

# ANROWS

AUSTRALIA'S NATIONAL RESEARCH  
ORGANISATION FOR WOMEN'S SAFETY  
*to Reduce Violence against Women & their Children*

## **Committee Secretary**

Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

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

Dear Committee Secretary

ANROWS thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to respond to the Inquiry into current and proposed sexual consent laws in Australia.

ANROWS is an independent, not-for-profit company established as an initiative under Australia's *National Plan to Reduce Violence against Women and their Children 2010–2022*. Our primary function is to build the evidence base that supports ending violence against women and children in Australia. ANROWS is embedded in the National Plan architecture and will continue to deliver and develop this function across the next decade under the *National Plan to End Violence against Women and Children 2022–2032* (the National Plan). Every aspect of our work is motivated by the right of women and their children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and their children, and we are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

Primary funding for ANROWS is jointly provided by the Commonwealth and all state and territory governments of Australia. ANROWS is also, from time to time, directly commissioned to undertake work for an individual jurisdiction, and successfully tenders for research and evaluation work. ANROWS is registered as a harm prevention charity and deductible gift recipient, governed by the Australian Charities and Not-for-profit Commission (ACNC).

ANROWS's submission responds to terms of reference "a" through "f". It draws on evidence from rigorous peer-reviewed research, including findings from the upcoming release of the 2021 National Community Attitudes towards Violence against Women Survey (NCAS) (provided under strict embargo). We would be very pleased to assist the Committee further, as required.

Yours sincerely

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## Overall comments

ANROWS commends the Inquiry's focus on reviewing current and proposed consent laws in Australia, and strongly supports a national approach to consent. ANROWS's submission draws on our evidence base to highlight the impacts of an inconsistent approach to consent, responding to the following terms of reference:

- a. inconsistencies in consent laws across different jurisdictions
- b. the operation of consent laws in each jurisdiction
- c. any benefits of national harmonisation
- d. how consent laws impact survivor experience of the justice system
- e. the efficacy of jury directions about consent
- f. impact of consent laws on consent education.

ANROWS has previously made submissions to jurisdictional inquiries and reviews on consent laws and sexual offences in New South Wales (ANROWS, 2018, 2019a, 2019b) and Queensland (ANROWS, 2020) and is pleased to make a submission to this Inquiry.

## Recommendations

**Recommendation 1:** Harmonise national consent laws.

**Recommendation 2:** Include affirmative consent as an essential component of sexual consent laws in every Australian jurisdiction.

**Recommendation 3:** Consider how the mistake of fact defence intersects with, and contradicts, the affirmative consent model.

**Recommendation 4:** Provide continuous funding for the National Community Attitudes towards Violence against Women Survey, implemented by ANROWS, to monitor progress in community attitudes towards consent and violence against women.

## Definitions

### A note on terminology

The definitions of “sexual violence”, “sexual assault”, “sexual harassment” and “intimate partner sexual violence” can vary between studies and surveys. The definitions below are those preferred by ANROWS and are used when referring to sexual violence and intimate partner sexual violence as concepts in this submission.

### Sexual violence

Sexual violence is defined as the intentional perpetration of sexual acts without consent (ANROWS, 2019c), capturing all forms of sexual assault and sexual harassment (Coumarelos et al., in press). This definition of sexual violence refers to both criminal and non-criminal sexual activity perpetrated without consent to reflect that some emerging forms of sexual violence have not yet been addressed in legislation (Coumarelos et al., in press).



## **Intimate partner sexual violence**

Intimate partner sexual violence (IPSV) is the intentional perpetration of sexual acts without consent in intimate partner relationships (ANROWS, 2019c). Intimate partner relationships can include those with husbands, wives, partners, boyfriends, girlfriends and dates, and also include both cohabiting and non-cohabiting people (ANROWS, 2019c). IPSV is a tactic of domestic and family violence (DFV).

