raped by someone they know than a stranger' and of those who did agree with the statement, less than half agreed *strongly*.[20] Rape is rape, but some rape is less serious than others and marital rape falls within the latter category. As one proponent of this perspective explains:

> First and foremost, other things being equal, rape by a cohabitee or ex-cohabitee, though horrible, as all rape is, cannot be so horrible and terrifying as rape by a stranger. I speak with the handicap of being a male, but a male can empathise with the female victims of crime, and anyway I take courage from the support of some women (including the woman most important to me), even though they are not the vociferous ones.
>
> Secondly, the stranger who pounces, perhaps wearing a mask, is a greater menace to society and a greater terror to women than the known attacker who acts in pursuance of what he misguidedly thinks of as his rights, or who is suffering from an unbearable sense of the loss of his partner by separation (he may even, stupidly, think that by forcing himself upon her he may regain her affection).[21]

20. ANOP Research Services, *Community Attitudes to Violence Against Women*, Office of the Status of Women, 1995, p 139, (see note 7 above).
21. G Williams, 'Rape is Rape' (1992) 142 *New Law Journal* 11.

Real (legitimate)	Less than real
stranger	known to victim
injuries	no injuries
resistance	no resistance
weapon	no weapon
corroboration	no witnesses
virgin/Madonna type	impure
reported immediately	delay in reporting
no issue of provocation	'provocative'
no prior consensual sex	prior sex with offender

Figure 7.1 A dominocentric continuum of rape

Impact on survivor — low rates of reporting

The survivor, like most in her community, grows up exposed to this dichotomy of authentic/not quite legitimate sexual assault. Her sense of responsibility is derived from the myths we have just looked at. Her feelings coincide with those held by some in the community. Almost one-third in an Australia-wide survey on beliefs about rape were either undecided or agreed that 'women who hitchhike have only themselves to blame if they are raped'. More than one-quarter either disagreed or were undecided that 'there is no behaviour on the part of a woman that should be considered justification for rape'.[22] Fifteen per cent in another project agreed that 'Women who are raped, often ask for it'.[23] Indeed, findings from the 1995 survey conducted for the Office of the Status of Women concluded that sexual violence is less understood by the community than domestic violence, and many survivors report a less than sympathetic response from family and friends.

And so we can understand the victims' own responses as mirrors of the myths that surround them and evidence of the unwritten but omnipresent continuum. Thus, another collision of realities is enacted since the 'good and proper victim', as constructed by the community (and as we will see, the law) will report to the police immediately. In real life, however, only 15 per cent of victims in the *Women's Safety Australia* survey reported;[24] 20 per cent of the *Voices of the Survivors* sample,[25] and one-third of those who participated in the New South Wales *Sexual Assault Phone in Report*.[26] Those who fall at the 'genuine rape' end of the covert but omnipresent rape typology (discussed below) are more likely to report. Aboriginal and non-English speaking women may also be particularly less apt to go to the police with some socialised with values that more explicitly place responsibility on the women.

22. P Easteal, 'Beliefs About Rape: A National Survey' in *Without Consent: Confronting Adult Sexual Violence*, P Easteal (ed), Australian Institute of Criminology, Canberra, 1993, p 26.
23. ANOP, *Community Attitudes to Violence Against Women*, 1995, p 138, (see note 7 above).
24. ABS, *Women's Safety Survey*, Office of the Status of Women, Canberra, 1996.
25. P Easteal, 'Survivors of Sexual Assault: An Australian Study', 22 *International Journal of the Sociology of Law*, 1994, p 342.
26. NSW Sexual Assault Committee, *Sexual Assault Phone-In Report*, Ministry for the Status and Advancement of Women, Sydney, 1993.

Plus, there may be more entrenched false ideas about what constitutes sexual assault.[27]

Shame is the most frequent explanation given by survivors for not reporting rape. As one victim of 'date' rape wrote:

> I think I felt shame because apart from struggling, kicking and screaming there came a point where I realised the inevitability of the act and 'went along with it'. I let myself go limp.

Reasoning did vary significantly according to the nature of the relationship between the victim and the offender. For those raped by a husband or an estranged partner, fear of the perpetrator (61 per cent) and a belief that the police would not act (40.1 per cent) were the major factors cited by those survivors.[28] One woman who had experienced marital rape explained that there were a number of variables that kept her from disclosing or leaving:

> In a relationship, sexual assault can occur because of emotional blackmail. Also, fear of consequences, fear of family criticism of the victim often means the assault goes without comment. Anxiety and trauma often are carried without comment to anyone. Also frequently you live with the hope that things will improve and you stay together with the hope of a better relationship.

FORMING A CONTINUUM FOR THE COURT

Like the victims, their family and friends, the ears of the legal system are not immune to the muffling and distorting power of mythology; after all, its practitioners and its culture are not isolated from the rest of the society. Two of the many examples of the scale of real/and not so real rape include:

> In my view this was a serious rape. It involved a breaking into a house, the forcible rape of a woman living in it and an absence of any remorse.[29]

> This is a different sort of case. It is really the simple refusal of a young man to take 'no' for an answer at the end of an outing with a girl. There were *no threats* and no *great force*. [30]

In fact, both female sexuality and gendered temperament are mirrored in how women are embodied in the law of rape. Passive, emotional, weak,

27. To further examine non-English and culturally diverse victims' issues, see P Easteal, *Shattered Dreams: Marital Violence Against Overseas-born Women in Australia*, Bureau of Immigration and Multicultural Population Research, Melbourne, 1996; *Quarter Way to Equal — A Report on Barriers to Access to Legal Services for Migrant Women*, The Law Foundation of New South Wales, Sydney 1994; *Not the Same: Conference Proceedings and a Strategy on Domestic Violence and Sexual Assault for Non-English Speaking Background Women*, Domestic Violence and Incest Resource Centre (DVIRC) and Office of the Status of Women, Melbourne, 1996; *Many Voices, Different Stories: Speaking Out About Cultural Diversity and Sexual Assault,* Fairfield Multicultural Family Planning, 1996. Aboriginal women issues are discussed by C Thomas, 'Sexual Assault: Issues for Aboriginal Women', and by J Lloyd and N Rogers, 'Crossing the Last Frontier: Problems Facing Aboriginal Women Victims of Rape in Central Australia', in *Without Consent: Confronting Adult Sexual Violence*, P Easteal (ed), Australian Institute of Criminology, Canberra, 1993, pp 139–148 and pp 165–72.
28. P Easteal, *Voices of the Survivors*, 1994, p 227, (see note 1 above).
29. *R v Robertson* (unreported, CA (Qld), Pincus and McPherson JJA and Ambrose J, 13 of 1996, 21 March 1996, BC9601133) per Ambrose J.
30. King CJ in *Morse* (1979) 23 SASR 98 at 100, cited by K Warner, 'Sentencing for Rape' in *Balancing the Scales: Rape, Law Reform and Australian Culture*, P Easteal (ed), Federation Press, Sydney, 1998, p 182.

mercurial, nurturing and obedient are undoubtedly parts of the masculocentric 'reasonable' woman. Such standards of appropriate 'feminine' behaviour have obvious repercussions upon the treatment of women and interpretation of key legal concepts. When living in a world dominated by men and where male values and male ways of being in the world are seen as normal and right, women are seen as deviants from the male standard of normalcy. Thus, women are characterised as irrational, illogical, emotional and erratic.[31] These are not traits that evoke credibility in a male world — in fact, quite the opposite. Catherine MacKinnon writes, 'The law sees and treats women the way men see and treat women'.[32] Fittingly, Mary Heath and Ngaire Naffine point out that legal tomes and case law frequently contain images of women as 'rather passive, namby pamby creatures requiring direction from men'.[33]

Laws are very grey; they have an open-plan construction with supporting beams of judicial interpretation and discretion. Moreover, although law reform may appear to remove a concept, it does not stop judges from raising the subject in their remarks to the jury or in their sentencing.[34] Figure 7.2 illustrates how those doing the interpreting often use the legal digest of false myths described above as their guide. For instance, Carol Smart describes the rape trial as 'the Original Story being re-enacted on a daily basis':

> ... Women are the outsiders because rape law has for centuries reflected the patriarchal view of human relationships and sexuality which defines woman as 'other', and that which is possessed. Rape law reflects a construction of sexuality which discounts women's subjectivity and privileges the male perspective.[35]

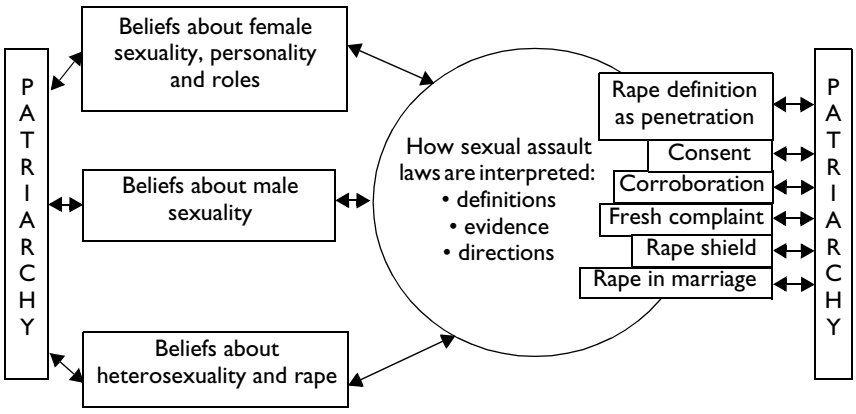

Figure 7.2 One lens affecting law and sexual assault — false mythology

31. N Naffine, 'Sexing the Subject of Law' in M Thornton (ed), *Public and Private: Feminist Legal Debates*, Oxford University Press, Melbourne, 1995.
32. C MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1984) *Signs: Journal of Women in Culture and Society*, p 635.
33. M Heath and N Naffine, 'Men's Needs and Women's Desires', (see note 9 above), pp 30–52.
34. Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary*, Parliament of the Commonwealth of Australia, Canberra, 1994, p 73 points out that gender bias 'may reveal itself in resort to antiquated and inappropriate gender myths and stereotypes when judges sum up to juries'.
35. R Kaspiew, 'Rape Lore: Legal Narrative and Sexual Violence' 20 (1995) *Melbourne University Law Review*, p 355.

Mythology and the 'rape shield'

Take the admission of sexual history evidence as an example. Despite the fact that an absolute prohibition was placed on the admission of evidence relating to sexual reputation in all jurisdictions,[36] the 'rape shield' has been pierced in a plethora of ways (such as arguing mistaken belief in consent).[37] Fundamentally, the piercing can be attributed to the persistence of certain cultural views about women:

> If women were really regarded as legal subjects capable of autonomous sexual decision-making, past sexual history evidence would simply be excluded on the basis of irrelevance.[38]

Further, it has been speculated that because of these reforms restricting the defence access to the victim's sexual history for cross-examination purposes, the defendant's legal team is looking for other strategies to discredit the victim. One such method was thrust centre-stage in November 1995 when a Canberra Rape Crisis counsellor was gaoled for contempt of court for refusing to comply with a subpoena that sought access to all documents relating to a client. Crisis counselling records are desired by the defence to show the victim's mental instability as illustrated by her seeking counselling. It also may be used as evidence of her self-doubt and blame[39] and the defence may attack the therapist's techniques as creating sexual allegations through false memory syndrome.[40]

Thus the 'rape shield' legislation would not appear to consistently have had the results intended by feminists reformers. Let us now look more closely at several other examples of recent sexual assault law reform and how their indeterminacy and interpretation is shaded by the differing realities of women and men.[41]

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36. Evidence Act 1971 (ACT) s 76G(1); Crimes Act 1900 (NSW) s 409B(2); Criminal Law (Sexual Offences) Act 1978 (Qld) s 4; Evidence Act 1929 (SA) s 34i(1)(a); Evidence Act 1910 (Tas) s 102A(1)(a); Evidence Act 1958 (Vic) s 37A(1); Evidence Act 1906 (WA) s 36B; except the Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(1), where the trial judge retains discretion to admit such evidence.
37. T Henning and S Bronitt, 'Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence', in *Balancing the Scales: Rape, Law Reform and Australian Culture*, p 93 (see note 1 above). A recent High Court case may act to weaken the shield further. In a 5–0 ruling, the court in *Bull v R*; *King v R; Marotta v R* [2000] HCA 24 (11 May 2000) held that the trial judge should have allowed the jury to hear evidence of a phone call between the woman and one of the men accused of raping her a couple of hours later which the defence said showed that, contrary to the evidence of the complainant, there were clear sexual overtones in the invitation which was extended to her.
38. R Hunter and K Mack, 'Exclusion and Silence' in *Sexing the Subject of Law*, N Naffine (ed), LBC Information Services, Sydney, 1997, p 185.
39. For in-depth analyses, see A Cossins, 'Tipping the Scales in Her Favour: the Need to Protect Counselling Records in Sexual Assault Trials', in *Balancing the Scales: Rape, Law Reform and Australian Culture*, P Easteal (ed), pp 94–106 (see note 1 above), S Bronitt and B McSherry, 'The Use and Abuse of Counselling Records in Sexual Assault Trials: Reconstructing the "Rape Shield"' 8(2) (1997) *Criminal Law Forum*, pp 259–291.
40. For a discussion about the debate concerning the syndrome versus repressed memory and its implications for the court, see I Freckelton, 'Repressed Memory Syndrome: Counterintuitive or Counterproductive?' 20 (1997) *Criminal Law Journal*, p 7.
41. See S Bronitt and B McSherry, *Principles of Criminal Law*, LBC, Sydney, 2001, Chapter 12, for more information about actual legislation and jurisdictional variation.

Mythology and consent

The crime of rape is distinctive because liability rests on what the accused believes that the victim believes about consent. This dualism derives from the separation of the physical and mental elements. Lack of consent plays a role in both.[42] As discussed above, women have been (and continue to be) expected not only to say 'no' but also to resist, struggle and incur other injuries as a consequence. The image of the Madonna fighting it out with the whore is implicit. Following this model, physical inaction has been traditionally viewed by the courts as signalling consent.[43]

The Australian Capital Territory, the Northern Territory, New South Wales, South Australia, Western Australia and Victoria amended their sexual assault provisions, setting out that a failure to offer physical resistance to a sexual assault does not of itself constitute consent.[44] But, although the substantive laws have changed:

> It still remains the case in most jurisdictions that the prosecution must prove beyond reasonable doubt that the complainant effectively communicated lack of consent to the accused, and the easiest way to show this is through signs of physical resistance.[45]

Victorian law has gone further. Judges are required in *relevant* cases (watch that term *relevant* — it may be interpreted through a lens of '[dominant] common sense' or determined by the law which is patriarchal) to direct the jury that:

> ... the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement.[46]

The presumption of consent changes to one of *non-consent*.[47]

Although research by the Victorian Rape Evaluation Project found that most judges gave the mandatory directions on consent, the authors identified six trials out of 27 where judges failed to direct juries that 'saying and doing nothing' ought not to be construed as an indication of consent in circumstances where this direction may have been relevant.[48] This finding suggests that 'relevance' may mean different things to different judges. Further, judges' informal remarks during trials have implied their persistent view that a struggle is necessary.

Perhaps we can better understand this invisibility of the victims' reality of consent if we remember that the judges' views do not exist in a vacuum. The

42. N Lacey, *Unspeakable Subjects*, Hart Publishing, Oxford, 1998, p 112.
43. See B McSherry, 'Constructing Lack of Consent', *Balancing the Scales: Rape, Law Reform and Australian Culture*, P Easteal (ed), 1998, (see note 1 above), pp 26–40 for an in-depth description of consent issues and reforms.
44. Crimes Act 1900 (ACT) s 92P(3); Crimes Act 1900 (NSW), s 61R(2)(d); Criminal Code (NT) s 192A; Criminal Law Consolidation Act 1935 (SA) s 48; Crimes Act 1958 (Vic) s 37(b)(i); Criminal Code (WA) s 319(2)(b).
45. B McSherry, 'Constructing Lack of Consent' (1998) *Balancing the Scales: Rape, Law Reform and Australian Culture*, P Easteal (ed), 1998, p 30 (see note 1 above).
46. Crimes Act 1958 (Vic) s 37(a).
47. S Bronitt, 'The Direction of Rape Law in Australia: Toward a Positive Consent Standard' 18 (1994) *Criminal Law Journal,* p 253.
48. M Heenan and H McKelvie, *Rape Law Reform Evaluation Project, Report No 2: The Crimes (Rape) Act 1991: An Evaluation Project*, Department of Justice, Melbourne, 1998, p 298.

positive consent standard fits with a communicative model of sexuality that is based on an ideal of mutuality in emotional and physical gratification. Bernadette McSherry, however, states that, 'This ideal may be far from the reality of how sexual intercourse occurs in a society where the penetrative/coercive model of sexuality is still persuasive.' She concludes that 'because of the pervasiveness of [these] assumptions about "normal" heterosexual intercourse, it is little wonder that the law has traditionally presumed that a woman consents to sexual penetration unless she in some way strongly resists her assailant'.[49] Rather than adopt a model of sexual autonomy in the present law as property in one's body,[50] autonomy could be structured by the law around relational and affective values such as trust, communication, mutual pleasure, rather than penetration, coercion, offer and acceptance.[51]

The issue of consent and what constitutes its vitiation can be an issue for the prosecution in any case. However, this is even more so in fiduciary-type relationships (that is, abuse of power in a position of professional trust.) The Australian Capital Territory case *Davis v Director of Public Prosecutions* illustrates this: a retired doctor was accused by 13 former patients with a number of offences including 'acts of indecency'. He requested a permanent stay, arguing an inability to locate all relevant records. The alleged acts took place between 1960 and 1974.

A stay was granted in 1995. In the stay, the judge made some comments on consent. For example, in reference to one complainant:

> She states that when she was 17 or 18, the doctor went to a cabinet at the end of the bed and rubbed something on his hands which she thought was cream and was saying how an orgasm could help relieve her period pain and that we would give it a go. He then put two fingers on her clitoris and began rubbing and massaging … It seems to me that if this complainant's evidence in committal proceedings accorded with her statement to the police, the prosecution might well fail to establish on a prima facie basis that she did not consent to whatever took place.

