NWSA responses to the Law Council of Australia's Submission

- **Principle 1**: sexual consent laws and sexual assault offences should be expressed clearly.

We agree to this principle. The current lack of clear and consistent laws and sexual assault offences is mirrored in our cultural understanding of consent as a concept. The assumption that consent is a 'state of mind' rather than a communicative process emerges from the patchwork of state and territory legislation which, at various points, has allowed respondents to hold an honest or reasonable belief in consent, grounded in demonstrably unreasonable beliefs in sexuality and rape-myths.[1] This legal framework went on to influence police responses, public perceptions of victimhood and jury deliberations,[2] all of which are significant factors affecting survivor decisions to report.

- **Principle 2:** the fundamental principles that underpin the criminal justice process, such as the presumption of innocence and right to silence, must be maintained.

The human rights of the victim-survivor must be upheld and maintained in all criminal justice processes.
How do we balance this (hundreds-years old) judicial concept with the pervasive cultural belief that victims of sexual violence were 'asking for it'? Why is the presumption of belief not extended to the victim/accuser?

We would point to the ANROWS 2017 National Community Attitudes towards Violence against Women Survey, and specifically, the research report investigating Australians' mistrust in women's reports of sexual assault.

In summary, the research found that as many as four in 10 Australians mistrust women's reports of sexual violence. The following extract highlights how pervasive the mistrust of female victims is in Australia:

> *"**Participants took a default position of doubt and suspicion when considering a woman's allegation of sexual assault.** As a result, a range of unrealistic expectations had to be met for a woman's allegation to be believed, **while the accused man's actions to gain or confirm consent were rarely scrutinised.** For example, the participants questioned whether or not the woman was explicit enough when she said "no" to sex, whether she could*

[1] Faulkner, J (1991) '*Men's Rae in rape: Morgan and the inadequacy of subjectivism*': Melbourne University Law Review vol 18, p. 62. "The majority of Australia's population [was] still effectively subject to the law as shaped by the Morgan decision - by way of sexual assault legislation". http://classic.austlii.edu.au/au/journals/MelbULawRw/1991/3.pdf

[2] Larcombe et al (2016) *'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', Social & Legal Studies vol 25(5), 611-629.

show she had physical injuries from the assault, and whether she had an ulterior motive for reporting the assault, such as covering up consensual sex because she was ashamed. This mistrust drew on inaccurate myths and gendered stereotypes and contrasts starkly with the fact that false allegations of sexual assault are extremely rare."[3]

- **Principle 3:** any change should be justified on the basis of proportionality analysis, having regard to the interests of victim-survivors and the rights of the accused to a fair trial.

This cannot be considered a pressing or realistic 'concern' in the face of the sexual violence crisis that is currently taking place in Australia. Of course, there needs to be a fair tail. However, evidence relating to the judicial processing of sexual violence and rape cases clearly and overwhelmingly shows how devasting and unfair much of this process is to the victim - before it even makes it to court.

Currently, we have a 1.7% conviction rate for sexual offences that make it to a legal outcome.[4] Within that tiny percentage, we see sentencing outcomes of community service for convicted rapists; with the primary concern being that the perpetrators' life not being permanently negatively impacted.

The longitudinal data from the ANROWS 2022 report is clear: Victims and survivors of sexual violence are up to 45 per cent more likely to have high levels of financial stress and report worse physical and mental health, including chronic conditions and mental health issues, than those who have not experienced sexual violence.[5]

In a recent inquiry, we found that, in the ACT jurisdiction, over 200 complaints of sexual violence had been dismissed by police without investigation.[6] This is completely unacceptable in 2023 Australian society,

- **Principle 4**: sexual consent laws should reflect the communicative model of consent.

NWSA fundamentally disagrees based on the anecdotal evidence from our members in jurisdictions that have this law in place; The communicative model is the model that currently exists in Queensland and unfortunately has been interpreted in a way that it requires the victim-survivor to communicate "no" or fight the perpetrator off (essentially) to communicate a lack of consent. This has also led to people believing that once consent has been given it can not be revoked.