## **The National Community Attitudes towards Violence against Women Survey**

The National Community Attitudes towards Violence against Women Survey (NCAS) is the world's longest-running population-level survey of community attitudes towards violence against women. The survey is implemented every four years, and ANROWS has led the 2017 and 2021 surveys. The NCAS provides insight into how people in Australia understand violence against women, their attitudes towards violence against women, and whether there has been change over time. The survey also gauges attitudes towards gender equality and people's preparedness to intervene when witnessing abuse or disrespect towards women.

The NCAS functions as a gauge for how Australia is progressing in changing the broader climate that facilitates and maintains violence against women. Attitudes are shaped by the world around us, influenced by our family, friends and communities, as well as through formal societal systems and institutions such as schools, the media, policies and the law. Attitudes also influence social norms about what is acceptable behaviour and can influence how people respond to violence against women. Shifting attitudes throughout the community that condone or tolerate violence against women, gender inequality and other inequalities is critical to shifting the climate of violence and stopping violence before it starts.

This submission draws on the important findings of the 2021 NCAS to highlight attitudes towards and understandings of sexual violence against women. Any changes to consent laws in Australia would not only be intended to create change within the legal system but to influence attitudes and responses to sexual violence more broadly. While future waves of the NCAS cannot directly identify the impact of consent laws, they can highlight changes in how Australians understand sexual violence over time.

## **What inconsistencies exist in sexual consent laws across Australian jurisdictions?**

Contemporary understandings of consent have shifted in recent years, and this is reflected in the sexual consent law reform that has occurred across many Australian jurisdictions. This submission highlights key areas of inconsistency across jurisdictions that have been components of recent reform: affirmative consent models, the mistake of fact defence, and "stealthing".

## **Affirmative consent models have been introduced in some jurisdictions**

Affirmative consent laws have been introduced in some jurisdictions following recent sexual consent law reform. The affirmative consent model requires individuals to communicate their consent and to take steps to ensure that the other person is also consenting. The model reflects that consent is an ongoing process and must be present for every sexual act. This marks a shift away from a "no means no" model of consent whereby silence can be interpreted as consent. This is important, as victims and survivors may



experience the “freeze” response in non-consensual situations and be unable to verbally communicate that they are not consenting (see ANROWS, 2020). The legislation on affirmative consent is currently inconsistent across jurisdictions. Affirmative consent models have recently been introduced in amendments to the New South Wales *Crimes Act 1900*, the ACT’s *Crimes Act 1900*, and the Victorian *Crimes Act 1958*. ANROWS supports the introduction of nationally consistent affirmative consent models across all jurisdictions.

Community understanding of affirmative consent is still developing alongside these recent reforms. Findings from the 2021 NCAS highlight a lack of understanding of affirmative consent among a notable minority of the Australian population. One in four respondents (25%) agreed that a sexually aroused man may be “unaware” that a woman does not want to have sex, and one in 10 (10%) agreed that women say “no” when they mean “yes” (Coumarelos et al., in press). Through an affirmative consent lens, sexual activity in these situations would not be consensual. Furthermore, a minority of respondents did not recognise the need for ongoing consent to each sexual act, with 8 to 11 per cent believing that sexual assault was justified when the woman had initiated kissing, and 3 per cent agreeing that it was justified when the man had initiated kissing (Coumarelos et al., in press). This finding also reflects a gendered and victim-blaming understanding of sexual assault, whereby it is seen to be more justifiable for a man to sexually assault a woman if she was the one who initiated sexual contact. This is informed by narratives that position women as responsible for keeping themselves safe from men’s violence and justify men’s non-consensual sexual behaviours due to a perceived biological inability for men to regulate their sex drives (Coumarelos et al., in press). The introduction of consistent affirmative consent models across jurisdictions could support the development of more advanced community understanding.