In conclusion, the judge noted the weakness of the prosecution's case as a factor in his decision to grant the stay:

> In each case the complainant consented to a medical examination of an intimate nature. The complaint in each case is that the applicant went beyond the range of physical contact necessary to a properly conducted examination and assumed the role of sexual predator. But, as stated above, some complainants appear to have consented to the acts alleged to have been indecent.[52]

The power imbalance between a doctor and a patient or a therapist and client makes consent at best problematic. Yet the judge's reasoning in the case above also reflects the current law in most jurisdictions that requires the (sexual assault) victim to have said, 'No, I don't want you to do that'. Is a

49. B McSherry, 'Constructing Lack of Consent' in *Balancing the Scales: Rape, Law Reform and Australian Culture*, P Easteal (ed), pp 35 and 29 (see note 1 above).
50. N Lacey, *Unspeakable Subjects*, 1998, (see note 42 above).
51. See S Bronitt and B McSherry, *Principles of Criminal Law*, LBC, Sydney, pending publication 2001, Chapter 12.
52. *Davis v Director of Public Prosecutions* (unreported, SC, Gallop J, 782/1994, 6 March 1995). Discussed in P Easteal, 'Suppressing the Voices of the Survivors' 33(3) (1998) *Australian Journal of Social Issues*, pp 211–29.

patient, with the added uncertainty about whether what is taking place is in fact 'treatment', actually in a position to say no?

With a concept of positive consent that is based on disclosure of risks and an understanding of the sexual nature and quality of the act, the patient's mistaken belief would not be an issue[53] as it was in *Mobilio*.[54] In that case, a radiographer was found guilty of rape after he had conducted internal vaginal examinations with an ultrasound transducer for his own sexual pleasure. The Court of Criminal Appeal reversed the finding, holding that each patient, having understood the nature of the physical act, had consented and that their consent was not negated by a mistake as to the defendant's purpose.

This type of situation is more evidence of the urgency for consent (in the criminal context) and other such concepts to be reconstructed with the reality or experience of the victim (health care user) included. The consent/non-consent dichotomy may be too narrow to allow for women's experiences, particularly those in an unequal relationship such as patient–doctor or patient–radiographer or client–therapist.

Mythology and two rules relating to complainant credibility[55]

Corroboration

Not long ago, judges in Australia were required to warn juries not to convict on the uncorroborated evidence of complainants who were regarded as especially unreliable as a class of witness. Women (and children) testifying about sexual assault were, and still are, regarded by judges as belonging in that category.

Over the past 30 years or so, there has been a plentitude of reforms that started out by abolishing any requirement to warn about the dangers of convicting an accused of a sexual offence on the uncorroborated testimony of the victim.[56] Some gave no direction as to what courts should or should not say,[57] while some stated that warnings were not to be given, or not to be given unless justified in the circumstances of the particular case,[58] or that the courts must/shall not suggest that the law regards complainants in sexual cases as unreliable.[59] Other jurisdictions have retained judicial power to warn

53. See S Bronitt, 'Rape and Lack of Consent' 16 *Criminal Law Journal 1992,* pp 289–310 and S Bronitt, 'The Direction of Rape Law in Australia: Toward a Positive Consent Standard' 18 (1994) *Crim L J* for an in-depth discussion of the law reform in this area.
54. *Mobilio* [1991] 1 VR 339 at 344.
55. The requirement that victim/witness allegations must be supported by other independent evidence.
56. Evidence Act 1971 (ACT) s 76F (now repealed and replaced by the Evidence Act 1995 (Cth) ss 164–165); Crimes Act 1900 (NSW) s 405C(2) (now repealed and replaced by the Evidence Act 1995 (NSW) ss 164–165); Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(5)(6); Evidence Act 1929 (SA) s 34i(5); Criminal Code 1910 (Tas) s 136; Crimes Act 1958 (Vic) s 61; Evidence Act 1906 (WA) s 36BE (now repealed and replaced by the Evidence Act s 50); for the Evidence Acts, (see note 36 above).
57. Crimes Act 1900 (NSW) s 405C(2) now repealed and replaced by the Evidence Act ss164–165); Evidence Act 1929 (SA) s 34i(5); Crimes Act 1958 (Vic) s 61(first version).
58. Criminal Code 1910 (Tas) s 136; Evidence Act 1906 (WA) s 36BE (now repealed and replaced by s 50).
59. Evidence Act 1971 (ACT) s 76F (now repealed and replaced by the Evidence Act 1995 (Cth) ss164–165); Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(5)(6); Crimes Act 1958 (Vic) s 61 (1991 revision);

or comment about uncorroborated evidence, if appropriate or necessary in the interests of justice.[60] The different wording of legislation in the jurisdictions does not appear to have affected their interpretation and application.

The current benchmark may be *Longman v R*[61] in which the High Court unanimously reversed a conviction on the basis that the trial judge had failed to warn that it was unsafe to convict on the uncorroborated testimony of the complainant. A year earlier, legislation had been enacted which stated that the judge 'shall not give a warning unless satisfied that such a warning is justified in all the circumstances'.[62] In the same vein, despite legal changes in that state,[63] New South Wales judges gave corroboration warnings in 74 of 92 trials with an old style warning (dangerous to convict on her evidence alone) in 40 per cent of cases and new style warnings (for example, evidence of complainant must be scrutinised with great care) in 59 per cent.[64] One judge remarked to the jury:

> There is no evidence, apart from the evidence she gave, which corroborates (or) significantly confirms, what she has told you. Her evidence is not evidence of the truth.[65]

Kathy Mack concludes that although the harsh judicial statements required in the past are no longer allowed, judges today do exercise their discretion to comment on the evidence. She attributes this persistence to

> ... social and judicial attitudes which accept and endorse the myths which were used to justify the older practices of denigrating the credibility of those who testify about sexual assault.[66]

Delay in reporting

Holistically, we can understand that the persistence of the warnings is enmeshed with false beliefs about women as liars and as incredible witnesses, especially when they are testifying about something that falls within the non-Madonna domain. This is another way used traditionally to discount women's credibility. In theory, in some jurisdictions such as Victoria, the rule is no longer supposed to operate through mandatory directions that highlight to the jury that there may be 'good reasons' for delay in making a complaint of sexual assault.[67]

Once more though, discretion, as illustrated in the High Court case of *Crofts* enters the picture.[68] The majority held that the reforms were intended

60. Evidence Act 1971 (ACT) s 76F (now repealed and replaced by the Evidence Act 1995 (Cth) ss164–165); Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(5)(6); Crimes Act 1958 (Vic) s 61 (1991 revision).
61. *Longman v R* (1989) 168 CLR 79 at 89 per Brennan, Dawson, Toohey JJ.
62. Evidence Act 1906 (WA) s 36BE(1), replaced by s 50 in 1988.
63. Crimes Act 1900 (NSW) s 405C(2) (s 405C(2) repealed and replaced by ss 164–165 Evidence Act in 1995.
64. *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault*, Department for Women, Sydney, 1997, p 188.
65. *Heroines of Fortitude*, 1997, p 193 (see note 64 above).
66. K Mack, "'You Should Scrutinise Her Evidence With Great Care": Corroboration of Women's Testimony about Sexual Assault' in *Balancing the Scales: Rape, Law Reform and Australian Culture*, P Easteal (ed), 1998, p 65 (see note 1 above).
67. Crimes Act 1958 (Vic) s 61(1).
68. *Crofts v R* (1996) 139 ALR 455.

only to abolish the rules, which presumed that women *as a class of witness* were untrustworthy; that they were not intended to create a presumption of reliability for all women who allege rape. Trial judges in individual cases could continue therefore to invite the jury to use lack of recent complaint to impugn the credibility of the victim by authorising them 'in fairness to the accused' to warn the jury that complainants who do not report their sexual abuse at the first reasonable opportunity lack credibility as witnesses.[69]

Thus, although judges in New South Wales are now required to warn the jury that such delay does not necessarily mean a false allegation,[70] research in that jurisdiction indicated that the warning[71] was given in just 51 per cent of trials in which delay in complaint was raised by the defence.[72] Indeed, it does continue to be used by the defence. For instance, in the Australian Capital Territory, where legislation[73] precludes the prosecution from leading evidence of recent complaint, the subject still appears since the defence may raise the issue of delay during cross-examination. Further, while the Victorian judiciary complied to a greater extent in giving the direction,[74] analysis of their court proceedings showed that the impact of mandatory directions could be neutralised by general comments about the significance of prompt as compared with delayed complaints.[75]

In this manner and the others just outlined, complex laws such as those concerning recent complaint lead both to directions by the judges and to the perpetuation of misunderstandings about how a 'reasonable' rape victim will behave. It is of course a masculocentric behaviour model that fails to see the reality of rape and the shame, blame, and fears (the perpetrator, not being believed, people's reactions etc).

Rape in marriage

This is a particularly interesting area of sexual assault law. Aside from all of the other issues that affect construction of sexual assault, rape in marriage also represents an intersection of the public sphere and the private domain and includes beliefs about conjugal relations and the inviolability of the home: for discussion, see Chapter 6.

Since 1981, Australian jurisdictions have struck down the immunity of husbands from prosecution and a license to rape.[76] Looking at the issues of prosecution incidence, consent, and sentencing, one wonders if attitudes

69. Discussed thoroughly by S Bronitt, 'The rules of Recent Complaint: Rape Myths and the Legal Construction of the "Reasonable" Rape Victim', in *Balancing the Scales: Rape, Law Reform and Australian Culture*, P Easteal (ed), 1998, (see note 1 above).
70. Discussed by G Mason, 'Reforming the Law of Rape: Incursions into the Masculinist Sanctum' in *Sex Power and Justice*, D Kirkby (ed), Oxford University Press, Melbourne, 1995, p 55.
71. Crimes Act 1900 (NSW) s 405B.
72. Department for Women, *Heroines of Fortitude*, 1997, p 211 (see note 62 above).
73. Evidence Act 1971 (ACT) s 76C(1).
74. Crimes Act 1958 (Vic) s 61(1).
75. M Heenan and H McKelvie, *The Crimes (Rape) Act 1991 — An Evaluation Report*, Report 2, (see note 48 above), pp 70–71.
76. Crimes Act 1900 (ACT) s 92R; Crimes (Sexual Assault) Amendment Act 1981 (NSW); Criminal Code (NT) s 192 as amended in 1994; Criminal Code (Qld) s 347 as amended in 1989; Criminal Law Consolidation Act Amendment Act (1992) (SA); Criminal Code (Tas) s 185(1) as amended in 1987; Crimes Act 1958 (Vic) s 62(2) as amended by Crimes Act Amendment Act 1985 and Crimes (Sexual Offences) Act 1991; Criminal Code 1913 (WA) s 325 was repealed by Act No 74 Acts Amendment (Sexual Assault) Act 1985 (WA).

about a husband's so-called conjugal rights are so easily eradicated. In fact, most of the difficulties in prosecuting husbands for rape derive from gendered beliefs about what is reasonable behaviour between a husband and wife. The so-called antiquated view of a wife as chattel and as granting an irrevocable agreement to sex does persist.

There are special difficulties in reaching a just verdict where the rape or attempted rape is alleged to have occurred in the matrimonial bed or the bed of parties to a continuing sexual relationship. There is the risk of motives, disclosed or undisclosed, arising out of tensions in the relationship. There is the risk of misunderstandings as to consent arising out of the habitual physical contact inherent in the relationship. The opportunities for corroboration are slight and an accused can do little to defend himself apart from denying the allegation.[77]

Certainly, very few rapes in marriage make it to court. As mentioned earlier, part of the reason is non-reporting. Yet even if the victim who is still cohabiting with her perpetrator does report, one suspects from both the virtual absence of these cases (particularly those in which the couple are still cohabiting), and from comments in which recent consensual sex casts doubt upon the legitimacy of the act as a rape, that the court's ability to construct rape within cohabitation remains highly problematic.

> Given that the last of those occasions [separation] was only a month or so before this offence took place, it might not be possible to say that the relationship was then obviously at an end. The respondent probably hoped to repair the rupture and resume living with his wife … However, the fact was that the parties were living apart, and this cannot be explained as the case of a husband losing his self-control during the continuance of the cohabitation.[78]

That last sentence is suggestive of equating rape with sex and male sexuality as irrepressible — particularly male conjugal sexuality (because he is used to having sex regularly?). Further, the underlying premise appears to be that if the victim had engaged in consensual sex with her ex-partner the day before or even months before, any future act would lose any possible interpretation as rape.

Justice Bollen's comments in the infamous South Australian case of *Johns v R*, where the perpetrator was charged with six counts of rape in which he had admittedly used force against his estranged wife, point to part of the problem — the judge's (and undoubtedly others') opinion that not only are these sorts of duress not seen as obviating consent, but that some types of coercion are acceptable within marital sex:

> There is, of course, nothing wrong with a husband faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. It may be, in the end, that handling and persuasion will persuade the wife to agree. Sometimes it is a fine line between not agreeing, then changing of the mind, and consenting.[79]

As a consequence of these values, the cases that are prosecuted are only representative of the most violent (estranged) marital rapes and do not reflect

77. Case stated by the SA DPP (No 1 of 1993) per King CJ.
78. *Director of Public Prosecutions v Cowey* (unreported, CCA (SA), Cox, Prior, Lander JJ, 204 of 1995, 18 July 1995, BC9502299).
79. *Johns v R* (unreported, SC (SA), Bollen J, 26 August 1992).

many women's experience of coercion.[80] Once again, the language and legal interpretation of consent neither correspond with the victim/women's reality nor capture the range of coercive behaviours, such as interpersonal intimidation involving threats that are not only physical.

COLLIDING KALEIDOSCOPES (OF REALITY) — CRASHING INTO THE VICTIM

The example of sexual assault laws serves (as did violence against women in the home) to illustrate how difficult it is to challenge the traditional kaleidoscope vision of women. It is no surprise then that if viewed from the perspective of the victim, reform has not significantly altered the imbalance in the scales of justice as intended. It would seem that the interests of the defendant to a 'fair trial' continue to be weighted more heavily[81] and the question of victim credibility continues to loom over the courts. Accordingly, we see the complainants cross-examined about lying, making a false report and their motives in reporting sexual assault. In the *Heroines of Fortitude* report, over half (53.7 per cent) were queried about a motive for false reporting with a median of five questions, whilst 84.3 per cent, in cross-examination, were asked an average of seven questions focused on lying.[82]

Defence counsel You're prepared to sit there calmly in the witness box and tell lies and then when it suits you, you throw a little tantrum to assist you don't you?

[This complainant was alleged to be lying 70 times by the counsel and was asked 178 questions regarding her general drug use habits.]

Defence counsel You weren't in shock, you were having consenting sexual intercourse on the lounge room floor weren't you?

Complainant I was not.

Defence counsel You see this is a tissue of lies by you isn't it?

Complainant It is not [crying] a lie — why would I go to the police station and make a 20 page statement and be there for 8 hours and go through hell for this! [screaming].[83]

This chapter has looked primarily at how the myths themselves are acted out within the implementation of the law. Those acting as the 'gatekeepers' may be led by the image of the masculocentric 'reasonable' woman who embodies those traits the culture defines as female. That is one kaleidoscopic image that collides with the victim's truth. But, it is also the process of the legal system and the masculocentric etiquette and adversarial style of court proceedings that run in diametrical opposition to the victim. Some cross-examination techniques and what has been referred to as rhetorico-grammatical processes can be especially effective in muting the complainant's

80. See the discussion in Chapter 6.
81. This will be discussed in Chapter 12.
82. Department for Women, *Heroines of Fortitude*, 1997, p 169; (see note 64 above); P van de Zandt, 'Heroines of Fortitude', in *Balancing the Scales*, P Easteal (ed), 1998, p 130, (see note 1 above).
83. Cited in P van de Zandt, 'Heroines of Fortitude', in *Balancing the Scales*, (see note 1 above), p 130.

voice;[84] these include ridiculing her testimony; attacking her character; asking questions in a way that only permits a 'yes' or 'no' response and may address events out of time sequence; interrupting often and asking the same questions repeatedly.[85] The general tone may be 'a strategy of insinuation'.[86]

We will look at some macro-scale solutions to those issues and others in Chapter 12. At this point, however, I will mention just a few of the potential springboards to attitudinal and/or behavioural change. It is obvious that judges and other legal practitioners need more education about the victim's reality. This can derive from mandatory training, changes in law school curriculums, and through the voice of the expert:

> The most effective way to displace the discriminatory stereotypes which continue to dominate rape trials is to generate an alternative narrative to explain victim behaviour which is both empirically and normatively sound. Such narrative will not be created by merely tinkering with the wording of the mandatory jury direction or by resorting to more elaborate explanations of the 'good reasons' for delay. Directions which are not supported by expert evidence cannot adequately confront these myths and misconceptions — from a judicial perspective such compulsory directions appear to be counter-intuitive and ultimately unfair to the accused.[87]

Additionally, lens readjustment can be imposed with more tightly-written mandatory directions, ongoing monitoring and increased judicial accountability. Through these means and attitudinal shifts away from the mythology, perhaps the picture at the end of the court's kaleidoscope will better incorporate the victim's construction of the reality of rape.

EXERCISES

1. Group

Discuss what you see as the cultural and legal contexts for the direction that Bollen J made: see p 134. Was it highlighted in the media at the time because it was an unusual type of statement for a judge to make in a rape trial?

2. Individual or group

Look at an area of rape law not discussed in-depth in this chapter, for example, confidentiality of counsellor notes, the 'rape shield', child sexual assault, victim support. Conduct some research into how it has been handled in Australia and contrast the situation with one other country.

3. Group

Take a look at **Figure 7.1** and **Figure 7.2**.

First, identify differences between the victims' kaleidoscope and the reality apparently held by many in the community and the criminal justice system.

84. Discussed in N Puren's review of *Balancing the Scales: Rape, Law Reform and Australian Culture* (see note 1 above) in *The Australian Feminist Law Journal* 13, 1999, p 146.
85. Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, No 84, Australian Law Reform Commission, Sydney, pp 343–8.
86. A Young, 'The Wasteland of the Law, the Wordless Song of the Rape Victim', p 456, (see note 18 above).
87. S Bronitt, 'The Rules of Recent Complaint', in *Balancing the Scales*, P Easteal (ed), 1998, p 57 (see note 1 above).

Then choose one area of law reform, for example, consent. This chapter has tended to focus upon the limitations of law reform. Take an alternative and more optimistic view and explore how and where the reform has succeeded in 'balancing the scales'.

4. Individual or group

Investigate the issue of expert witnesses in rape trials. Discuss rape trauma syndrome, repressed memory and other 'psychological' evidentiary phenomena. How have these been used in Australia compared with other countries? What are the pros and cons of using expert evidence? What are other types of potential expert evidence or witnesses?

5. Individual or group

This chapter (and Chapter 6) looked at marital rape and found that there are specific issues involving consent when there has been previous consensual sex.

