AUSTRALIAN FEMINISTS FOR WOMEN'S RIGHTS

30 January 2025

Input to the addendum to the report of the Special Rapporteur on violence against women and girls on the concept of consent

Australian Feminists for Women's Rights (AF4WR) welcome the opportunity to provide input into this addendum. We are a feminist group whose object is research-based advocacy on women's sex-based rights in all areas.

Consent to sexual relations is variously defined in Australian law; being a federal system, the responsibility for passage and application of criminal law largely falls to states. The so-called "age of consent", the age at which it can be considered that a person is able to fully consent to sexual relations, is either 16 or 17 depending on the state.

For adults, the laws concerning consent to sexual acts also vary from state to state, and reforms to legislation are ongoing, but the general principle underpinning consent laws is that consent must be "informed". It is part of a shift from the lack of refusal, or "no means no" mentality, to the "affirmative consent" model, or "yes means yes".

The Commonwealth (Federal) Consent Policy Framework outlines 5 core concepts of sexual consent. It must be:

- voluntary (absence of violence or threat thereof, or other intimidating or coercive behaviours);
- clear and informed: the person consenting must understand what she is consenting to;
- "affirmative and communicated", thus, actively and clearly given;
- ongoing and mutual: both parties must consent and continue to do so;
- able and capable of consenting: not under the age of consent, not heavily affected by drugs or alcohol, and fully conscious.

In addition, the Commonwealth Framework stipulates that consent is not a "problem" to be solved or transactional in nature (consent in exchange or as a tradeoff for something).

There are no cases of sexual assault in which the notion of consent is considered irrelevant.

As concerns application of the law in courts in the case of sexual offences, in all criminal cases under the Australian common law system, the onus remains on the prosecutor to prove "beyond reasonable doubt" that the complainant did not consent to the sexual activity and that the accused person knew that there was no consent. This can be very

difficult to do, as—almost by definition—sexual acts do not occur in front of witnesses and demonstrating the presence or absence of consent often comes down to a woman's word against a man's. That said, lack of resistance is not in itself sufficient proof of consent.

Across the world, reports of sexual assault lead to a conviction in only a minority of cases, and Australia is no exception. In the state of NSW (New South Wales), to take one example, a 2024 report by the NSW Bureau of Crime Statistics and Research showed that only 15% of reported cases result in charges being laid and only 7% result in a conviction.

The shift from the old "absence of refusal" model to "presence of consent" model has followed advice from various law reform bodies designed to help overcome hurdles in criminal prosecutions and improve conviction rates in sexual assault cases. As the above figures show in the case of NSW, such reforms, being very recent, have yet to have any significant impact. We will need to wait another few years to see whether the promised improvements have occurred.

That said, an unintended and somewhat perverse consequence of the more active consent model in law is that it risks bureaucratising sexual relations. Consensual sexual activity between adults normally does not follow a box-ticking approach to consent and often occurs without a specific verbal transaction taking place. It also, given the burden of proof requirement in Australian criminal law, places yet more responsibility on the victim of sexual assault to prove lack of consent. Even if a burden to *ask* for consent is also placed on males, the power dynamics between men and women are such that psychological manipulation to obtain such consent can be frequent, and very difficult to prove in a criminal court.

Clearly, there are many reasons to welcome the growing institutional acknowledgement of the sorts of pressures and various forms of coercive behaviour by men, and temporary incapacitation through drugs or alcohol (for which the male aggressor may also be partly or wholly responsible), that make it impossible for women to engage freely and equally in sexual relations with men.

However, law and policy are only the institutional tip of the misogynist iceberg that brings about various forms of sexual assault against women. The law is a very blunt instrument for addressing a much broader problem: that of the value placed on women in society and various cultural attitudes to and representations of women as sexual objects for the gratification of men—from popular television series to advertising to pornography. It is even inculcated in women and girls from an early age that pleasing males and being sexually attractive to them is a measure of their worth.

Dealing with the issue of "consent" is thus a problem that the law alone cannot solve in any other but that blunt-instrument way. A much broader cultural shift is needed, including but not solely through education.