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[3] Minter, K., Carlisle, E., & Coumarelos, C. (2021). *"Chuck her on a lie detector"* – Investigating Australians' mistrust in women's reports of sexual assault (Research report, 04/2021). ANROWS.

[5] Townsend, N., Loxton, D., Egan, N., Barnes, I., Byrnes, E., & Forder, P. (2022). *A life course approach to determining the prevalence and impact of sexual violence in Australia: Findings from the Australian Longitudinal Study on Women's Health* (Research report 14/2022). ANROWS.

We advocate for an affirmative consent model that requires all parties to reach agreement and to take active steps to establish consent and that silence is not adequate.

NWSA supports the implementation of a nationally consistent statutory definition of affirmative sexual consent. This constitutes a revocable, free and voluntary agreement between people to participate in a sexual act. This agreement is only present when all people involved mutually feel they want to engage in that sexual act and actively communicate this.

. We also believe that this legislative amendment must be reinforced by a comprehensive cultural change piece that informs and shift the publics' understanding on affirmative consent, which filters through judicial and policing bodies. This will help to ensure that when victims do come forward, they are given fair opportunity to be heard under the legislation that is been designed to protect them, and that those responsible for giving them justice understand their obligations and the laws around consent.

- **Principle 5:** consideration should be given to vulnerable groups disproportionately impacted by implementation of communicative model of consent laws, including persons with disability and young persons.

NWSA supports extensive community education with specifically focus on implicit bias; this includes policing bodies, judicial staff on the issue and prevention work to ensure all community members understand their responsibilities to comply with the law, and the people charge with upholding the law understand their obligations towards victim survivors.
In jurisdictions that have the affirmative consent framework the law also makes provision for these issues in the drafting.

- **Principle 6**: consideration should be given to a broader range of policies to substantially reduce the incidence of sexual violence, for example:
    - increasing investment in restorative justice for suitable sexual offence matters.
    - improving financial assistance and truth-telling for victim-survivors of sexual violence; and
    - improving civil litigation options for victim-survivors.

- **Principle 7:** consideration of broader limitations of the criminal justice system, including delays and the scope for appeals, that impact on the experience of victim-survivors. In this regard, consideration needs to be given:
    - appropriate resourcing of the legal assistance sector.
    - appropriate resourcing for judicial officers; and
    - avoidance of over-complex rules prescribing jury directions, which increase the scope for appeals.

NWSA fully supports simplifying options of civil litigation for all victim/survivors.

- **Principle 8:** the aims of any legislative change towards better realising the communicative model of consent must have the support of community education; there should be ample lead-in time to allow for targeted education of young people and vulnerable people who may be disproportionately impacted by changes.

We agree in principle and believe that we need to complement legislative reform with a national campaign on consent and sexual violence that includes social, spiritual, psychological, emotional, and biological factors, delivered across mediums in a way that meets diversity of need and awareness.
However, we also believe that urgent education is needed in for police, judicial officers and peripheral frontline services who deal with sexual violence victims, accusations and cases. In developing our initial submission to this inquiry, the NWSA consulted with our members who work in legal advocacy and rape support services. Police responses were frequently raised in these discussions.

For survivors who choose to report their assault, their experience with police and peripheral frontline services will often be a determining factor in pursuing a formal justice outcome. It was also frequently fed back to the NWSA that while consent harmonisation might be helpful in any number of social and legal ways, education and implementation will be immense.

The discussion on harmonisation also cannot is intrinsically linked with the considerations of implicit biases that permeate police services, jury deliberations, and the court system. Without broader social reforms and education, the impact of consent harmonisation on the lives of survivors of sexual violence will likely be piecemeal. We recommend that the committee considers the evaluation of the specialist sexual violence courts in their deliberations.