Either as an individual or as a group, do the same sort of investigation and analysis for 'date rape'. First, what is the incidence and cultural aspects? Include discussion of relevant mythology, then find some examples of cases that have been before the courts and analyse judges' comments and/or judgments in order to identify whether any of the myths are mediating the interpretation of legal concepts.

FURTHER READING

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Aside from this brief list, there are a substantial number of journal articles both within Australia and in the United States, Canada and the United Kingdom.

Shades of Grey – Domestic and Sexual Violence Against Women

Note: This volume is not reproduced in this version of the submissions

Arguing that the law must be looked at holistically, this book investigates the 'hidden gender' of the so-called neutral or objective legal principles that structure the law addressing violence against women. Adopting an explicitly feminist perspective, it investigates how legal responses to violence against women presuppose, maintain and perpetuate a certain context that may not in fact reflect women's experiences.

Carline and Easteal draw upon relevant legislation, case law and secondary studies from a range of territories, including Australia, England and Wales, the United States, Canada and Europe, to contextualize and critique policy responses. They go on to examine the potential and limits of law, making recommendations for best practice models of policymaking and law reform.

Aiming to help improve government, community and legal responses to women who experience violence, *Shades of Grey – Domestic and Sexual Violence Against Women: Law Reform and Society* will assist law-makers, academics, policy-makers and a wider audience in understanding the complexities of violence against women.

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Dr Patricia Easteal University of Canberra 15/10/2014

Dr Anna Carline is a Senior Law Lecturer at the University of Leicester. She has researched and published extensively on the topic of violence against women.

Professor Patricia Easteal AM is a Law Professor at the University of Canberra. She was made a Member of the Order of Australia for service to the community, education and the law through promoting awareness and understanding of violence against women, discrimination and access to justice for minority groups.

ACT Council of Social Service Inc

ABN: 81 818 839 988

Caroline Le Couteur MLA
GPO BOX 1020
Canberra, ACT, 2601

Via email: lecouteur@parliament.act.gov.au

Dear Ms Le Couteur,

Re: ACT Greens Discussion Paper, *Consent in Sexual Violence Laws*

Thank you for the opportunity to respond to the ACT Greens Discussion Paper, *Consent in Sexual Violence Laws*.

The ACT Council of Social Service (ACTCOSS) supports the proposal to reform the ACT's criminal law to adopt a new definition of consent. ACTCOSS believes it is imperative the ACT adopt an affirmative model of consent, which is a more victim/survivor-responsive approach to prosecuting sexual violence. The following letter outlines our support for the proposed amendments, and a series of recommendations regarding further work to enhance the protections an affirmative model of consent affords.

ACTCOSS has previously advocated for greater attention to sexual violence in the ACT. In our submission to the *Standing Committee on Justice and Community Safety Inquiry into Domestic and Family Violence - Policy approaches and responses* last year, we noted:

> *…it is important to ensure this focus on domestic and family violence is complemented by specific work to progress implementation of recommendations from the Evaluation of the ACT Sexual Assault Reform Program and continuing to build community understanding of the complexities of sexual violence, how to prevent sexual violence and better meet the needs of survivors.*
>
> *The recent report into sexual assault at universities resulted in particularly high results from the Australian National University. Both the victims/survivors and the perpetrators in these events are members of the Canberra community. Although the ANU is a national institution, the ACT*

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Government should actively respond to the survey results with scope to consider that the results might be indicative of levels of sexual assault in the community more broadly.

Finally, as noted in the Women's Services Network submission, the Canberra Rape Crisis Centre has reported increasing and substantial growth in demand over the past few years.

We therefore commend the ACT Greens for discussing sexual violence in the ACT, and agree that successful implementation of these laws, combined with effective community education, is important at a legal and conceptual level, "in giving the community an understanding of what consent and assault are, and hopefully preventing those cases occurring in the first place".[1]

The need for affirmative consent

Sexual assault is a difficult issue for the justice system. This is in part due to society and community shame and silence around sexual violence. Victims/survivors often do not report, and sexual violence statistics often misrepresent actual rates in the community, which are generally higher. Non-reporting is also due to the actual and perceived difficulty of prosecution. Access to legal justice is often considered out of reach for victims/survivors, as determining guilt or innocence rests on the word of the accused against the victim/survivor. Accessing legal justice can often be re-traumatising for victims/survivors.[2]

The ACT's current consent laws do not have an affirmative model of consent, instead the legislation simply names factors that negate consent. As such, the onus is on the victim/survivor to prove that they *did not* consent (i.e. through verbal or physical resistance), rather than that they *did*. Without a 'yes means yes' model, ACT legislation does not protect victims/survivors who may have felt too unsafe or unable to express non-consent.

It is also important the ACT brings its legislation in line with other states and territories. We have a transient community, including many students and workers from interstate. Updating our consent legislation to be as protective as other states and territories will help safeguard the rights of these people. There is no reason

[1] ACT Greens Discussion Paper: Consent in Sexual Violence Laws, p. 4.

[2] Evaluation of the ACT Sexual Assault Reform Program: Final Report, p. 42.

someone who lives in Queanbeyan and works in Canberra should be afforded different protections at work and at home. The Australian Institute of Health and Welfare recently noted that one of the main challenges to discussing family, domestic and sexual violence in Australia is that there is "no consistent definition for family, domestic and sexual violence".[3]

In preparing this letter, ACTCOSS consulted with the Women's Centre for Health Matters and the Youth Coalition of the ACT, whose submissions we support. ACTCOSS also thanks Sexual Health and Family Planning ACT (SHFPACT), the ANU Women's Department and Legal Aid ACT for their advice.

Recommendations

Include examples in the Explanatory Statement
As mentioned, ACTCOSS broadly supports the proposed updates to the ACT consent in sexual violence laws, but we believe the Explanatory Statement could be amended to clarify the importance of adopting an affirmative consent model. This could involve including examples of sexual violence cases that would not result in prosecution under current laws, such as 'rape freeze', and other instances wherein a victim/survivor neither says no nor yes.

Education for police and others within the justice system
Changes to sexual violence legislation must be accompanied by immediate and comprehensive education for police and others within the justice system. Police are often the first responders to victims/survivors pursuing legal justice, and their conduct and response can influence the course of action. As noted in the *Evaluation of the ACT Sexual Assault Reform Program*, from 2008-2010 the most common causes of attrition at the point of police investigation were insufficient evidence (31.1%) and the victim/survivor withdrawing the complaint (26.6%).[4] In addition, the report states:

> *…law enforcement, the DPP and the victim support agencies consulted for [the] study recognised that the ways in which they attempt to assist victim/survivors can often*

[3] Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia*, AIHW, 2018, Canberra, p. 101.

[4] Willis et al, *Evaluation of the ACT Sexual Assault Reform Program: Final Report*, Australian Institute of Criminology, 2013, p. 43-44.

> *conflict, even though these agencies all aim to give the victim/survivor the best outcome.*[5]

Police and others within the justice system must therefore receive comprehensive education if the Crimes (Consent) Amendment Bill 2017 is amended. As the attrition data shows, police in particular must be aware of the changes in the burden of evidence/proof. This should include clear examples of cases that constitute sexual violence in the proposed legislation, but which are not currently covered.

Community education and resources

As mentioned, ACTCOSS firmly supports the ACT Greens' intention to influence the community's understanding of consent, and therefore reduce rates of sexual violence. The Discussion Paper asks how best these changes should be communicated to the public, and ACTCOSS believes the government must allocate resources and funding to community awareness campaigns that specifically address the changes, and consent and respectful relationships more broadly.

A key point communicated to ACTCOSS by SHFPACT is that issues of consent are often framed as a young people's issue. But although young people are a vulnerable cohort, consent is a whole of community issue, which must be met with a whole of community education response. Consent and respectful relationships education should be a discussion within schools, universities, families, and workplaces. SHFPACT advises a combination of focused preparation materials as well as broader community education. The ANU Women's Department notes that consent education is most effectively delivered in-person.

ACTCOSS stresses the importance of specific resources for communities that may be vulnerable, or have differing social, cultural, comprehension or communication needs and abilities. Sexual violence most commonly affects women, and Aboriginal and/or Torres Strait Islander women, women with a disability, and culturally and linguistically diverse (CALD) women are significantly more vulnerable. Women with intersectional identities across these groups may face compounding vulnerability.

Particularly for Aboriginal and/or Torres Strait Islander women and culturally and linguistically diverse women, resources should be

[5] ibid, p. 21-22.

culturally safe and responsive. Aboriginal and/or Torres Strait Islander women experience significantly higher rates of sexual assault than the general population – they are up to 12 times more likely to be victims/survivors than non-Indigenous women.[6] Resources developed for Aboriginal and/or Torres Strait Islander people should take into account intergenerational trauma, and should be developed in collaboration with Aboriginal leaders and community-controlled organisations. For CALD women, it is necessary to consider "variation in the extent to which [CALD] women have knowledge about the law, ability to access the Australian legal system, [and] willingness to engage with the police and other institutional actors".[7]

Education resources for people with a disability should encourage healthy sexual relationships and work to ensure a full understanding of consent. Consultation with relevant national Disabled Peoples Organisations such as People With Disabilities Australia (PWDA), First Peoples Disability Network (FPDN) and Women With Disabilities Australia (WWDA), should be taken to ensure implementation avoids perpetuating justice outcomes where people with a disability are over-represented as both victims and perpetrators. People with a disability have a heightened vulnerability to sexual violence in part due to the perception that they are unable to have, or are uninterested in, sexual relationships.[8] In Australia, more than 70% of women with a disability have experienced sexually violent encounters, and 90% of women with an intellectual disability have experienced sexual abuse.[9] Men with an intellectual disability are also more likely to be victims/survivors than the general population.[10]

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[6] Bainbridge et al, *Responding to Indigenous Australian Sexual Assault: A Systematic Review of the Literature*, SAGE, 2014, p. 1.

[7] Australian Law Reform Commission, *Sexual Assault and Family Violence*, Australian Government, 2010, accessed 22 March 2014, <https://www.alrc.gov.au/publications/24.%20Sexual%20Assault%20and%20Family%20Violence/prevalence-sexual-violence>

[8] P French, *Disabled Justice*, Queensland Advocacy Incorporated, 2007, Queensland, p. 22.

[9] Women With Disabilities Australia, *Fact Sheet: Violence Against Women With Disabilities*, Women With Disabilities Australia, 2014, Tasmania, p. 1.

[10] Australian Institute of Family Studies, *Sexual assault and adults with a disability*, 2008, Australian Government, accessed 22 March 2018, <https://aifs.gov.au/publications/sexual-assault-and-adults-disability/prevalence-sexual-assault-adults-disabilities>

ACTCOSS notes that the government must particularly account for the differing and specific needs of people with intellectual disabilities, complex communication disabilities, or psychiatric disabilities. WWDA recommend all Australian states and territories,

> *…address the lack of accessible violence response services for women and girls with disabilities. These strategies should ensure that violence response services operate within a framework that requires them to consider the needs of persons with disabilities at each stage of the service delivery model.*[11]

Finally, ACTCOSS notes that education should be inclusive of LGBTQI Canberrans, as issues of consent and sexual violence are often exclusively considered within a heterosexual relationship model. ACTCOSS recommends the Women's Centre for Health Matters 2017 *Same Love, Same Rules* public awareness campaign on domestic violence in LGBTQI relationships as a useful resource.

Yours sincerely,

Susan Helyar
Director

Email: director@actcoss.org.au

23 March 2018

[11] Women With Disabilities Australia, *Fact Sheet: Violence Against Women With Disabilities*, Women With Disabilities Australia, 2014, Tasmania, p. 3.

Submission on draft Crimes (Consent) Amendment Bill 2018

March 2018

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Introduction

The Women's Centre for Health Matters Inc. (WCHM) welcomes the opportunity to make a submission to the office of Caroline Le Couteur on the draft *Crimes (Consent) Amendment Bill 2018*.

WCHM is a community-based organisation that works in the ACT and surrounding region to improve women's health and wellbeing. WCHM believes that health is determined not only by biological factors, but by a broad range of social, environmental and economic factors known as the 'social determinants of health'. We acknowledge that the environment and life circumstances that each woman experiences have a direct impact on her health, and in many cases, women's poor health is rooted in social disadvantage. For these reasons, WCHM is committed to taking a whole-of-life and social approach to women's health that is also firmly situated within a human rights framework.

WCHM focuses on groups of women who experience disadvantage, social isolation and marginalisation and uses social research, community development, advocacy and health promotion to:

- Provide women with access to reliable and broad ranging health-related information which allows informed choices to be made about each woman's own health and wellbeing; and

- Advocate to influence change in health-related services to ensure responsiveness to women's needs.

Further information on the impact of consent legislation on women in the ACT can be provided, if required.

Active Consent

WCHM are pleased to see an amendment to the *Crimes Act 1900* to change the definition of consent to "free and voluntary agreement" rather than focusing solely on factors that negate consent.

This change will make the ACT consistent with other Australian jurisdictions, meaning that the definition of consent does not change whether the act occurred in an apartment in Queanbeyan or in Campbell.

This change from negating consent to active consent represents a major shift in community attitudes towards what is accepted as consenting activity. Situations in which consent was not considered to be negated because the victim did not verbally state their non-consent should, with this change in definition, be considered a sexual offence.

However, there are still situations in which subjective decisions may need to be made about whether there was consent. It would be helpful to include examples of these situations, and whether it is the Assembly's intention that this should constitute consent, in the Explanatory Statement for the Amendment. This will be of assistance to courts when cases come before it.

Ongoing consent

One example that would be helpful is "rape freeze". Women who may have actively consented prior to sexual activity beginning, may in fact find that the activity is not what they thought they were consenting to, and may experience "rape freeze", in which they do not demonstrate ongoing consent, nor do they physically act to try and stop the activity.

Resources aimed at educating people about active consent do not always address this issue of ongoing active consent. An example of checking in for active consent can be found in the Consent Matters training resources delivered to students at Australian National University and University of Canberra. In the training resource, two people actively consent to engage in sexual activity with each other, and the activity commences. But after this, the body language of one of the participants changes, and they seem less enthusiastic about the activity. In the training resource, it is made clear that the participant who wants to continue the activity should check for ongoing active consent, giving their partner the opportunity to negate consent and cease the activity.

In this situation, it is not clear whether the new legal definition of active consent has been met. A woman might give consent, freely and voluntarily, before activity begins, and may not physically resist ongoing activity after she has realised she wants to withdraw consent because of rape freeze. An example that describes such a situation, and makes it clear that there is a legal obligation to check for ongoing active consent if the woman is not demonstrating this through her body language, would be helpful for the courts.

Education resources about consent

The most recent Australian Bureau of Statistics' *Personal Safety Survey 2016* found that one in five women, and one in twenty men, had experienced sexual violence since the age of 15. These numbers are the same as the results from the *Personal Safety Study* 2012. However, the proportion of women of women experiencing sexual violence in the 12 months prior to the survey has increased from 1.2% in 2012 to 1.8% in 2016.[1] What this shows is that a stronger definition

[1] Australian Bureau of Statistics, 2017, *Personal Safety, Australia*, cat. no. 4906.0, viewed 22 March 2018: http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0

of consent in other States and Territories around Australia has not, in itself, led to a reduction in women's experience of sexual violence.

To assist in reducing the prevalence of sexual violence in the community, it would be helpful to fund the creation and distribution of resources that will help people understand active consent, including ongoing consent.

A recent survey of ACT women's sexual and reproductive health needs by WCHM found that a significant proportion of ACT women do not find it easy to find reliable and relevant information about their sexual and reproductive health. In particular, 37% of women aged 15 to 18 years, 28% of women aged 19 to 29 years, and 28% of women aged 60 years or more answered no to this question.

For young women, education resources to help them understand sexual consent need to provided before they have reached 15 years of age. WCHM's survey found that 71% of women aged 15 to 18 years, and 94% of women aged 19 to 29 years, had sexual activity with another person in the past 12 months.

In the same survey, 48% of women aged 60 years or more said they do not feel that sexual and reproductive health information is appropriate for their age and stage of life, and 64% of women aged 60 years or more had answered yes when asked if they had sexual activity with another person in the last 12 months. Women aged 60 years or more should continue to have access to information about sexual consent.

Further analysis of the WCHM survey results is ongoing, and a detailed report is expected to be released later in 2018.

While Consent Matters is useful for university students, many young people become sexually active before they reach the age where they might attend university, may not attend university at all, or may attend a university that does not provide access to this resource. The resource was also originally developed for a United Kingdom university age audience.

A resource that uses language, accents, and social situations common to an Australian audience would be a helpful addition to the existing resources that are available. Resources appropriate to younger people of high school age, and young people who may or may not be attending university, would also be appropriate. It may also be helpful to have resources available that are suited to older Australians, for whom issues of consent are still relevant but can be overlooked in health literature aimed at people over 60 years.

Impact on young people

As discussed previously, young people under the age of 18 years in the ACT are engaging in sexual activity. This includes sharing intimate images, which occurs frequently with young people who have not yet reached the age at which they can consent to sexual activity.

However, not all intimate images depict sexual activity. So while a young person under 16 years of age may want to consent to sharing an intimate image with another young person of a similar age, they may not be sharing images that depict sexual activity.

It therefore makes sense that the age of consent for sharing an intimate image with another young person of similar age may be lower than the age of consent for participating in sexual activity with another young person of similar age.

Commonwealth offences

The *Crimes (Invasion of Privacy) Amendment Bill 2017* was intended to provide legal protection for young people from adults exploiting their intimate images, while allowing for a young person to consent to create or share their intimate image with another young person no more than two years older than them without it being a criminal offence.

However, the main form in which young people distribute intimate images is via their mobile phone or online social media. For young people under 18 years, it is an offence under Commonwealth law to use the internet or mobile phones to share their intimate image with another person because it is classified as “child pornography” or an “indecent act”. The penalty is up to 15 years in prison.

The changes proposed in the *Crimes (Consent) Amendment Bill 2018* do not address this issue. The only way to address this issue is through amendments to the Commonwealth legislation.

While there remains this conflict between what is considered an offence in the ACT compared to Federal law, young people may not be clear about their legal responsibilities. Training resources are needed for young people, their parents or carers, schools and others who work with young people, to assist them in understanding the law relating to consenting to sharing intimate images by mobile phone or online.

Subjectivity in intimate images

Based on the amendment Bill, there are some situations in which a young person aged 16 or 17 years may consent to sharing an intimate image with another person who is more than two years older than them, and the image could subjectively be considered to be child exploitation material under s64(3) or 65(1) of the *Crimes Act 1900*, or could be considered not an offence at all under s72D if the image is considered to be an intimate image.