### **The mistake of fact defence is inconsistent with the principles of affirmative consent**

The “mistake of fact” defence in relation to sexual offences is another example of inconsistency between jurisdictional consent laws that can create confusion. The mistake of fact defence means that an accused person can argue that they reasonably, but mistakenly, believed that the victim and survivor was consenting. The mistake of fact defence undermines the principles and positive duty of the affirmative consent model, which requires individuals to take active steps to ensure that the other party is providing clear and ongoing consent. The defence also perpetuates common rape myths, such as the idea that men are unable to regulate their sex drives, that they may not understand that a woman is not consenting when they are sexually aroused, and that women say “no” when they mean “yes”. Findings from the 2021 NCAS, outlined above, highlight that significant minorities of Australians still hold attitudes and understandings that reflect these rape myths and excuse the perpetrator. Furthermore, 1 in 20 respondents to the 2021 NCAS (6%) agreed that an intoxicated man is less responsible for perpetrating sexual assault, and 1 in 10 respondents (6% to 10%) agreed that an intoxicated woman is partly responsible if she is sexually assaulted (Coumarelos et al., in press). While the mistake of fact defence has been the focus of reform in some jurisdictions, the defence remains in varied forms across multiple jurisdictions. ANROWS urges all jurisdictions to consider how the mistake of fact defence intersects with, contradicts and undermines the affirmative consent model.

### **Inconsistent approaches to criminalising “stealth” across jurisdictions highlight the need for an affirmative consent model**

In the absence of a consistent affirmative consent model, states and territories must individually address emerging forms of non-consensual behaviour. Stealthing is the practice of removing a condom without



consent during sexual activity and has been the subject of a legislative gap in relation to sexual offences in Australia (ANROWS, 2020). In recent years, many states and territories have identified a need to respond to this gap. Legislative responses to stealthing have typically fallen into two categories whereby jurisdictions either create an offence of “stealthing” or amend the definition of consent within their existing Crimes Act to add stealthing to the list of circumstances that negate consent (Parrot & Chesser, 2022). The value of using an affirmative consent model can be seen in New South Wales, where stealthing is criminalised by default, as the affirmative consent model in the *Crimes Act 1900* (NSW) requires consent to be sought, communicated, voluntary, and obtained for each sexual activity. The introduction of an affirmative consent model in each jurisdiction would eliminate the need to individually criminalise individual forms of non-consensual behaviour as they emerge or become better understood. Perpetrators’ non-consensual behaviours, and their impacts on victims and survivors, could therefore be recognised and responded to without waiting for legislative reform.

## How do consent laws impact victims’ and survivors’ experiences of the criminal justice system?

### **Consent laws can help us to recognise sexual violence**

Consent laws can reflect outdated understandings of consent and influence whether victims and survivors recognise their experiences as sexual violence. Research shows that sexual violence is more likely to be perpetrated by someone known to the victim and survivor than by a stranger (ABS, 2021). Despite this, rape in marriage or between intimate partners was only recognised as a criminal offence across all Australian jurisdictions in the 1980s (Australian Law Reform Commission, 2010). Findings from the 2021 NCAS indicate that a lack of understanding of the dynamics of sexual violence persists in the Australian community. While most respondents (69%) strongly or somewhat agreed that women were more likely to be raped by someone they know than by a stranger, one third of respondents either disagreed (18%) or did not know (12%). This misconception is known as the “stranger rape myth”, which represents rape as generally occurring between two strangers and involving the use of physical force (Coumarelos et al., in press; Toivonen & Backhouse, 2018). The stranger rape myth can make it challenging for women to recognise their intimate partner as a “rapist” and can contribute to acute shame (Backhouse & Toivonen, 2018), with research indicating that victims and survivors of intimate partner sexual violence often face difficulty recognising their experiences as sexual violence (see Cox, 2015; Hegarty et al., 2022; Toivonen & Backhouse, 2018; Wendt et al., 2019). The *National Plan to End Violence against Women and Children 2022–2032* (the National Plan) outlines the imperative to “confront some people’s belief that sexual violence cannot happen within an intimate relationship” (Commonwealth of Australia [Department of Social Services], 2022, p. 22). Consent laws are a critical piece of the puzzle in ensuring that victims and survivors can recognise their experiences of sexual violence as sexual violence.