The amendment Bill applies a two year rule to offences under s64(3) and s65(1), as well as s66(1). This means that if a child or young person is creating or sharing an image of sexual activity with another person no more than two years older than them, it is not an offence.

Under s64(3) of the *Crimes Act 1900*, it is an offence for a person to user, offer or procure a child for the production of child exploitation material. The maximum penalty, where the child is 12 years or older, is 10 years in prison. The penalty is higher where the child is under the age of

Under s65(1), it is an offence for a person to possess child exploitation material, with a maximum penalty of 7 years in prison.

Under s66(1), it is an offence to encourage a young person to commit or take part in, or watch someone else committing or taking part in, an act of a sexual nature. For a first offence against a young person aged 12 years or older, the maximum penalty is 7 years in prison.

If a 17 year old engages in sexual activity with the 20 year old, and shares images of that activity with the 20 year old without the use of a mobile phone or online, the older person in the relationship may be committing offences under s64(3) for production of child exploitation material, and s65(1) for possessing the child exploitation material. This is because there is more than two years between the age of the young person in the images, and the person creating and possessing the images.

But there is no offence under s72D because the young person was over the age of 16 years.

If the image depicts sexual activity between the 17 year old and the 20 year old, the activity itself is also not an offence under s55 because the young person is not under the age of 16 years. But it may be an offence under s66(1) because of the two year rule.

What this means is that police are required to make a subjective decision: is the image created and shared with the 20 year old child exploitation material under s64(3) and s65(1), or is it an intimate image under s72D? Was the older person also committing an offence under s66(1)?

It seems that the safest course of action would be that the creation and/or sharing of intimate images by persons under 18 years should only be done with another person aged at least 10 years and no more than two years older than the younger person, and that images depicting sexual activity should only be created and/or shared by young persons aged at least 16 years and with the other person no more than two years older than the younger person. In any case, these images should not be created or distributed using mobile phones or online.

This subjectivity means that police and the courts will need training resources to help them decide when it is appropriate to charge someone with an offence, and under which section of the Act.

Examples in the Explanatory Statement accompanying the amendment Bill that describe the kind of image that might be considered an intimate image under s72D, but not child exploitation material under s65(1), would also assist the courts in the making these subjective decisions where a person aged 16 or 17 has shared images with someone more than two years older.

Training resources will also be needed for the community to understand the changes to the consent laws, and the areas in which subjective decisions could be made that an offence has occurred, to ensure that people are aware of the risks they may be taking.

Two year rule

The two year rule is that a sexual offence is not committed under various sections of the *Crimes Act 1900* provided that the younger person involved is over a certain age (varying between 10 and 16 years, depending on the section of the Act) and the other person is no more than two years older than them. The wording of the amendment Bill ensures that the two year rule will be applied to offences relating to intimate images in a way that is, for the most part, consistent with other sexual offences.

The two year rule is an arbitrary measure of the power imbalance that may exist between a young person and the person they are engaging in activity with. In addition, s72D sets the age of consent for sharing intimate images at 16, regardless of the age of the person the images are shared with.

There are situations in which a 16 or 17 year old may be engaging in consenting sexual activity with a person who is more than two years old than them, such as a 17 year old in a relationship

with a 20 year old. For example, some first year university students are still 17 years old when they begin their studies, and may be meeting and socialising with other first or second year students who are a little more than two years older. This can also happen in workplaces where there are numbers of young people in entry level positions, or in any social setting where the basis of being present is not that they are in the same school grade or were born in the same year.

The age difference may not, in itself, equate to an imbalance in power between the two people. This is based on an outdated social norm that the relationship will be between two people of different genders, and that the woman will be the younger person in the relationship. Differences in the power within the relationship may stem from knowledge and experience of systems, positions of authority in workplaces or education settings, or socio-economic status. For example, two young people within two years of each other may:

- Work in the same fast food store, where one is a supervisor (although not the supervisor of the other young person).
- Attend the same school, where one student is a prefect or member of the Student Representative Council and the other is not.
- Be from very different socio-economic backgrounds, where the person from the lower socio-economic background feels a level of shame or stigma related to economic class.
- Both be the same gender, but one may be openly participating in the LGBTIQ community while the other would prefer not to be known to be in a same-sex relationship.

In any of these situations, it may be possible for one person to obtain consent from the other because of the power imbalance in the relationship, without having committed an offence, even though they are both young people of a very similar age.

It is also possible that these situations may exist with an age difference of slightly more than three years, and that the person with the greater level of power in the relationship may not be the older person.

Ongoing consent and young people

It is our view that there should be no time limit to withdrawing consent, whether to sexual activity or to creating and/or sharing intimate images. Where young people are concerned, this means that it should be possible for a young person over the age of 16 to consent to creating and sharing an intimate image with another person within two years of their own age, but to withdraw their consent some years into the future and require the person who holds the image to delete it.

Where two young people had shared intimate images with each other, and it is now some years after the relationship had ended, one of the people involved no longer wants their former partner to possess their intimate images. If the intimate images depict a young person under the age of 18, they could be committing an offence under s65(1). If they move the images to another computer or phone that they own, and the person shown in the images was between 10 and 15 years old at the time but within 2 years of the person that they shared the images with, they could also be committing an offence under s72D.

The person who possesses the images in the above example has no way of knowing that consent has been negated unless the other person gives them this information. The new definition of active consent, that is freely and voluntarily given, also does not provide for ongoing consent or withdrawal of consent. It would therefore be up to police and the courts to decide whether an offence has been committed under s65(1) or s72D.

Examples in the Explanatory Statement accompanying the amendment Bill to demonstrate situations in which consent has clearly been withdrawn, as well as examples where it would be reasonable to believe that consent continued to exist, would help the police and courts.

Training and education resources for young people, their parents or carers, schools, and others who work with young people, to assist them in understanding the importance of communicating withdrawal of consent to possess images and the impact this may have in future, would also be helpful.

Recommendations

1. ACT Attorney-General to write to the Federal Attorney-General to request that Commonwealth law be changed so that young people aged 16 to 18 years sharing intimate images via mobile phone or internet with consent are not committing a child pornography offence, making Commonwealth law consistent with law in the States and Territories.

2. Provide examples in the Explanatory Statement accompanying the amendment Bill that describe the kind of image that might be considered an intimate image under s72D, but not child exploitation material under s65(1), where a person aged 16 or 17 has shared images with someone more than two years older. Advice should be sought from Legal Aid ACT, Women's Legal Centre ACT, Youth Coalition, and the ACT Human Rights Commissioner for Children and Young People on appropriate examples.

3. Provide examples in the Explanatory Statement accompanying the amendment Bill that describe ways in which consent, freely and voluntarily given, can be provided, as well as situations in which ongoing consent should be sought. Advice should be sought from Legal Aid ACT, Women's Legal Centre ACT, Youth Coalition, and WCHM on appropriate examples.

4. Provide examples in the Explanatory Statement accompanying the amendment Bill that describe situations in which consent to create or distribute and intimate image has been withdrawn, as well as situations in which it would be reasonable to expect that consent was ongoing, where the image depicted a young person aged 16 or 17 years. Advice should be sought from Legal Aid ACT, Women's Legal Centre ACT, Youth Coalition, and the ACT Human Rights Commissioner for Children and Young People on appropriate examples.

5. Request that ACT Government provide funding for training resources to be developed for young people, their parents or carers, schools, and others who work with young people, to assist them in understanding the law relating to consenting to share intimate images by mobile phone or online, and the importance of communicating withdrawal of consent to possess images and the impact this may have in future. Training resources should be developed by community sector organisations who understand the needs of each of these groups within the community, and are able to develop resources that can be delivered in a way that is easily accessible and interesting to the intended audience.

6. Request that ACT Government provide funding for training and education resources for police and courts on when an image depicting a 16 or 17 year old, and shared with a person more than two years older than the young person, should be classed as an intimate image under s72D and when it should be considered child exploitation material under s65(1). Training resources should be developed by community sector organisations who understand the needs and behaviour of young people, and are able to develop resources that can be delivered in a way that is easily accessible and interesting to police and the courts.

7. Request that ACT Government provide funding for training resources appropriate to younger people of high school age, young people who may or may not be attending university, older people aged 60 years or more, and for the Canberra community in general, to assist them in understanding the new definition of consent. Training resources should be developed by community sector organisations who understand the needs of each of these groups within the community, and are able to develop resources that can be delivered in a way that is easily accessible and interesting to the intended audience.

CANBERRA

ACT LGBTIQ Ministerial Advisory Council

23 March 2018

Ms Caroline le Couteur MLA
The Office of Caroline Le Couteur MLA
ACT Legislative Assembly
196 London Circuit
CANBERRA ACT 2601

Dear Ms Caroline le Couteur MLA Caroline

The ACT LGBTIQ Ministerial Advisory Council (the Council) is a body appointed by the Chief Minister to advise on issues relating to lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) issues in the ACT. The Council works with the Office of LGBTIQ Affairs in the Chief Minister, Treasury and Economic Development Directorate to provide a whole-of-Government support to policies and programs relating to LGBTIQ people in the ACT.

The Council welcomes the opportunity to respond to the Exposure Draft of the *Crimes (Consent) Amendment Bill 2018.* We commend your efforts to further the recommendations of the Australian law Reform Commission's 2010 Report, *"Family Violence, A National Legal Response".* Principally, the Council agrees with the proposal to define the meaning of consent in the *Crimes Act 1900* (ACT) to include an affirmative definition of consent. While often conceived of in heteronormative terms, sexual violence happens within, and towards, our communities and action that is taken to clarify the legal meanings of consent affect LGBTIQ communities too.

Council recommends expanding on the definition of consent and including a definition of 'proper medical purpose' within s 50. Council also recommends further consideration of the negation of consent where there is a mistaken belief as to the identity of the other person and the issues this raises around disclosure for trans and gender diverse individuals.

Informed consent

Our first recommendation focuses on the issue of consent as it relates to medical contexts. In a medical context, actions performed without consent may be more difficult to recognise as sexual assault given the institutional power of the medical profession and the power dynamics between doctor and patient. We believe these acts, if performed without medical need and informed consent, should amount to sexual assault. Council is particularly concerned about the risks to, and treatment of, intersex people.[1] Intersex

[1] The United Nations Free&Equal fact sheet (2015) defines intersex as: Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies. Intersex is an umbrella term used to describe a wide range of natural bodily variations. In some cases, intersex traits are visible at birth

people are vulnerable to unwanted medical attention, examination and 'treatments' at the hands of individual medical practitioners as well as the institutions that support them. Often out of curiosity on behalf of medical practitioners and hospitals, people with intersex variations may face excessive medical examinations and photography of their sexual organs.

Unnecessary and non-consensual medical practices negate the human rights of intersex people, including their bodily integrity and physical autonomy. The *Human Rights Act 2004* (ACT) recognises protection from torture and cruel, inhuman or degrading treatment and states that 'no-one may be subjected to medical or scientific experimentation or treatment without his or her free consent'.[2] This reflects the recognition of the importance of consent in relation to medical treatment in the ACT.

The Darlington Statement is a community consensus statement from intersex advocates around Australia and New Zealand published in March 2017. The Darlington Statement calls for:

> '...the immediate prohibition as a criminal act of deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children without personal consent. We call for freely-given and fully informed consent by individuals, with individuals and families having mandatory independent access to funded counselling and peer support'.[3]

The definition of sexual intercourse in s 50 of the Crimes Act recognises that actions carried out for a 'proper medical purpose' are not considered to be sexual intercourse and therefore not covered by the definition of sexual assault.[4] However, the term 'proper medical purpose' is not defined in the Act. As it is the medical profession who determines what is medically necessary, which practices are medically necessary and which are not can be unclear, especially to the patient.

Council recommends that consent in s 67 be defined as 'free, voluntary and informed'. This conception of 'informed' should go beyond the necessity to disclose the material risks of a proposed treatment, where failure to do so has already been held to constitute medical negligence,[5] but should also include an understanding of the acts to be undertaken in the examination or treatment itself. The term 'proper medical purpose' should be clearly defined as medical care which involves informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.

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while in others, they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all.

[2] *Human Rights Act 2004* (ACT) s 10.

[3] Black, Bond, Briffa et al, Darlington Statement (2017) 7.

[4] Council notes that the current definition of s67 includes subpart (h), which negates consent 'by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person'. However, this subpart will not apply if the acts are not considered to be sexual intercourse in the first place.

[5] *Rogers v Whitaker* (1992) 175 CLR 479, 489-490.

Trans disclosure

Our second recommendation is to further consider s 67(f), where consent is negated where there is a mistaken belief as to the identity of the other person. This raises issues around disclosure for trans and gender diverse individuals.

Case law in the United Kingdom has shown that mistaken identity provisions have been used to prosecute transgender people for sexual assault in situations which would otherwise have been consensual.[6] That these cases were successful reflects that this kind of exception could support perceptions that transgender people are not 'real men' or 'real women', that someone's biology is determinative of their 'true identity' and therefore there is something inherently deceptive about trans people.

While these cases have at least not yet arisen in Australia, we stress the importance of considering the impact this provision could have on trans and gender diverse individuals.

Should you wish to discuss this submission in more detail, you are welcome to contact the Council through the Office of LGBTIQ Affairs via lgbtiqcouncil@act.gov.au. The Council would appreciate the opportunity to be involved in any further action regarding this proposed legislation.

Sincerely

Anne-Marie Delahunt
Chair
ACT LGBTIQ Ministerial Advisory Council

[6] *R v McNally* [2013] EWCA Crim 1051; *R v Barker* [2012] Unreported.

Women with Disabilities ACT
ABN: 74 908 530 982

23 March 2018

The Office of Caroline Le Couteur MLA
ACT Legislative Assembly
196 London Circuit, Canberra ACT
E: lecouteur@parliament.act.gov.au

Dear Caroline,

Thank you for the discussion paper and draft legislation on **Consent in Sexual Violence Laws**, *A proposal to reform the ACT's Criminal Law to adopt a new definition of consent in the Crimes Act 1900 (ACT).*

WWDACT welcomes this initiative because we believe it will lead to dispelling the myths which prevail in the ACT judicial system assessment of and attitude to sexual violence and assault of women with disabilities. Women with disabilities are disproportionately affected by these stereotypes, such that their reporting of rape and sexual assault is minimal compared to the reporting rates of non-disabled women. Reporting of incidents is extremely low because of fear of not being believed, fear of having support removed, feeling guilty and at fault, fear of retaliation, feelings of shame and embarrassment, and of being used to abuse[1].

Yet research shows that the incidence of sexual assault of women with disabilities is 4-10 times that of non-disabled women with 90% of women with intellectual disabilities having been subjected to abuse. The incidence of unwanted sex is also at a disproportionately high rate[2]. Therefore we support any proposal which would improve the ability of the justice system to address the high rates of sexual violence against women with disabilities.

[1] Plummer, S., & Findley, P. (2011). Women With Disabilities' Experience With Physical and Sexual Abuse. *Trauma, Violence, & Abuse*, *13*(1), 15-29. http://dx.doi.org/10.1177/1524838011426014

[2] Fact Sheet: Violence against Women with Disabilities (prepared by Carolyn Frohmader, Women With Disabilities Australia (WWDA), Australian Civil Soceity Delegation to the 53rd Session of the Committee Against Torture, Geneva, November 2014, http://www.pwd.org.au/documents/temp/FS_Violence_WWD's.pdf

The very nature of disability means that women with disabilities will always experience a power imbalance in relation to the perpetrator, and we contend that this power imbalance extends into the justice system itself if they make a disclosure. Currently, the focus in trials is on competing evidence, and this immediately entrenches the disadvantage that a woman with disabilities experiences.

From a human rights perspective, these characteristics of the obliteration of the rights of women with disabilities in cases of sexual abuse, are acknowledged in the Convention on the Rights of Persons with Disabilities (CRPD) Article 16, ***Freedom from Violence, Exploitation and Abuse***. Implementing this article requires States Parties to take *all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home from all forms of exploitation, violence and abuse, including their gender-based aspects.* We believe that this is an argument for making changes to legislation which will address the power imbalance and take the emphasis away from the 'competing evidence' model currently in the courts. WWDACT believes your discussion paper mirrors all of these aspects of what is required for the legal protection of women with disabilities as outlined in Article 16. WWDACT believes that the changes to the law proposed would lead to better outcomes for women with disabilities in protecting them from sexual exploitation and abuse.

WWDACT further believes that the implementation of Article 12 (***Equal Recognition before the Law***) of the CRPD also underpins this proposed change to legislation. Article 12 relies on the premise that people with disabilities must be assumed to have full legal capacity, and that this further requires a change of attitude and eradication of the myths towards women with disabilities and sexual violence which prevails. Development of court systems which enable Supported Decision Making Volunteers (SDMV)to work with women with disabilities in the justice system will address the fear that there will be an increase in false allegations being made in the knowledge that the woman is being supported by a trained SDM volunteer.

In the matter of community education about any changes, this would involve reinforcement in sex education and education relating to consent to contraception for women and girls with disabilities. This sort of education is already available through SHFPACT. Education of parents, families and support service provider organisations, is ongoing and would be unchanged by the introduction of this type of legislation. Education of judiciary to dispel the myths surrounding women with disabilities will be necessary but this should be part of the Disability Justice Strategy currently being developed in the Justice and Community Safety Directorate.

WWDACT believes that a statutory definition of consent based on the concept of free and voluntary agreement, phrased in Easy English wording, is needed as a basis for change to the law.

WWDACT also resubmits our contribution to the 2017 ACT Greens Discussion paper on Invasions of Privacy and Technology-Facilitated Abuse and draws your attention again to the high incidence of image based abuse with 50% of people with disabilities reporting such incidents compared to 20% of non-disabled people. Changes to the laws surrounding consent accompanied by education appropriate for women with cognitive impairment is welcome.

In conclusion, WWDACT wholeheartedly supports the *proposal to reform the ACT's Criminal Law to adopt a new definition of consent in the Crimes Act 1900 (ACT) (**Consent in Sexual Violence Laws)*. Your discussion paper addresses these issues through a sociological, criminological, and gendered lens. WWDACT asks that this perspective be enhanced with the addition of a disability lens, and that this further justifies the need for change.

Yours sincerely

Sue Salthouse
Chair WWDACT

Women With Disabilities ACT acknowledges and pays respect to the Ngunnawal peoples, the traditional custodians of the ACT Region, on whose land our office is located. We pay our respects their Elders past, present and emerging. We acknowledge their spiritual, social, historical and ongoing connection to these lands and the contribution they make to the life of the Australian Capital Territory.