### **Consent laws can influence whether victims and survivors report sexual violence**

Consent laws may impact victims’ and survivors’ likelihood of disclosing or reporting experiences of sexual violence. Data from the Australian Bureau of Statistics (2021) indicates that women were more

likely to report their most recent incident of sexual assault<sup>1</sup> by a male perpetrator to police if they perceived the incident as a crime at the time, compared with if they perceived it as wrong but not a crime, or as something that “just happens”. Consent laws could serve a symbolic purpose by providing victims and survivors with a reference point that clearly defines sexual violence. The introduction of consistent consent laws across Australian jurisdictions would further support this.

Laws can influence community-wide attitudes which impact, for example, how well we respond to victims and survivors reporting sexual violence. A recent ANROWS study investigated Australians’ mistrust of women’s reports of sexual assault and found that participants viewed allegations with a default position of mistrust, informed by an interplay of rape myths and problematic stereotypes about women (Minter et al., 2021). Participants viewed victims’ and survivors’ allegations with increased suspicion where they had not immediately reported to police or demonstrated emotional distress (Minter et al., 2021). Participants identified two key motives as potential reasons why victims and survivors would lie about sexual assault: to target or harm men, or to mitigate social damage from embarrassment or regret after a sexual encounter (Minter et al., 2021). These attitudes align with findings from the 2021 NCAS, which highlighted that 34 per cent of respondents believed that sexual assault allegations were commonly used to get back at men, while 24 per cent agreed that allegations could be made in response to a regretted sexual encounter (Coumarelos et al., in press). Furthermore, 14 per cent of respondents agreed that many sexual assault allegations made by women are false (Coumarelos et al., in press). This mistrust and the underlying beliefs that drive suspicions around victims’ and survivors’ reports of sexual violence persist despite research that indicates that false rape allegations are extremely rare (see Coumarelos et al., in press).

The mistrust of allegations of sexual violence can impact victims’ and survivors’ willingness to report. Fear of not being believed is a key factor in whether women disclose sexual assault to their informal networks and through formal pathways such as police or authorities (see O’Donohue, 2019; Whiting et al., 2020). Results from the latest *Personal Safety Survey* identified that 20 per cent of women have experienced sexual assault since the age of 16 (ABS, 2023). However, data drawn from the 2016 *Personal Safety Survey* and 2019 *Recorded Crimes – Victims* data revealed that, of women who had experienced sexual assault by a male perpetrator in the 10 years preceding the survey, only 13 per cent had reported the most recent incident to police (ABS, 2021). The number of women in Australia who are not reporting their experiences of sexual violence is therefore substantial. Additional barriers to reporting exist for victims and survivors from specific population groups. Women with disability, people with diverse gender identities and sexualities, women from culturally and linguistically diverse backgrounds, and Aboriginal and Torres Strait Islander women face additional barriers when reporting to police and accessing services (Mitra-Kahn et al., 2016). These barriers can include, but are not limited to, historical and cultural distrust of authorities, language barriers, geographical isolation, inaccessibility of services for women with disability, and the cultural appropriateness of services (Mitra-Kahn et al., 2016). Another ANROWS study found that, while trans women of colour were twice as likely as other groups of women to report having been sexually assaulted 10 or more times, no trans women in the study had accessed support from police or justice agencies (Ussher et al., 2020). Participants in the study identified that feelings of judgement, blame and mistrust, as well as a lack of acknowledgement, made them unlikely to

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<sup>1</sup> The Australian Bureau of Statistics (2021, n.p.) defines sexual assault in the *Recorded Crime – Victims* collection as “physical contact, or intent of contact, of a sexual nature directed toward another person where that person does not give consent, gives consent as a result of intimidation or deception, or consent is proscribed”.



make police reports when sexual violence occurred (Ussher et al., 2020). Clear and consistent consent laws that articulate what constitutes non-consensual behaviour could be leveraged to help address rape myths and reduce mistrust of allegations of sexual violence.

## **Consent laws can impact how we respond to sexual violence**

Consent laws can impact victims' and survivors' experiences in the criminal justice system. Criminal justice processes can be re-traumatising for victims and survivors, particularly when victims and survivors feel invalidated where the offence is not prosecuted or conviction is not achieved due to the criminal standard of proof (ANROWS, 2021; Salter et al., 2020). Sexual violence that occurs within intimate partner relationships can be particularly challenging to prosecute, largely because it occurs within the context of other consensual sexual relations and established patterns of sexual activity that do not involve verbalised consent (Cox, 2015). Myths and misconceptions about the nature of sexual violence and mistrust of victims and survivors that persist within the community can also undermine police, legal and juror perceptions about the credibility of sexual violence allegations (Coumarelos et al., in press; Salter et al., 2020). The introduction of consistent consent laws could support improved responses to sexual violence in the criminal justice system, through clearer identification of the scope of non-consensual behaviours and an increased focus on the perpetrator. Consistent and updated consent laws could also underpin further training and education within the criminal justice system to address myths and misconceptions about sexual violence.

Perpetrators can be acutely aware of, and exploit, inconsistencies in consent law between jurisdictions. A study by Langton et al. (2020) investigated the experiences of Aboriginal women in two regional, cross-border locations in Victoria and New South Wales when seeking assistance from family violence legal and support services. This research looked more broadly at family violence, which can include intimate partner sexual violence, and provided insight into the impacts of the differences between legislation and information-sharing challenges across jurisdictions (Langton et al., 2020). Several lawyers in the study discussed that seeking protection orders and obtaining accurate information across jurisdictions was a challenge (Langton et al., 2020). The researchers also identified that there was an opportunity for perpetrators to intentionally manipulate these inconsistencies in laws between jurisdictions, such as by perpetrating domestic or family violence in Victoria to avoid the civil or criminal responses under the New South Wales legislation (Langton et al., 2020). The potential for perpetrators to manipulate or take advantage of inconsistencies or gaps in consent laws is also reflected in the move to criminalise stealthing. The rolling need to get ahead of perpetrator behaviour and explicitly criminalise stealthing in each subsequent jurisdiction highlights the potential vulnerabilities created by inconsistencies and gaps in consent laws between jurisdictions.

## **What are the benefits of national harmonisation?**

The national harmonisation of consent laws could benefit victims and survivors by setting a national standard. The National Plan identifies the need to work towards nationally consistent definitions to support the development of a shared understanding of, and consistent responses to, gender-based violence in Australia (Commonwealth of Australia [Department of Social Services], 2022). The National Plan also acknowledges that this understanding will continue to evolve and will involve collaboration with states and territories to develop consistent national definitions where they do not currently exist (Commonwealth of Australia [Department of Social Services], 2022). Furthermore, the National Plan recognises that legal definitions of sexual consent vary between jurisdictions, with acknowledgement that



several reforms have included consideration of adopting an affirmative consent standard (Commonwealth of Australia [Department of Social Services], 2022). Current consent laws, inconsistencies between jurisdictions, and reactive legislative responses to emerging forms of sexual violence can negatively impact victims and survivors and clearly represent an opportunity to pursue national consistency. The introduction of a national standard that captures the need for an affirmative consent model could help to ensure that all victims and survivors in Australia have the same opportunities to seek help and to access services and the justice system.