SUBMISSION ON THE CRIMES (CONSENT) AMENDMENT BILL 2018

MARCH 2018

WWW.YOUTHCOALITION.NET

The Youth Coalition of the ACT acknowledges the Ngunnawal people as the traditional owners and continuing custodians of the lands of the ACT and we pay our respects to the Elders, families and ancestors.

We acknowledge that the effect of forced removal of Indigenous children from their families as well as past racist policies and actions continues today.

We acknowledge that the Indigenous people hold distinctive rights as the original people of modern day Australia including the right to a distinct status and culture, self-determination and land. The Youth Coalition of the ACT celebrates Indigenous cultures and the invaluable contribution they make to our community.

Submission on the Crimes (Consent) Amendment Bill 2018
© Youth Coalition of the ACT
March 2018
Prepared by Youth Coalition staff members Kieran Chowdry, Hannah Watts, and Dr Justin Barker.

The Youth Coalition would like to acknowledge the input of ACT Council of Social Services, Women's Centre for Health Matters, and Legal Aid ACT to this submission.

The Youth Coalition receives funding for peak activity (policy development, sector development, advocacy & representation) from the ACT Government - Community Services Directorate.

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Table of Contents

1. INTRODUCTION

Section 1 of this submission provides contextual information about the Youth Coalition of the ACT ('Youth Coalition'), young people, and the process for developing and format of this submission.

1.1 About the Youth Coalition

The Youth Coalition is the peak youth affairs body in the ACT. As a membership based organisation, the Youth Coalition is responsible for representing and promoting the interests and wellbeing of young people aged 12 to 25 years and those who work with them.

The general activities of the Youth Coalition fall under four themes: policy; sector development; advocacy and representation; and, projects that respond to ongoing and current issues.

A key role of the Youth Coalition is the development and analysis of ACT social policy and program decisions that affect young people and youth services. The Youth Coalition facilitates the development of strong linkages and promotes collaboration between the community, government and private sectors to achieve better outcomes for young people in the ACT.

1.2 About Young People in the ACT

Young people are a distinct population group aged between 12 and 25 years. Although diverse, as a group young people frequently experience systemic disadvantage, discrimination and unequal access to resources. This means that young people who experience other forms of disadvantage, such as poverty or low educational attainment, are amongst the most vulnerable members of the ACT community.

Canberra has one of the youngest populations of any Australian State or Territory, with approximately 78,000 people aged between 10-24 years residing in the ACT, representing more than 20% of Canberra's population. With over one fifth of Canberra's population comprised of young people, it is important that the wellbeing of young people be regarded as an indicator of the ACT's future population health and development.

1.3 About the ACT Youth Sector

The youth sector in the ACT is both diverse and unique in its composition and delivery of services to young people aged between 12 and 25, and their families. A range of professionals work within the youth sector, including generalist youth workers, specialist youth workers, health workers, mental health workers, alcohol and other drug workers, social workers, counsellors, statutory workers, nurses and doctors, educators, psychologists, family workers, lawyers, volunteers, and management staff.

The youth sector uses a range of service delivery models to support young people. These include centre-based, outreach, street outreach, in-reach, case management, case work, residential, crisis support, group-based work, recreation-based activities, and education.

1.4 About the Submission

The Youth Coalition welcomes the opportunity to provide feedback to the office of Caroline Le Couteur on the proposed Crimes (Consent) Amendment Bill 2018 ('the Amendment Bill').

This submission is based on:

- Ongoing collaborative work with ACT partner agencies, in particular ACTCOSS, Women's Centre for Health Matter, and Legal Aid ACT gave specific feedback to this submission;
- Previous Youth Coalition research and submissions to the ACT Government;
- Current and topical research on youth affairs, including research specifically related to ACT and Commonwealth consent legislation.

This submission provides a number of recommendations regarding the proposed legislation changes. The Youth Coalition would be happy to provide further information on the proposed legislation, and our recommendations, if required.

2. SUMMARY OF RECOMMENDATIONS

Section 2 provides a summary of the recommendations for this Submission. It is vital that these recommendations be referred to in the context of the broader Submission.

The Youth Coalition's recommendations regarding the Amendment Bill are:

Recommendation 1: Proceed with introducing a definition of consent as written in section 67(1) of the Crimes (Consent) Amendment Bill 2018.

Recommendation 2: Provide examples in the explanatory statement, attached to section 67(1) of the Crimes (Consent) Amendment Bill 2018, of when consent is present, not present, revoked, and steps that can be taken to understand whether it is present.

Recommendation 3: ACT Government to fund a program which educates young people about the new definition of consent.

Recommendation 4: ACT Government to fund an education initiative in all ACT schools which highlights the broader culture of sexual violence in the ACT and teaches young people about respectful relationships, as well as the development of resources for youth services and programs.

Recommendation 5: ACT Government to request changes to Commonwealth legislation so that young people, aged 16-17 years, cannot be charged with distributing/possessing child exploitation material for consensually sharing intimate images via mobile phone/internet, bringing federal law into line the States and Territories.

Recommendation 6: Proceed with extending the "2-year rule" defence, as written in sections 64(1), 64(3), 65(1), 66(1) and 66(2) of the Crimes (Consent) Amendment Bill 2018.

Recommendation 7: Include, in the judgement of cases which concern the consensual distribution/possession of intimate imagery and young people, an independent third-party mediator such as the Public Advocate or the ACT Children and Young People's Commissioner.

Recommendation 8: Provide examples in the explanatory statement, attached to sections: 64(1), 64(3), 65(1), 66(1) and 66(2) of the Crimes (Consent) Amendment Bill 2018, of when consent is present, withdrawn and the steps required to be taken upon withdrawal of consent.

Recommendation 9: ACT Government to fund an education initiative in all ACT schools to inform young people of what constitutes the consensual distribution of intimate imagery, when consent is present, withdrawn and the steps required to be taken upon withdrawal of consent, as well as the development of resources for youth services and programs, parents and the community.

3. CONSENT AND SEXUAL INTERCOURSE IN THE ACT

3.1 Introduction

Defendants' presumption of innocence[1] and the onus that is placed on the state to prove guilt beyond a reasonable doubt in order to record a guilty verdict[2] are fundamental to criminal prosecutions in both Australia and the Australian Capital Territory (ACT), including in cases of alleged sexual assaults. These standards are pillars of the criminal justice system and are key to minimising the likelihood that individuals are incorrectly and unjustly penalised. It is therefore important that neither the presumption of innocence nor the state's burden of proof is undermined when proposing any amendments to legislation. At the same time, it is vital that the ACT introduces an objective definition of consent, not only to bring it in line with every other state/territory in Australia, but to be able to better understand what consent means, when it is present, and when it is not. It will also help, from a legal perspective, determine whether a sexual assault has taken place.

3.2 The issue with 'consent' legislation in the ACT

The presence or absence of consent is the central focus in cases of alleged sexual assault, but the lack of an objective, legal definition of consent in the ACT's *Criminal Code 2002* has been problematic for prosecuting sexual assault. Currently, the ACT defines sexual intercourse without consent as sex *'without the consent of the other person and who is reckless as to whether that person consents'*;[3] however, it fails to include an affirmative definition of what 'consent' entails, instead, listing factors which negate consent (e.g. violence, intoxication, etc.).[4] This is an issue for victims of sexual assault as the occurrence of negating factors in a given scenario becomes largely a matter of the defendant's word against their own. Furthermore, the presence of such factors may not explicitly vitiate consent, therefore making it harder to prosecute perpetrators of sexual violence.

In jurisdictions without an affirmative definition of consent, such as the ACT, the prosecution of sexual assault predominantly rests upon one issue: the mental state of the accused. As sexual assault falls under the criminal code, and *mens rea*[5] is typically required in order to find criminal responsibility, the onus is on the prosecution to prove that the accused had knowledge of non-consent. Furthermore, as held in *DPP v Morgan*[6] - a case which is recognised in common law jurisdictions in Australia - a mistaken but honest belief that the complainant consented, however unreasonable, is enough to negate the mental element and can be used as a defence to sexual assault ('the *Morgan* defence'). Consequently, sexual assault becomes less a matter of whether the complainant believes that they were sexually assaulted, but rather if the defendant genuinely believed that consent was present.

This highlights several egregious problems with the ACT's current consent legislation. Firstly, with no definition, consent has become highly subjective and open to varying

[1] see s22 *Human Rights Act 2004* (ACT)
[2] see s52 *Criminal Code 2002* (ACT)
[3] see s54 *Crimes Act 1990* (ACT)
[4] see s65 *Crimes Act 199*0 (ACT)
[5] The intention or knowledge of wrongdoing that constitutes part of a crime
[6] DPP v Morgan [1976] AC

interpretations. This has seen to be particularly difficult for jury trials due to jurors' inability to comprehend and form a unanimous understanding of its meaning. Secondly, in having to prove that the accused had knowledge of or intention to act with non-consent (without physical evidence or witnesses), an examination of whether the accused actively sought to obtain consent is neglected in favour of whether the complainant demonstrated non-consent. While juries are informed that an absence of verbal or physical resistance does not constitute consent - there is no 'implied consent'[7] - legislation does not consider whether positive steps were taken to obtain consent.

Although not intended, due to the way that the ACT's consent laws are currently written, sexual assault can only truly be proven if the claimant can demonstrate non-consent. This reinforces an archaic view of what constitutes sexual assault: an act of forcible sexual intercourse where the onus is upon the claimant to show that they resisted advances. It also undermines the affirmative model of consent - a positive agreement to engage in sexual activity is made between parties - which is widely supported by advocates.[8] Ultimately, legislation needs to: firstly, abandon its preoccupation with a singular paradigm of sexual assault victim which 'functions to disqualify many complainants' accounts of their sexual assault experiences' and 'works to undermine the credibility of those women who are seen to deviate too far from stereotypical notions of "authentic" victims, and from what are assumed to be "reasonable" victim responses'.[9] Secondly, it needs to shift its attention from complainants' displays of non-consent to the accused's understanding of and the steps taken to actively seek, clarify or confirm consent.

3.3 Defining 'consent' in ACT's Crimes Act

Recommendation 1: Proceed with introducing a definition of consent as written in section 67(1) of the Crimes (Consent) Amendment Bill 2018.

The Youth Coalition of the ACT ('Youth Coalition') recommends introducing an objective, affirmative definition of consent as it has been defined in the exposure draft of the *Crimes (Consent) Amendment Bill 2018.* Introducing the 'free and voluntary agreement' component in the definition of consent in part (a) brings the ACT in line with other states/territories and countries' definitions of consent.[10] More importantly, the terminology in Part B of the Bill places more responsibility on the person pursuing sexual activity to ensure that he or she:
(i) 'knows' that the other person 'freely and voluntarily' gave consent; or
(ii) 'is satisfied on reasonable grounds' that the other person 'freely and voluntarily' gave consent

The inclusion of this affirmative definition is significant as it firstly assists juries in establishing an informed and unanimous understanding of what constitutes consent; and

[7] see s72 *Evidence Act 1991* (ACT)
[8] see e.g. Anderson, M.J (2005), 'Negotiating Consent', *Southern California Law Review*, 78(6)
[9] Randall, M (2010), 'Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming', *Canadian Journal of Women and the Law,* 22(2):398
[10] New Zealand, England, Canada and all Australian states/territories, with the exception of the ACT, currently have an affirmative definition of consent which defines it as either a 'free agreement' or an agreement entered in to 'freely and voluntarily'.

secondly, it reframes the perceptions of consent in cases of sexual intercourse to focus on the positive steps taken to obtain consent rather than those taken to display non-consent.

3.4 Inclusion of explanatory statement

Recommendation 2: Provide examples in the explanatory statement, attached to section 67(1) of the Crimes (Consent) Amendment Bill 2018, of when consent is present, not present, revoked, and steps that can be taken to understand whether it is present.

To supplement the *Crimes (Consent) Amendment Bill 2018*, The Youth Coalition supports the attachment of an explanatory note that clarifies the purpose of the bill: to place greater consideration on the steps taken by a defendant to acquire 'free and voluntary' consent rather than the actions taken by the complainant to communicate non-consent. To reinforce its purpose, the Youth Coalition recommends the inclusion of anecdotal examples of when consent is present, not present, revoked, and steps that can be taken to understand whether it is in fact present.

3.5 Ongoing problems with the legislation

Recommendation 3: ACT Government to fund a program which educates young people about the new definition of consent.

Recommendation 4: ACT Government to fund an education initiative in all ACT schools which highlights the broader culture of sexual violence in the ACT and teaches young people about respectful relationships, as well as the development of resources for youth services and programs.

Once again, the proposed amendment represents a positive change to the legal treatment of consent in theory; however, as evidenced in other states, the introduction of more objective wording has not completely resolved the issue of prosecuting sexual assault. Such issues are highlighted by the infamous conviction (2013) and subsequent acquittal (2017) of Luke Lazarus in NSW[11] - a state which in 2007 introduced a definition of consent similar to what being proposed in the ACT. In reasoning her judgement, Judge Tupman held that the accused had reason to believe that the complainant was consenting despite Tupman not accepting *'that the complainant, by her actions, herself meant to consent to sexual intercourse and in her own mind was not consenting to sexual intercourse.*[12]
Tupman accepted that there were 'reasonable grounds...for the accused to have formed the belief…the complainant was consenting to what was occurring'. The decision was reached based on an assessment that, among others things, '[the complainant] did not say "stop" or "no" [or] take any physical action to move away from the intercourse or attempted intercourse'. This calls into question the extent to which courts do not consider 'implied consent' and how victims can be rendered paralyzed during an assault[13]. Furthermore, at no point in Tupman's analysis of the acquittal appeal was there any discussion of the steps

[11] Lazarus v R [2016] NSWCCA 52; R v Lazarus [2017] NSWCCA 279
[12] R v Lazarus [2017] NSWCCA 279, 72 (Tupman J)
[13] Russo, F (2017), 'Sexual Assault May Trigger Involuntary Paralysis', *Scientific American*, <https://www.scientificamerican.com/article/sexual-assault-may-trigger-involuntary-paralysis/>

taken by the accused to actively obtain consent. This judgement, and its reasoning was reached in spite of the amendments to NSW's consent legislation.

By continuing to emphasise non-consent as opposed to consent, this decision failed to accord sufficient weight to the communicative model of consent and hold those who display predatory sexual behaviour responsible for their violation of another's sexual autonomy. Furthermore, Vandervort believes that 'when judges allow [those] accused to use the defence of mistaken belief in consent, they are actually permitting social myths about women's sexual tastes to be treated quite improperly as evidence of consent'[14]. While an argument can be made that, in this instance, the accused was not guilty of rape, there is overwhelming evidence to suggest that he exerted strong emotional and physical pressure - into the realm of coercion - over the complainant in order to penetrate her.

While the Youth Coalition strongly supports the Amendment Bill and what it aims to achieve, it recognises that the legislation will not substantially change the way in which criminal matters, including sexual assault, are prosecuted in the court of law. Further measures are required to supplement the proposed amendment legislation that can create large-scale change to the way in which sexual assault is treated both in the ACT and Australia. More needs to done to combat a culture that condones sexualised aggression and violence against women[15].

The Youth Coalition recommends that the ACT Government fund an education initiative and resources, which teach about respectful relationships, and highlights the problem of a broader culture of sexual violence. This education initiative should be delivered in all ACT schools, and resources be made available for youth services and programs, as well as parents/carers and the broader community.

[14] Vandervort, L (1987), 'Mistake of Law and Sexual Assault: Consent and Mens Rea', *Canadian Journal of Women and the Law,* 2(2):233
[15] Hildebrand, M.M & Najdowski, C.J (2014), 'The potential impact of rape culture on juror decision making: Implications for wrongful acquittals in sexual assault trials', *Albany Law Review*, 78:1059

4. DEFENCES TO CHILD SEX OFFENCES IN THE ACT

4.1 Introduction

In the digital age, where the average child receives their first phone at 11,[16] the way in which children and young people interact has completely transformed. With the increased power and ease of use of smart technologies, including phones, they are increasingly being utilised for means other than verbal and written communication. They are now frequently being used as means of engaging in or pursuing sexual activity. According to the 2017 Australian eSafety Youth Digital Participation Survey, of a sample size of 1,424 teens (aged 14-17), nearly 1 in 3 young people reported having some experience with sexting in the prior year. This included sending, being asked and asking, sharing or showing nude or nearly nude images or videos.[17]

Naturally, when it comes to young people an intimate imagery, there are serious concerns over safety and privacy due to the permanence of digital data. So while the legislation needs to criminalise predatory and exploitative behaviours, it need not also criminalise the consensual, normative behaviours of young people.

4.2 The issue with intimate image distribution and young people legislation in the ACT

Recommendation 5: ACT Government to request changes to Commonwealth legislation so that young people, aged 16-17 years, cannot be charged with distributing/possessing child exploitation material for consensually sharing intimate images via mobile phone/internet, bringing federal law into line the States and Territories.

In 2017, when discussing the issue of 'intimate image abuse', Jeremy Hanson MLA explicitly stated that young people should not face criminal prosecution for engaging in the consensual transmission of intimate imagery with other people of their own age. However, not only does this remain illegal at a Commonwealth level - it is a federal offence for those under 18 to use the internet or mobile phone to share intimate images with another - for a person in the ACT aged under 18, such intimate image sharing can be classed as "child pornography", "child exploitation" or an "indecent act", even where the images were distributed consensually. As a consequence, young people who engage in consensual image sharing with other young people, are at risk of criminal prosecution.

4.3 Extending the '2-year rule' defence for child sex offences

Recommendation 6: Proceed with extending the "2-year rule" defence, as written in sections 64(1), 64(3), 65(1), 66(1) and 66(2) of the Crimes (Consent) Amendment Bill 2018.

The Youth Coalition recommends extending the '2-year rule' defence to child sex offences across:

[16] The Guardian (2013), 'Nearly one in 10 children gets first mobile phone by age five, says study', <https://www.theguardian.com/money/2013/aug/23/children-first-mobile-age-five/>

[17] Office of the eSafety Commissioner (2017), 'Young people and sexting - attitudes and behaviours', OeSC, Canberra

- s64(1): Using child for production of child exploitation material etc
- s65(1): Possessing child exploitation material
- s66(1): Using electronic means to suggest a young person commit/watch a sexual act
- s66(2): Using electronic means to send/make available pornography to a young person

4.4 Further issues with intimate image distribution and young people legislation in the ACT

Recommendation 7: Include, in the judgement of cases which concern the consensual distribution /possession of intimate imagery and young people, an independent third-party mediator such as the Public Advocate or the ACT Children and Young People's Commissioner.

Recommendation 8: Provide examples in the explanatory statement, attached to sections: 64(1), 64(3), 65(1), 66(1) and 66(2) of the Crimes (Consent) Amendment Bill 2018, of when consent is present, withdrawn and the steps required to be taken upon withdrawal of consent.

Recommendation 9: ACT Government to fund an education initiative in all ACT schools to inform young people of what constitutes the consensual distribution of intimate imagery, when consent is present, withdrawn and the steps required to be taken upon withdrawal of consent, as well as the development of resources for youth services and programs, parents and the community.

Prescriptive nature of the '2-year rule' defence

Consider the following scenario:

A 17-year-old and a 20-year-old are in engaged in an intimate, consensual relationship. The 17-year-old consensually sends a sexually explicit image of themselves to the 20-year-old using a mobile phone. Despite the proposed amendments, the 20-year-old is now in violation of multiple sections of the Criminal Act, including:

- 64(1) and (3) – offence because under 18 and other person is not within 2 years
- 65(1) – offence because under 18 and other person is not within 2 years
- 66 – offence because under 18 and other person is not within 2 years

The Youth Coalition recommends extending the '2-year rule' across the aforementioned child sex offences; however, it has some concerns that its inclusion will unfairly criminalise acts which fall just outside the '2-year' window (i.e. the differences of ages between the young person and adult is 3 years). As stated in its submission on the *Crimes (Intimate Image Abuse) Amendment Bill 2017* (ACT), the Youth Coalition also recommends that an independent third party, such as the Public Advocate or Children and Young People's Commissioner, be included in the resolution and judgement of such scenarios concerning the consensual distribution or possession of intimate imagery.

Consent and intimate imagery

Like with other forms of sexual activity, the sharing of intimate imagery is subject to the laws of consent. Consent for someone to possess an intimate image of another can be withdrawn at any point. However, due to the permanence of digital data, it is often difficult to ensure with complete certainty that all trace of intimate images are deleted. As such, the Youth Coalition recommends that the explanatory statement attached to the Crimes (Consent) Amendment Bill 2018 should also include a step-by-step guide of what do when consent is revoked for an intimate image that was previously consensually shared.

The Youth Coalition also recommends the ACT Government fund an education program to be delivered in all schools, which informs young people about the intimate image distribution laws and the permanence of online imagery. Resources should also be developed and made available to be available to all youth programs and services, parents, and the broader community.

ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

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Dear Ms Le Couteur

Exposure draft: Crimes (Consent) Amendment Bill 2018

Thank you for seeking the Human Rights Commission's input on the exposure draft of the Crimes (Consent) Amendment Bill 2018, which is seeking to introduce amendments to the *Crimes Act 1900* to:

(i) apply the 2-year rule as an exception to young people engaging in consensual sexual activity more consistently across the Crimes Act; and

(ii) create an affirmative definition of consent for sexual and intimate image abuse offences.

Our analysis of the proposed measures has been aided by the human rights assessment contained in the Explanatory Statement to the bill. We commend the provision of human rights justificatory material at the exposure stage of the bill's development.

Exceptions to child pornography offences

The exposure bill proposes to insert a similar-age consent exception to existing child pornography offences in sections 64, 65 and 66[1] of the *Crimes Act 1900*. Specifically, a person will not have committed an offence under these provisions if there is no more than 2 years difference in age between the person and the young person, and the young person consented to the act constituting the offence.

The Commission is pleased to see these amendments as they address our long-standing concerns that young people who engage in consensual, and non-predatory and non-exploitative behaviour were at risk of inappropriate criminalisation in the ACT. In our view, these changes achieve the right balance between children's rights to freedom of expression in s 16 of the *Human Rights Act 2004* (HR Act), and to protection on the basis of being a child (s 11(2)). It ensures that vulnerable children and young people are protected from predatory sexual exploitation and abuse, while also ensuring that young people are afforded autonomy in limited circumstances without the risk of criminal prosecution and the adverse consequences of incurring a criminal conviction.

[1] We note that new s 66A(1)(e) in item 5 of the exposure bill should refer to s 66(3) of the *Crimes Act 1900*, and not s 66(2).

It is also welcome that the bill clarifies that, for the offences against ss 64 and 65, the defendant bears only an evidential burden in relation to the relevant matters. As we have previously noted, an evidential burden is more likely to be considered a proportionate limitation on the right to be presumed innocent (s 22(2)), in accordance with the reasonable limits test in s 28 of the HR Act.

However, it is not apparent why the bill omits to expressly extend this clarification to the offences in s 66 of the Crimes Act, and it is not clear if the intention is to apply a legal burden instead. Placing a legal burden on the defendant in these circumstances gives rise to a serious risk that a person may be convicted, not because he/she committed the criminal act, but because they were unable to overcome the burden placed upon them to show they did not.

In our view, absent a clear justification for treating the offences in s 66 differently to the other child pornography offences in ss 64 and 65, the bill should clarify that the defendant has an evidential burden for those matters as well. Consideration could also be given to aligning the similar-age consent defences (that impose a legal burden on the defendant) currently contained in the Crimes Act – including in s 55 (sexual intercourse with a young person) and s 61 (acts of indecency with young people) – with this approach to ensure greater consistency across the Crimes Act.

Definition of consent

The exposure bill proposes to define consent for the sexual offences listed in s 67(1) of the Crimes Act as follows:

(a) the person gives free and voluntary agreement; and

(b) the other person –

(i) knows the agreement was freely and voluntarily given (ie, subjective knowledge); or

(ii) is satisfied on reasonable grounds that the agreement was freely and voluntarily given (ie, objective knowledge).

A similar definition is also proposed for the offences in Part 3A of the Crimes Act, relating to the distribution of intimate images.

The Commission considers that the introduction of a statutory definition of consent in ACT law which reflects a 'communicative model' of consent is an important reform that has been long overdue. Notably, all Australian jurisdictions, with the exception of the ACT, have a legislative definition of consent, which give effect, in one form or another, to a communicative model of consent. Consistent with the human rights principles in the HR Act, the introduction of an appropriately defined communicative model of consent will provide greater protection of a person's freedom and autonomy to make decisions about engaging in sexual activity. In particular, the adoption of a statutory definition of consent, which requires examination of whether consent was free and voluntary taking into account all the relevant circumstances, including steps taken by the accused to ascertain the presence of consent, will help advance women's right to equal protection of the law without discrimination, given that sexual assault is predominantly a gendered crime.

While the Commission strongly supports the introduction of a statutory definition of consent that reflects a 'communicative model' of consent, we have some concerns about the provisions as currently drafted. Under the bill, the meaning of consent for the purposes of sexual and intimate image abuse offences is defined as requiring both (i) free and voluntary agreement by the person; and (ii) either subjective or objective knowledge by the other person that consent was present. The Explanatory Statement to the exposure bill states at page 2 that the objective knowledge requirement of the definition is 'modelled upon the "reasonable belief" construction of section 273.2 of the Criminal Code (Canada) R.S.C., 1985, c. C-46'. The 'reasonable belief' construction in the comparable Canadian legislation, however, is not included as part of the definition of consent, but is instead set out in a separate provision which addresses various matters where belief in consent is not a defence:

> **Where belief in consent not a defence**
>
> 273.2 It is not a defence to a [relevant] charge … that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> **…**
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

We are not aware of any comparable provision that incorporates the 'reasonable belief' requirement as part of the definition of consent. For example, the NSW *Crimes Act 1900* also defines consent to mean 'free and voluntary agreement' (s 61HA(2)), but sets out the 'reasonable belief' test in a separate provision dealing with knowledge about consent:

> **61HA Consent in relation to sexual assault offences**
>
> …
>
> (3) Knowledge about consent: A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:
>
> …
>
> (c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.
>
> For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:
>
> (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
>
> (e) not including any self-induced intoxication of the person.

Similarly, the Victorian *Crimes Act 1958* deals with the question of reasonable belief about the presence of consent in a separate section (see s 36A). We are concerned that the provisions as currently drafted are likely to result in ambiguity and uncertainty, as they appear to conflate two discrete issues: (i) consent by one person and (ii) the responsibility of the other person to take steps to ascertain consent exists.

In our view, it would be preferable to adopt an approach consistent with other jurisdictions, by setting out the meaning of consent ('free and voluntary agreement') separately to the objective fault test for belief about consent. The purpose of adopting an objective fault test is to ensure that the person has reasonable grounds for their belief about consent, and that the person seeking consent has the responsibility to take steps to ascertain consent exists. While an objective fault test is central to assessing whether consent was freely and voluntarily given, it is not clear how the relevant offences in the Crimes Act would operate if it were included within the definition of consent itself. Dealing with the definition of consent and knowledge about consent separately does not detract from the objective of promoting a communicative model of consent. The requirement that a person must have reasonable grounds for believing that the agreement was freely and voluntarily given sends a clear message that a person must be certain of consent. This is a step that necessarily involves communication with the other person.

Finally, it will be important to ensure that these reforms are accompanied by education initiatives about what is and is not acceptable behaviour, and that a person should take steps to ensure the other person is consenting of that behaviour.

If you have any questions or would like more detailed information on any of the issues raised in this submission, please do not hesitate to contact us on (02) 6205 2222.

Yours sincerely,




Dr Helen Watchirs OAM	Jodie Griffiths-Cook	Karen Toohey	Heidi Yates
President and Human Rights Commissioner	Public Advocate and Children and Young People Commissioner	Discrimination, Health Services, and Disability and Community Services Commissioner	Victims of Crime Commissioner

26 March 2018

YWCA CANBERRA

26 March 2018

Ms Caroline Le Couteur MLA
Member for Murrumbidgee
GPO Box 1020
Canberra ACT 2601

Dear Ms Le Couteur,

RE: Crimes (Consent) Amendment Bill 2018

Thank you for the opportunity for YWCA Canberra to respond to the ACT Greens' exposure draft of the *Crimes (Consent) Amendment Bill 2018* in relation to the definition of consent in sexual assault provisions of the *Crimes Act 1900* (ACT).

YWCA Canberra supports the inclusion of a positive definition of consent, based on the concept of free and voluntary agreement, in the *Crimes Act 1900* (ACT).

Our comments are primarily concerned with broader feminist research, legal reform and policy developments in the context of defining consent. In responding to the ACT Greens discussion paper on the proposed legislative changes, this submission focuses on three key issues. Firstly, the positive definition of consent defined as a free and voluntary agreement, secondly, how the consent provision may impact on diverse and vulnerable groups of women and finally, the importance of public education campaigns in supporting legislative changes.

This submission will also briefly address the ACT Greens' proposal to extend the "2-year rule" for child sex offences and clarify child pornography offences to prevent unintended criminalization of young people. This issue was more specifically addressed in YWCA Canberra's submission in response to the ACT Greens *Crimes (Invasions of Privacy) Amendment Bill 2017*.[1]

Overview of Recommendations

YWCA Canberra recommends that:

1. a statutory, positive definition of consent, based on the concept of a free and voluntary agreement should be enacted in the *Crimes Act 1900* (ACT).
2. legislative reform is accompanied by consultation with Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women and women with disability to determine the specialist support most appropriate to their needs.
3. the ACT government fund the implementation of Respectful Relationships education for all students from kindergarten to year 12.
4. fund and roll-out a public education campaign on the definition of consent and the meaning of the '2-year rule', targeted at young people.

[1] See YWCA Canberra, *Submission on the Invasion of Privacy and Technology-Facilitated Abuse*, 2017 at https://ywca-canberra.org.au/wp-content/uploads/2014/08/Submission-on-the-Invasion-of-Privacy-Technology-Facilitated-Abuse1.pdf

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Introduction

YWCA Canberra has a long history of working with both women and young people in Canberra — providing outreach services, youth engagement programs and housing services to women and their children.

YWCA Canberra delivers its own Respectful Relationships curriculum aimed at challenging gender stereotypes and educating young people on issues such as consent and power dynamics in intimate relationships. YWCA Canberra's practice and policy is focused on the importance of primary prevention to challenge gender stereotypes which enable and perpetuate violence against women.

It is widely held that sexual assault cases are one of the most complex, if not most difficult offences to successfully obtain convictions.[2] According to Larcombe, in Australia, low rates of sexual assault reporting (estimated at 1 in 5) coupled with the difficulties in legal prosecution have resulted in a national conviction rate of less than 5 per cent.[3] However, as is widely recognised, this may not reflect the actual occurrence of sexual assault, but instead, the fact that there are cultural and systemic factors which contribute to the failure of our institutions to 'adequately acknowledge, report and address sexual violence'.[4]

Positive definition of consent: free and voluntary agreement

During consultations for the Australian Law Reform Commission's (ALRC) *Family Violence — A National Legal Response* report, the majority of stakeholders expressed support for the introduction of a positive statutory definition of consent based on the concept of a 'free and voluntary agreement'.[5] This definition is also consistent with the Model Criminal Code.[6] At the time of the Inquiry, the ACT was the only jurisdiction without a statutory definition of consent based on the concepts of either 'free agreement', 'free and voluntary agreement' or 'consent freely and voluntarily given'.[7] As noted by the ALRC, these definitions align with the 2009 recommendation by the United Nations Division for the Advancement of Women, that legislation should define consent as 'unequivocal and voluntary agreement' and that onus should be on the defendant to prove that consent was given.[8]

A key factor raised in the ALRC report was that the introduction of a nationally consistent, positive definition of consent, would provide legal clarity and set a benchmark for appropriate sexual behaviour.[9] Further, it was considered by the Australian Institute of Family Studies as an important legislative step

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[2] Fileborn, B. (2011). *Sexual assault laws in Australia* (ACSSA Resource Sheets). Melbourne: Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, p. 1.
[3] Larcombe, W, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 145.
[4] Australian Women Against Violence Alliance (AWAVA), *Sexual Violence: Law Reform and Access to Justice*, Issues Paper, 17 May 2017, p. 16 (AWAVA, *Sexual Violence Issues Paper*).
[5] Australian Law Reform Commission, (2010), Chapter 25: Sexual Offences, *Family Violence – A National Legal Response*, p. 1149 (ALRC, *Family Violence Report*).
[6] Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 41–47 cited in ALRC, *Family Violence Report*, p. 1149.
[7] ALRC, *Family Violence Report*, p. 1148.
[8] ALRC, *Family Violence Report*, p. 1148; United Nations Department of Economic and Social Affairs Division for the Advancement of Women, Handbook for Legislation on Violence Against Women (2009), 27 cited in ALRC, *Family Violence Report*, p. 1148.
[9] ALRC, *Family Violence Report*, p. 1147; Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 33, 35 cited in ALRC, *Family Violence Report*, p. 1147.

because it would contribute to 'a shift in how the offence of sexual assault is understood' in Australian society.[10] The ALRC further noted that a definition of consent based on the concept of agreement 'properly reflects the two objectives of sexual offences law' — to protect the sexual autonomy and freedom of choice of two adults.[11]

The evidence presented by the ALRC aligns with feminist research on the experiences of survivors/victims of sexual assault in the criminal justice system — that 'the historical treatment of sexual offences, and particularly consent, is often said to epitomise the justice system's inherent bias against women'.[12] According to reports from the ACT Victims of Crime Coordinator, survivors/victims of sexual assault are frequently disappointed by the outcome of their cases due to no conviction or because they do not reach prosecution.[13] Furthermore, survivors/victims report feeling traumatised and judged by the experience of being in court and report that their transition from being a survivor/victim to a witness in their own sexual assault case was 'disempowering and confusing'.[14]

However, as noted by the ALRC, the Victorian Law Reform Commission and feminist research, decades of policy and legal reform to improve responses to the needs of sexual assault survivors/victims has resulted in very little change, both for conviction rates and for the experience of complainants.[15] Despite these shortcomings of the criminal justice system for survivors/victims of sexual assault, YWCA Canberra considers the ALRC's recommendation 25—4 for all jurisdictions to 'include a statutory definition of consent based on the concept of a free and voluntary agreement' should be enacted in the ACT.[16] This would enable the law in the ACT to reflect the benchmark of appropriate sexual behavior, meet the key objectives of sexual assault law and bring the ACT in line with all other states and territories on this issue.[17] For this reason, YWCA Canberra supports the inclusion of a positive definition of consent as outlined in the exposure draft of the *Crimes (Consent) Amendment Bill 2018.*

Sexual violence, consent and diverse groups of women

The majority of sexual assaults against women are perpetrated by male family members, former partners, friends or acquaintances.[18] However, despite the poor conviction rates for sexual assault overall, case law demonstrates that justice through the courts is extremely difficult for women who experience intimate partner or family violence, who have mental health difficulties or a criminal record.[19] Similarly, success in the criminal justice system is equally as difficult for cases where the victim did not sustain physical injuries, did not physically resist their attacker or where the victim was heavily

[10] Australian Institute of Family Studies, Submission FV 222, 2 July 2010 cited in ALRC, *Family Violence Report*, p. 1149.
[11] Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 43 cited in ALRC, *Family Violence Report*, p. 1150.
[12] AWAVA, *Sexual Violence Issues Paper*, p. 12.
[13] ACT Victims of Crime Coordinator (2009) *A rollercoaster ride: Victims of sexual assault – their experiences with and views about the criminal justice process in the ACT*, Canberra: ACT Government cited in K. Daly, (2011) *Conventional and innovative responses to sexual violence* (ACSSA Issues) Melbourne: Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, p. 7.
[14] ACT Victims of Crime Coordinator (2009) *A rollercoaster ride: Victims of sexual assault – their experiences with and views about the criminal justice process in the ACT*, Canberra: ACT Government cited in K. Daly, (2011) *Conventional and innovative responses to sexual violence* (ACSSA Issues) Melbourne: Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, p. 7.
[15] AWAVA, *Sexual Violence Issues Paper*, pp. 13-14; Victorian Law Reform Commission (2003), Sexual Offences: Interim Report, Section 4.4 cited in AWAVA, *Sexual Violence Issues Paper,* p. 13; ALRC, *Family Violence Report*, p. 1115 cited in AWAVA, *Sexual Violence Issues Paper*, p. 13.
[16] ALRC, *Family Violence Report*, p. 1150.
[17] See ALRC, *Family Violence Report*, pp. 1147, 1148; Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 33, 35, 43 cited in ALRC, *Family Violence Report*, pp. 1147, 1150.
[18] Larcombe, W, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 146.
[19] Larcombe, W, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, pp. 146-147.

intoxicated (but not unconscious).[20] As commentators have identified, the outcomes of sexual assault criminal prosecutions perpetuates the stereotype of the "real rape" which 'continues to disqualify the majority of women and many members of highly vulnerable groups who experience sexual assault from securing legal redress'.[21]

These statistics are extremely concerning in a context where one in four Australian women have experienced intimate partner violence.[22] Women at greater risk of family, domestic and/or sexual violence include those most vulnerable — women with disability, Aboriginal and Torres Strait Islander women, young women and women separating from partners.[23]

According to the Women's Services Network, many women (especially those experiencing family and/or intimate partner violence) do not recognise that they have experienced sexual assault or abuse, until a worker provides a definition for them.[24] However, understanding what sexual violence is and recognising their experience is only the first step for many survivors. Alternative pathways to justice for sexual assault victims/survivors are increasingly being explored by law reformers and scholars.[25] It is important for women most vulnerable to sexual assault to be consulted regarding how the justice system may be able to effectively address their needs.[26]

For this reason, YWCA Canberra recommends that any legislative reform is accompanied by consultation with Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women and women with disability to determine the specialist support most appropriate to their needs.