This legislative change could also serve as a symbolic indicator of what behaviours are acceptable in Australia, and as a mechanism to change attitudes and understandings. In implementing consent law reform in New South Wales, the NSW Attorney General stated that “the consent reforms are not just about holding perpetrators to account but changing social behaviour with clearer rules of engagement to drive down the rate of sexual assaults” (NSW Attorney General, 2022, n.p.). While legislation alone cannot be expected to change attitudes or behaviour, the national harmonisation of consent laws (including an affirmative consent standard) would provide a clear framework for acceptable behaviour and a reference point for victims and survivors to understand their own experiences of sexual violence.

## What is the efficacy of jury directions about consent?

Jury directions could be used to address misconceptions about consent and rape myths. As identified throughout this submission, problematic attitudes towards and understandings of sexual violence and consent persist in the Australian community. Jury directions could be used to address understandings of:

- the “stranger rape” myth
- how common it is for victims and survivors to either not report sexual violence, or to not report immediately
- the reasons why victims and survivors may not report or not report immediately
- the freeze response
- the impact of trauma on victims’ and survivors’ memory and presentation.

ANROWS has previously supported the use of jury directions to address misconceptions about consent and rape myths in submissions to reviews of consent laws in New South Wales and Queensland (ANROWS, 2019a, 2019b, 2020).

## What is the impact of consent laws on consent education?

The introduction of a national standard would be a catalyst for renewed attention to and dissemination of consent education and awareness campaigns on a national level. The findings from the 2021 NCAS provide insights into the types of attitudes and understandings that these campaigns would need to address. Expanding upon the findings from the 2021 NCAS, Coumarelos et al. (in press) suggest that educational campaigns could span topics such as the nature and prevalence of violence against women, myths and misconceptions regarding domestic and sexual violence, beliefs about the acceptability of violence in relationships, bystander behaviours and skills, and gender equality. These campaigns could be targeted at specific populations, such as at-risk youth and families or school and tertiary education students, or deployed as national public service campaigns at the general population level (Coumarelos et al., in press). Public service campaigns have previously been successful in improving understanding of the nature and prevalence of violence against women and increasing the rejection of attitudes that condone



violence and gender inequality (Coumarelos et al., in press). For example, an evaluation of the Australian Government's *Stop It at the Start* campaign found that 73 per cent of people who recalled seeing the campaign reported taking action as a result, including through speaking with a young person about respectful relationships and reconsidering or changing their own behaviours (Australian Government, 2021).

The implementation of consent education and awareness campaigns aligns with existing priorities in the response to violence against women and children in Australia. Strengthening positive, equal and respectful relationships between all people in public and private spheres is a key objective of the National Plan. Suggested actions to achieve this objective include access for people of all ages to programs that promote positive and respectful relationships, including age-appropriate consent and respectful relationships education for all children (Commonwealth of Australia [Department of Social Services], 2022). The Australian Curriculum Version 9.0, due for implementation in 2023, also reflects an increased commitment to respectful relationships education in Australia, with a focus on delivering more explicit education on consent and respectful relationships (Pfitzner et al., 2022). Respectful relationships education could be strengthened through the national harmonisation of consent laws, providing a clear national standard that all children and young people are supported to understand and adhere to. As highlighted throughout this submission, the NCAS can provide insight into community understandings of, and attitudes towards, sexual violence and consent and would be a valuable tool to track the development of these understandings and attitudes as consent law reform continues around the country. ANROWS recommends that continued funding be committed to enable ANROWS to continue to deliver these insights through the NCAS.

The introduction of a national consent standard should also be underpinned by training and capacity building within the legal system. As identified earlier, myths and misunderstandings about sexual consent and sexual violence persist in the Australian community and can undermine police and legal perceptions about the credibility of sexual violence allegations (Coumarelos et al., in press; Salter et al., 2020). It is therefore important that police and legal professionals are supported to develop an understanding of affirmative consent and to translate this into practice. ANROWS suggests that the introduction of a national affirmative consent standard should also be accompanied by updates to relevant bench books. These updates could support best practice and consistency in judicial decision-making and court experiences for victims and survivors of sexual assault across jurisdictions.

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