Legislative reform supported by educational public awareness campaigns

It is widely recognised that legal and policy reform alone is not enough to improve the experiences of sexual assault survivors/victims in the criminal justice system and/or increase conviction rates. For example, Daly has found that education campaigns targeted at challenging gender norms and violence against women are likely to be more successful at delivering outcomes.[27] Similarly, Larcombe has found that without targeted education or 'strict legislative guidance' (including for those included in juries) understandings of consent will continue to be viewed through 'the conventional legal construction of consent as mental permission'.[28]

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[20] Larcombe, W, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, pp. 146-147.
[21] Larcombe, W, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 147; S. Estrich, *Real Rape* (1987) Harvard University Press: Harvard cited in Larcombe, W, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 147.
[22] Australia's National Research Organisation for Women's Safety, Personal Safety Survey 2016: Fact Sheet, accessed at https://anrows.org.au/node/1462 on 22 March 2018.
[23] Note: There is limited data available regarding the prevalence of sexual assault in the ACT. See: ACT Victims of Crime Coordinator (2009) *A rollercoaster ride: Victims of sexual assault – their experiences with and views about the criminal justice process in the ACT*, Canberra: ACT Government, p. 5; Australian Institute of Health and Welfare (AIHW), (2018) *Family, domestic and sexual violence in Australia 2018*, Cat. no. FDV 2. Canberra: AIHW, pp. x, 31.
[24] WESNET – The Women's Services Network, *Submission FV 217*, 2010, cited in ALRC *Family Violence Report*, p. 1193.
[25] Larcombe, W, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 151.
[26] Larcombe, W, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 151.
[27] K. Daly, (2011) *Conventional and innovative responses to sexual violence* (ACSSA Issues) Melbourne: Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, cited in AWAVA, *Sexual Violence Issues Paper*, p. 14.
[28] Larcombe, W et al, 'I think its rape and I think he would be found guilty: Focus group perceptions of (un)reasonable belief in consent in rape law', *Social and Legal Studies* (2016) Vol 25(5), p. 614.

The need for consent education contextualised in broader educational programs challenging gender norms is also central to Our Watch's plan of action to eliminate violence against women.[29] Their research has found that gender inequality and unequal gender norms are key determinants of violence against women. However, their research has also found that violence is preventable through mutually reinforcing public education campaigns, programs, policy and legislative responses.[30] In their evidence paper on the inclusion of Respectful Relationships education in schools in Australia, Our Watch established that the education of children and young people in how to develop and maintain respectful relationships is essential to achieve the results of the *National Plan to Reduce Violence Against Women and their Children (2010-2022)*.[31] For this reason, YWCA Canberra recommends that to support the inclusion of a positive definition of consent in the *Crimes Act* 1900 (ACT), the ACT government should:

- fund the implementation of Respectful Relationships education for all students from kindergarten to year 12.

Young people, consent and the "2-year rule"

The issue of consent, particularly in relation to sexual conduct, for young people is a complex legal and social concept.[32] According to the ACT Human Rights Commission (ACT HRC), the issue of consent for children and young people 'will raise issues of maturity and capacity'.[33] However, as noted by the ACT HRC and other commentators, any legislation must strike the right balance between respecting young people's autonomy and protecting their vulnerability without criminalising age-appropriate sexual exploration with their peers.[34]

In YWCA Canberra's submission in response to the ACT Greens *Crimes (Invasions of Privacy) Amendment Bill 2017,* we supported the introduction of the "2-year rule" for young people engaging in consensual sexual activity to protect them from criminalisation.[35] However, in supporting this change, we also noted that young people need to be provided with holistic sexual education, such as the Respectful Relationships curriculum, which specifically address consent, boundaries in relationships, power dynamics and gender stereotypes.[36] Evidence for this stems from research which has found that young people are deeply persuaded by the gendered behaviours and norms of their peers and social enviornments and that relationships between two young people under the age of consent can also be unequal, non-consensual or coercive.[37]

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[29] Our Watch, Australia's National Research Organisation for Women's Safety and VicHealth (2015) *Change the Story: A shared framework for the primary prevention of violence against women and the children in Australia*, Our Watch: Melbourne.
[30] Our Watch, Australia's National Research Organisation for Women's Safety and VicHealth (2015) *Change the Story: A shared framework for the primary prevention of violence against women and the children in Australia*, Our Watch: Melbourne.
[31] Our Watch, (2015) *Evidence Paper: Respectful Relationships Education in Schools*, 2015, p. 29.
[32] ACT Human Rights Commission, Response to ACT Greens Crimes (Invasions of Privacy) Amendment Bill 2017, accessed at http://hrc.act.gov.au/wp-content/uploads/2017/06/Caroline-Le-Couteur-MLA-Crimes-Invasion-of-Privacy-Amendment-Bill_HRC-comments.pdf on 22 March 2018, p. 2.
[33] ACT Human Rights Commission, Response to ACT Greens Crimes (Invasions of Privacy) Amendment Bill 2017, accessed at http://hrc.act.gov.au/wp-content/uploads/2017/06/Caroline-Le-Couteur-MLA-Crimes-Invasion-of-Privacy-Amendment-Bill_HRC-comments.pdf on 22 March 2018, p. 2.
[34] ACT Human Rights Commission, Response to ACT Greens Crimes (Invasions of Privacy) Amendment Bill 2017, accessed at http://hrc.act.gov.au/wp-content/uploads/2017/06/Caroline-Le-Couteur-MLA-Crimes-Invasion-of-Privacy-Amendment-Bill_HRC-comments.pdf on 22 March 2018, p. 2; Australian Institute of Family Studies, *CFCA Resource Sheet: Age of consent laws*, July 2017, p. 4.
[35] YWCA Canberra, *Submission on the Invasion of Privacy and Technology-Facilitated Abuse*, 2017 at https://ywca-canberra.org.au/wp-content/uploads/2014/08/Submission-on-the-Invasion-of-Privacy-Technology-Facilitated-Abuse1.pdf, p. 5.
[36] YWCA Canberra, *Submission on the Invasion of Privacy and Technology-Facilitated Abuse*, 2017 at https://ywca-canberra.org.au/wp-content/uploads/2014/08/Submission-on-the-Invasion-of-Privacy-Technology-Facilitated-Abuse1.pdf, p. 5.
[37] M. Templeton et al, 'A systematic review and qualitative synthesis of adolescents' views of sexual readiness' Journal of Advanced Nursing, 73(6), p. 1294; Australian Institute of Family Studies, *CFCA Resource Sheet: Age of consent laws*, July 2017, p. 5; YWCA Canberra, *Submission on the Invasion of Privacy and Technology-Facilitated Abuse*, 2017 at https://ywca-canberra.org.au/wp-content/uploads/2014/08/Submission-on-the-Invasion-of-Privacy-Technology-Facilitated-Abuse1.pdf, pp. 5-6.

In light of this, YWCA Canberra considers that education, relating to the definition of consent in sexual assault provisions as well as the meaning of the 2-year rule for young people, is critical to prevent the criminalisation of young people engaging the consensual sexual conduct. We similarly recommend education for young people regarding appropriate and legal sexual conduct (as per Respectful Relationships curriculum). [38] As noted by Our Watch's research, violence against women and unequal gender norms can be altered by strategic educational campaigns and programs challenging the root cause of gender-based violence.[39]

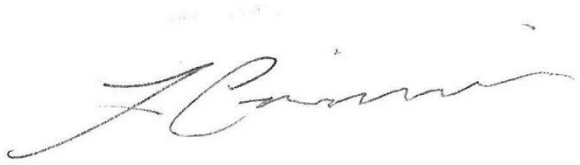
Conclusion

The introduction of a positive definition of consent in the *Crimes Act 1900* (ACT) would be a progressive step forward for gender equality in the ACT. It would ensure that the sexual assault provision of the Act would meet the key objectives of sexual assault law, provide the ACT community with a benchmark for appropriate sexual behavior and bring the ACT in line with the national standard.[40]

However, as noted in this submission, significant educative programs and campaigns for the public, vulnerable groups of women and young people need to accompany legislative changes to ensure that consent is widely understood. Furthermore, to support sexual assault survivors/victims in reporting rape and in improving conviction rapes, the ACT government must consult with those women most vulnerable to sexual assault for the criminal justice system to effectively respond to their needs.

I look forward to the results of this consultation and would be pleased to answer any questions in relation to this submission or YWCA Canberra's work in this area.

Yours sincerely



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[38] See also YWCA Canberra, *Submission on the Invasion of Privacy and Technology-Facilitated Abuse*, 2017 at https://ywca-canberra.org.au/wp-content/uploads/2014/08/Submission-on-the-Invasion-of-Privacy-Technology-Facilitated-Abuse1.pdf, pp. 5-6.
[39] Our Watch, Australia's National Research Organisation for Women's Safety and VicHealth (2015) *Change the Story: A shared framework for the primary prevention of violence against women and the children in Australia*, Our Watch: Melbourne.
[40] See ALRC, *Family Violence Report*, pp. 1147, 1148; Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 33, 35, 43 cited in ALRC, *Family Violence Report*, pp. 1147, 1150.

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28 March 2018

Submissions

Crimes (Consent) Amendment Bill 2018

Dear Ms Le Couteur,

Thank you for the invitation to make this submission. I seek to address the following specific feedback questions:

1. Reflections on the exposure draft of the Crimes (Consent) Amendment Bill 2018 including:
    a. Which elements of the proposed Bill that would be effective at preventing sexual assault, supporting victims and guiding sexual assault cases;
    b. How effective the proposed reforms would be;
    c. If the proposed reforms would achieve their stated objectives;

2. How will this legislation impact on other groups, especially young people…?

3. Is the current approach to consent adequately communicated or given social effect?

4. How best should these changes be communicated to the public?

In sum, I argue:

- **The Bill would provide a clear criterion for ascertaining consent or non-consent in everyday sexual activity** and will provide a benchmark upon which initiation or continuance of sexual activity should be based on going forward, and the **definition of consent should be incorporated into sexual education in schools** to provide a clear framework to young people initiating their involvement in sexual activity and to reduce instances of sexual assault in future generations.

- **The Bill would give increased security to complainants reporting allegations of sexual assault**, given that sexual crimes are more likely to go unreported where the victim did not react in a manner considered to be "normal" in instances of sexual assault or where the victim is caused embarrassment, humiliation or shame for their own actions (or lack thereof) in the course of their assault, and therefore a **definition of consent being included in ACT criminal law would ease psychological harm in sexual assault victims** caused by secondary victimisation in the criminal justice system's response to sexual assault victims.

The Bill would provide a clear criterion for ascertaining consent or non-consent in everyday sexual activity & should be incorporated into sexual education in schools

The current approach to consent in the Australian Capital Territory relies upon "negating factors" of consent, though does not define consent specifically. With the rise of the #MeToo movement, sexual liberty of women and the LGBTIQ+ community, and the discussions around the need for compulsory sexual education in schools, the need for a concrete concept of consent is necessary in all jurisdictions, for which the ACT lacks.

A 2016 national survey discussed their findings in relation to consent and relationships taught in formal school classes.[1] 63% the 16- to 21-year-old women responded to the survey with reports that they had not been taught about consent nor were they confident in their understanding of the concept of consent, and further only 40% of those women had been taught about respectful relationships.

Given that the ACT is the only state or territory in Australia that does not include a legal definition of consent, the lack of education around issues of consent are further in detriment to young women and men in the territory.

Having no legal benchmark for acquiring or giving consent and therefore nothing to teach regarding consent leaves the issue of agreeing to and participating in sex something of a personal assumption. Allowing sexually maturing young people to formulate their own opinions on sex and consent issues, especially in light of the prevalence of pornography in young people's lives and other material ill-fitting to the realities of sexual activity, leaves entire generations open to difficulties in relationships and bastardised views of healthy sex and sexuality.

The need for a specific definition of consent, and the enduring need for education around the issues of consent, will significantly aid in preventing instances of sexual assault. Giving young men and women specific criteria for ascertaining the willingness of their sexual partners will preclude the idea that consent is automatically given unless a victim "fights back". Further, the impact education around consent issues where there is a specific definition of consent will provide clarity to young people and foster a healthier attitude toward sexual activity in the future.

The Bill would give increased security to complainants reporting allegations of sexual assault

It is accepted that the majority of sex crimes go unreported to police, and that those that are reported to police seldom result in conviction of the perpetrator. Included among the reasons for not reporting the sexual assault, survivors report not having "enough proof", "fear of the justice system", fear "lack of evidence", and feel the crime "was not serious enough" as reasons for not reporting their crimes.[2]

More often than not, officials and courts consider the complainant's reaction to their sexual assault as a measure of the seriousness of the crime. Courts may be inclined to dismiss the notion of rape if the victim failed to physically or verbally resist. The lack of a definition of consent gives rise to this mindset; that if victims do not fight, or do not audibly refuse the

[1] Equality Rights Alliance, *Let's Talk: young women's views on sex education – Survey* (2016), available at www.equalityrightsalliance.org.au

[2] Maryland Coalition Against Sexual Assault, *Reporting Sexual Assault: Why Survivors Often Don't*. Available at https://ocrsm.umd.edu.

actions being administered on their bodies, that they are not victims. It's the "if it's not no, it's yes" mentality, or the "assumed consent" misnomer; where perpetrators of sexual violence believe that because no audible or physical refusal to the acts occurred, that consent has been given, and the ACT is fostering that mindset.

However, it has been proven that the majority of victims of sexual assault will employ the third, silent option in "fight or flight": "freeze". Victims are more likely to be involuntarily unable to move or physically resist during the course of their assault. The response has a name: "tonic immobility".

Tonic Immobility is "an involuntary, temporary state of motor inhibition in response to situations involving intense fear".[3] Courts have shown an inclination to dismiss claims of rape or sexual assault where the victim did not appear to resist the actions of their assailant.

Interpreting tonic immobility as "passive consent" is much more likely where there is no specific definition of consent, and where the lack of a definition of consent gives rise to the allowance of people's own opinions on how consent is given and received. Including in the "normal" chronology of sexual activity an expectation for one participant or the other the opportunity to explicitly state their agreement, freely and voluntarily given, to the specific acts about to be actioned will provide law enforcement, as well as courtrooms and juries, the ability to ascertain where consent was not given, and therefore where sexual assault took place.

Furthermore, research shows that tonic immobility is more likely to result in the victim developing post-traumatic stress disorder (PTSD) or severe depression following their assault. Victims have reported feelings of shame, embarrassment, humiliation and guilt for not responding to their own sexual assault in a manner considered "normal" by society; for not screaming, kicking, scratching their way out of their own assault, and corresponding feelings of their own contributory negligence in "allowing" their assault to occur.

Education that "passive consent" is not a viable option when committing sex acts is necessary to the promotion that sexual violence and assault is not okay. Having criteria to explicitly ascertain whether your sex partner is passively consenting to an act or has frozen from their incomprehensible fear of the violence they are experiencing, is necessary in the narrative of sexual intercourse, be it between long-time partners or one-night stands.

I am in full support of this Bill.

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[3] Anna Moller, Hans Peter Sondergaard, Lotti Helstrom, 'Tonic immobility during sexual assault – a common reaction predicting posttraumatic stress disorder and severe depression." *Acta Obstetricia et Gynecologica Scandinavica* (2017), available at https://doi.org/10.1111/aogs.13174.

Women With Disabilities ACT
WWDACT
ABN: 74 908 530 982

Submission to the ACT Greens Discussion Paper:

Invasions of Privacy & Technology-Facilitated Abuse

July 2017

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WWDACT

Women With Disabilities ACT acknowledges and pays respect to the Ngunnawal peoples, the traditional custodians of the ACT Region on whose land our office is located. We pay our respects to their Elders past, present and emerging. We acknowledge their spiritual, social, historical and ongoing connection to these lands and the contribution they make to the life of the Australian Capital Territory.

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Submission to the ACT Greens Discussion Paper:
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Introduction

Women with Disabilities ACT (WWDACT) is a systemic advocacy and peer support organization for women and girls with disabilities in the ACT. WWDACT follows a human rights philosophy, based on the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of Discrimination against Women (CEDAW). In the ACT, there are 32,600 women with a disability, making up 52.5% of the population of people with disabilities, and 8.5% of the total population of the ACT (ABS, Survey of Disability, Ageing and Carers Australia, 2015).

WWDACT welcomes the opportunity to provide a response to this initiative of the ACT Greens, aimed at reforming the ACT's criminal law to combat the rising scourge of technology-facilitated abuse. We commend the adoption of a "best practice" model that incorporates the National Principles agreed upon by Commonwealth Ministers in May 2017. We note, however, that no mention or consideration has been made of women with disabilities in the discussion paper, explanatory statement, or the Bill itself, even though this minority group is significantly more victimized than others mentioned.

Through this response, WWDACT would like to highlight the gross over-representation of women and girls with disabilities who are victims of this abuse, and the nature, extent, under-reporting and consequences that are often opaque to law reformers and policy makers. This response will draw attention to the human rights obligations of the Australian and Territory Governments, rights which continue to be violated in the context of the prevalence and extent of abuse. It will also request that appropriate increased attention be given to women with disabilities who are disproportionally victimized by this form of abuse. Additionally, it will address the specifics of the proposed legislation, including the terminology and definitions used, and make recommendations aimed at prevention and redress.

Prevalence

To fully understand the extent and nature of abuse experienced by women with disabilities, an intersectional approach that conceptualizes the nuanced relationship between disability violence and gendered violence is necessary (Dowse, L., Soldatic, K., Spangaro, J., & van Toorn, G. 2016). Despite decades of advocacy, exact figures are not available due to a scarcity of disaggregated data and information on all forms of abuse perpetrated on women with disabilities. Authors of a recent comprehensive literature review of this topic suggest this lack represents a continued reluctance of society to acknowledge the extent of abuse and violence occurring to this population, because of an overall devaluation and categorization of women with disabilities as asexual and dependent (Plummer, S., & Findley, P., 2011).

> *"If you can't access education, you're not likely to access employment. If you can't access transport you can't access education, health, work, or social participation. And If you don't address negative community attitudes you might not access any rights on an equal basis with others. Without justice, you can't do anything about it…" (Quote from respondent, Human Rights Commission, 2014).*

According to the latest available 2017 figures on technology facilitated abuse, one in two Australians with a disability report being a victim of image based abuse compared with one in five in the broader population (Henry, D., Powell, D., & Flynn, D. 2017). Whilst this figure pertaining to disability is alarming, overlaid with a gendered lens it reveals an even more shocking picture. The United Nations Broadband Commission for digital development on broadband and gender believes a problem of pandemic proportions exists with one in three women having experienced cyber related violence (2015). Within the intersection of these two figures lies the actual prevalence rates for women with disabilities as victims of image based abuse.

Furthermore, as noted in the UN Convention of the Rights of People with Disabilities (CRPD 2013), even though women with disabilities are more vulnerable as victims of abuse from both strangers and people who are known to them, it largely goes under-reported. In a review of the literature, it was found that those that did not report gave some of the following reasons: fear of not being believed, having support removed, feeling guilty and at fault, fear of retaliation, feelings of shame and embarrassment, and being used to abuse (Plummer, S., & Findley, P., 2011). The overwhelming inference that can therefore be drawn from collating, mapping, and overlaying this stark evidence is that women with disabilities are significantly more vulnerable to this form of abuse than any other minority group.

Frances was physically beaten by a group of young girls at a regional TAFE institute/ The violent attack was captured on CCTV footage. The local police advised Frances not to pursue charges because she was "mentally retarded" and there would be "no chance of any conviction" against the perpetrator (Senate Community Affairs Reference Committee, 2015).

Risk factors / perpetrator characteristics

Given this prevalence, it is crucial to understand the nuanced nature of abuse, including the risk factors which put some women with disabilities at greater risk and the distinctive profiles of the perpetrators. Both anecdotal and empirical evidence suggests that the type of disability a woman has, and where and how she is living can add yet another layer of vulnerability and targeting. Women who are dependent on others for personal care, those with communication challenges, cognitive impairments, and those women with disabilities who live in residential care settings are significantly more at risk (Sage Consulting,1997). Additionally, whilst the shift from the systematic institutionalization of people with intellectual disabilities to community living has brought many benefits, it can increase the risk of criminal victimization due to social vulnerability (Fisher, M., Baird, J., Currey, A., & Hodapp, R. 2016). According to these authors, this vulnerability comes about through individuals not being able to avoid adverse events that could affect their emotional or physical wellbeing. To avoid victim blaming, it is important to see this vulnerability in the context of the social model of disability adopted by the United Nations, which recognizes that persons with disabilities are being disabled by society rather than by their bodies. It is not the disability itself that is causing this vulnerability but rather society's reaction to it that marginalizes, victimizes, and dehumanizes women with disabilities.

More than half of the respondents (56.1%) in the 2017 RMIT study who needed assistance with tasks of daily living reported experiencing at least one form of image based sexual abuse compared to those with disabilities who reported not needing assistance (17.6%) (Henry, D., Powell, D., & Flynn, D. ,2017). When it comes to women with cognitive impairment the figures are even more shocking, with 90% of women with intellectual disabilities reporting having been subjected to sexual abuse, with 68% reporting that this abuse started before the age of 15 (Women With Disabilities Australia, 2016)..

In a further effort to understand this issue, it is important to highlight the differences in likely perpetrators of abuse and threats of abuse to women with disabilities. In a survey of 511 women with disabilities, the most common perpetrators of abuse identified were not just intimate partners, but care providers, and health care professionals (Plummer, S., & Findley, P., 2011). This is consistent with the results of the large 2017 RMIT study, which found a much stronger pattern of known (non-partner) victim relationship for people with disabilities. For example, for victims of non-consensual taking of nude or sexual images,

63% of those with a disability said it was a known non-partner, compared with 41% for those not disclosing a disability (Henry, D., Powell, D., & Flynn, D. ,2017). Likewise, for victims of distribution of images, 74% said it was a non-partner known perpetrator compared to 52% of non-disabled respondents.

Human Rights Obligations and abuse

Australia is a party to The United Nations Convention on the Rights of Persons with Disabilities and at Article 6 [Women with Disabilities] it recognizes the "pervasive marginalization and discrimination" faced by women and girls with disabilities. Article 6 is a "cross -cutting" article which means that when Governments are developing laws, policies, programs, and services for the wider community they must always take extra action to ensure the advancement of the rights of women and girls with disabilities. Article 16 Freedom from exploitation, violence, and abuse states that:

"Parties shall take all appropriate legislative, administrative, social, educational, and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence, and abuse, including their gender based aspects"

Internet use

The internet is a valuable resource for women and girls with disabilities. It is an important means of connecting to other people.

"I'm really lonely. It's nice to be able to pick up a computer and interact with people, but I miss having friends that I can interact with face to face" (Respondent cited in Women with Disabilities ACT and Women's Centre for Health Matters ACT, 2012)

According to the Australian Bureau of Statistics, 62% of people with disability have internet access at home (cited in Women with Disabilities Australia. ,2016). ACT figures from a 2012 survey of women with disabilities found that 87% of respondents used the internet in the week prior to completing the survey with 69% indicating they used it every day (Women with Disabilities ACT and Women's Centre for Health Matters ACT., 2012).

The UN Broadband Commission found that 85% of women surveyed said that the internet brought them greater freedoms. Unfortunately, as the reach of connectivity increases, so too will the opportunities for technologically facilitated abuse. Anecdotal evidence showing that a sizable proportion of women with mild intellectual disabilities who own mobile phones are subject to grooming on social media including Facebook, Tinder, and Grindr

Proposed Bill Terminology

- **Image based abuse**

WWDACT strongly supports the adoption of the term “image based abuse” rather than “revenge porn” as it broadens the conceptual understanding of this abuse. This broadening affords greater protection to women and girls with disabilities who have suffered because of the narrow conceptualisations of ‘family violence’ which has often led to violence perpetrated on women and girls with disabilities being obscured. Research in this area clearly demonstrates that violence against women and girls with disabilities is downplayed, often reframed as neglect or service infringement, and minimised because the women or girl has a disability and therefore must be to blame (Disabled People's Organizations Australia, 2017). It is also pertinent to a discussion on the replacement of the outdated term “revenge porn” to note that this form of abuse occurs in a range of circumstances, not just in circumstances of revenge, and -that the images are not always sexual in nature. Women with disabilities suffer from a broader range of abuse, victimization and threats including disability related abuse such as withdrawal of care and medications, denial of access to mobility aids, preventing attendance at social or medical appointments, and withdrawal of personal care (Plummer, S., & Findley, P., 2011). Women and girls with disabilities who rely on employed carers or family members for their personal and intimate care are more obviously at risk of this type of abuse. This victimization is overlaid with under-reporting that ensues, due to fear of losing this necessary support, in addition to the limited resources many of these women and girls have for defending themselves or escaping the situation (Nosek, M., Hughes, R., Taylor, H., & Taylor, P., 2006).

- **Consent**

WWDACT is in favour of bringing the ACT in line with other jurisdictions to determine a strong and clear statutory definition of consent. As discussed, women with disabilities are more vulnerable to non-consensual creation and sharing of images because of social vulnerabilities, marginalisation and a greater reliance on carers for intimate personal care such as toileting, dressing, and bathing. It is therefore critical that any definition of consent give principle consideration to women with disabilities when determining a definition of consent.

We strongly support legislation that puts the obligation on the defendant to prove consent. It needs to be conveyed to broader society through the careful wording of this legislation that consent can never be assumed. A review of submissions made to the Senate inquiry on this issue reveals a consensus view that the defining of consent is a key issue, and that any ambiguity in this definition would stand to favour the perpetrator by leaving it open to argument (Senate Legal and Constitutional Affairs Committee, 2016).

Given the overrepresentation of women with disabilities as victims of this abuse, we would like to see a disability specific example of abuse included in the legislation at 72 B Meaning of Consent subsection 2. We welcome and note the inclusion in this subsection of consent being negated if the consent is caused by

(*d) a threat to publicly humiliate or disgrace, or to physically or mentally harass the person or another person; or*

(i) the abuse by the other person of the other person's position of authority over, or professional or other trust in relation to the person;

We advocate for the inclusion in this subsection of

(l) the threat of or denial of access to a person's mobility aids, medication, personal care or rights to social and medical appointments

Additionally, at (j) in this subsection, we request the inclusion of cognitive impairment to read:

(j) the person's physical helplessness or mental or cognitive incapacity to understand the nature of the act in relation to which the consent is given

- **Invasions of privacy**

WWDACT advocates for the broadening of the definition of :

intimate body area at 72 A to include:

(c) A body area of the person's body that in the person's circumstances is private in nature

We request that this section at Para D include a disability specific example:

3. If a person with a disability has parts of their body that they would normally cover or keep private or find humiliating to have shared with others

- **Consent to share and distribute**

We emphasise and support the separation of the two offences of non-consensual capturing of images *and* the non-consensual distribution or sharing of images. It is essential that explicit and express consent is required for both. As advocated by witnesses to the Senate Inquiry on this issue, someone may consent to an image being taken at a time and in a specific context but this should not be seen as consent for distribution of that image (Senate Legal and Constitutional Affairs Committee, 2016).

- **Threat to share**

It is obvious that Image based abuse is used as a tool for power, coercion, and control. In the 2017 RMIT study, 41 % of people with disability reported having experienced threats related to the destruction of a sexual or nude image (Henry, D., Powell, D., & Flynn, D. ,2017). WWDACT sees that threats to distribute/ share images irrespective of whether they exist, can have the same impact as actual dissemination. As pointed out by the Women's Legal Service NSW at the Senate Inquiry into this abuse:

> "*For many of our clients they often do not know that there is material in existence, but a threat to distribute material – even material that may not exist - causes extreme anxiety …who feel a heightened sense of shame about these threats…and fear going to the police because of embarrassment about what these images may be" (Senate Legal and Constitutional Affairs Committee, 2016).*

- **Intent to cause harm**

WWDACT agrees with the Victorian Women's Lawyers and the Sexual Assault Support Service in their witness statements to the Senate Inquiry on this topic that *Intent to cause harm* should not be included in the proposed Bill.

> *"…there are a range of motivations for this behaviour. We are very concerned that if there is a provision that talks about intent to cause harm it may cause a bit of a legal loophole whereby perpetrators can basically say that they did not intend any harm or distress to the victim, that they just thought it was a bit of a laugh or that they were trying to entertain their mates" (Senate Legal and Constitutional Affairs Committee, 2016).*

This is critical when seen in the light of the devalued and marginalized status of women with disabilities who, according to the United Nations Committee on Economics, Social and Cultural Rights are often denied equal enjoyment of their human rights, by virtue of the lesser status ascribed to them, or as a result of covert or overt discrimination (as cited in Women With Disabilities Australia, 2016).

Recommendations

Despite the shockingly high prevalence rates of abuse for women with disabilities and the extra risk factors for women with cognitive impairments, there are very few recorded prosecutions of offences committed against persons with an intellectual disability (Australian Law Reform Commission, 2010), even for crimes involving physical and or

sexual violence. Considering this violation of human rights, it is critical that these proposed amendments to the law, must be able to serve to protect these most vulnerable members of society and send a clear message to society and the perpetrators that victimise them. The criminalisation of image based abuse and the strengthening of how consent is interpreted or negated in law, is a good first step. Obviously, protection under law is not on its own sufficient to counteract the tsunami of violence and abuse perpetrated against women with disabilities. Whilst there has been increased attention and resourcing to address abuse of women, there is a need for specific and generous resourcing for prevention and screening strategies to address abuse of women with disabilities.

- **Data**

To shed light on, adequately resource and respond to this issue, disaggregated data collection must be the first step to understanding the intersectional nature of this abuse, no matter where it occurs. As it stands, the current approaches fall dramatically short of providing what is needed by way of evidence to spearhead a national response. In research examining the extent of violence perpetrated on women with disabilities the report highlights the:

> *"methodological disjunctures that occur in data collection in Australia that result in the 'invisibility of the types, incidence, and prevalence of violence experienced by women with disabilities*" (Dowse, L., Soldatic, K., Spangaro, J., & van Toorn, G. ,2016).

In an example of the dearth of data captured, one needs to look no further than the Australian Bureau of Statistics which consistently omits women with communication disability, who are at greater risk of being victims of violence, from surveys such as the Personal Safety Survey which collects data about the nature and extent of violence experienced by men and women in Australia and the Survey of Disability Ageing and Carers. Appropriate resources are not made available to the ABS to undertake intensive studies of this nature, so that an information void is perpetuated. Moreover, the data collected by the ABS on computer and internet use by people with disability is not publicly available in gender disaggregated form.

It is critical that the Australian Bureau of Statistics, service and support providers, health professionals and the legal and criminal sectors collect data that reflect the diversity of the disabled population, rather than recording them as an asexual homogenous mass.

Given that Australia is undergoing disability policy reform, there is a clear need for empirical evidence to bring about better outcomes for women with disabilities. In their work

on capturing women with disabilities' experiences of physical and sexual abuse, Plummer and Findley (2011) suggest the use of a screening tool to better understand their over-victimisation. This, they believe, would lead to a better understanding of risk and protective factors that then can be targeted in education and training programs.

- **Education for women and girls with disabilities**

The next imperative in prevention is education and training.

> *"It is clear from decades of research and evidence that women and girls with disability have themselves not been provided with the relevant education and information to identify violence and risks of violence occurring within their lives. In many cases redress is not sought and women and girls with disability continue living at risk of harm"* (Women With Disabilities Australia, 2016)

A recommendation from the Senate Inquiry into violence, abuse, and neglect of people with disabilities in institutional and residential settings was:

> *"the critical need for all levels of Government to increase training for people with disabilities to recognise abuse, neglect, and violence and self-report*." (cited in Women With Disabilities Australia. 2016).

For women with disabilities, there needs to be generous resourcing and attention given for disability specific education programs and toolkits aimed at building abuse safety behaviours and skills related to Internet safety, consent, respectful relationships, sexual relationships, managing safely in personal care relationships, taking legal action, recognising, defining, and describing abuse in both intimate and personal carer relationships, and abuse -related safety information and support. These education programs/ toolkits must be accessible to all women and girls with disabilities in a variety of settings and in a variety of formats including Easy English for those with cognitive impairment.

> *"People with disability are often not recognised as sexual beings, as such their right to have a relationship and make decisions about their sexual and reproductive health is often not upheld. A significant issue that people with disability face is a poverty of meaningful relationships in their lives. Loneliness, isolation, and vulnerability to sexual and other abuse are features of people's reality. Evidence shows that when people receive relationship and sexuality education in a way that meets their needs, there is an increased likelihood that people will be able to make safe and healthy choices about relationships and their bodies" (Respondent, National Disability Forum, Human Rights Commission, 2014).*

- **Education and training for professionals**

Failures in understanding the intersectional nature of violence and abuse perpetrated against women and girls, lead to the response of it often falling through many legislative, policy, and service gaps. For example, in research aimed at improving responses to women with disabilities experiencing violence, it was found that staff in refuges designed to specifically deal with gendered abuse and violence, identified they don't have the capacity or 'know-how' to assist women with disability or women who have children with disability (Women With Disabilities Australia, 2016). Alarmingly this research also identified that even where there are mandatory reporting requirements, disability sector workers use wide discretion when reporting 'incidents' of violence and abuse of women with disabilities to the police. Clearly there is an urgent need for professionals working in the relevant sectors to undertake training in responding and recognising abuse and violence that occurs specifically in the lives of women with disabilities. Services that are funded to support this group of women cannot rely alone on women with disability, including those with communication needs, disclosing such violence. (Women With Disabilities Australia. 2016). In the voice of a participant at the Human Rights Forum on Disability in 2014:

> "*A lot of this is around community education and awareness raising. Involving the community in disability – bringing them into disability so that it is no longer the 'other' as opposed to the 'norm'. People with disability and the related issues that they face need to be so integrated into society that it all becomes just another part of life. Not so different and unusual that it is frightening, tiresome, or difficult and thus to be avoided*".

- **Supported decision making and access to justice**

WWDACT advocates for the use of more nuanced approaches to supported decision making for women with cognitive and communication impairments, and would like to see these mechanisms enforced in law to ensure women with disabilities' human rights are not violated. In an as yet unpublished report on Contraception and Consent, WWDACT has undertaken a comparative study into legal frameworks that would enable supported decision-making to be enacted that complies with Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD). This would see one or more people supporting the decision making and communication capabilities of the women, thus avoiding the need for substitute decision making as much as possible. Without this in place we will continue to marginalise and dehumanise these women who are most at risk of all forms of abuse and violence. All health, disability, legal, and medical staff need training in supported decision making, and those with the specialised skills in this area need the resourcing to be able to provide resources and training to this end.

- **Additions to proposed legislation**

WWDACT requests the following additions be made to the substance of the Carolyn Le Couteur Crimes (invasion of Privacy) Amendment Bill 2017 as outlined in the body of this report, *to wit*:

(i) At 9. Consent Section 67 (1A) grounds on which consent is negated to include the addition of (*j) the person's physical helplessness or mental or cognitive incapacity to understand the nature of the act in relation to which the consent is given….*

(ii) At 12. New Part 3A at 72A Invasion of Privacy, Definitions, Intimate body area to include: *(c) A body area of the person's body that in the person's circumstances is private in nature*

(iii) At 12, New Part 3 A on Invasion of Privacy at 72 A Definitions -pt. 3A, Para. D Examples: include a disability specific example:
3. If a person with a disability has parts of their body that they would normally cover or keep private or find humiliating to have shared with other…

Conclusion

Finally, WWDACT is grateful for the opportunity to draw attention to the over-representation of women with disabilities as victims of this form of abuse and trusts that our response will assist in drafting the new legislation as well as providing advocacy for models of prevention.

> *"The potential to use the Internet for hate crimes and abuse is exponential, unprecedented, vitriolic, and corrosive. It represents the worst of mob mentality and perceived safety in numbers by the perpetrators. Online harassment has become a team sport with women in the biosphere receiving more threats that directly attack their gender, safety, and their very right to express an opinion". (UN Broadband Commission for digital development working group on broadband and gender).*

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