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Special Rapporteur on Violence against Women and Girls
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By Email: hrc-sr-vaw@un.org

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Dear Ms Alsalem

**Submission on the concept of consent in relation to
violence against women and girls**

Feminist Legal Clinic Inc. is a community legal service based in Sydney that works to advance the human rights of women and girls. Our casework and advocacy are specifically focused on defending women from male violence and human rights abuses. We welcome the opportunity to make this submission.

1. Consent Definition

Affirmative consent laws were introduced in NSW in 2022 to ensure that ‘if you want to engage in sexual activity with someone, then they need to do or say something to show consent, or you need to do or say something to seek consent.’¹

According to the definition in section 61HI of the NSW *Crimes Act* 1900 (‘the Act’), a person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.

These reforms were designed to ensure consent must be communicated by words or actions and should not be presumed. The provisions also confirm that consent can be withdrawn at any time.

¹ <https://dcj.nsw.gov.au/news-and-media/media-releases-archive/2022/affirmative-consent-becomes-law-in-nsw.html>

Section 61HJ(2) of Act lists various factors that negate consent, including fraudulent inducement. However, section 61HJ(3) specifically limits this stating: *fraudulent inducement does not include a misrepresentation about a person's income, wealth or feelings.*

In other contexts, such as medical consent, it is a requirement that before giving consent a person should be 'informed' about the potential benefits, risks, and alternatives. However, there is no such requirement in the context of sexual activity. In NSW, you are not legally required to disclose pertinent facts before having sex, such as HIV status, if you take "reasonable precautions" to prevent transmission. Despite the various significant risks involved, particularly for women, informed consent is not fully legislated as a requirement for sexual activity.

2. Sex-Specific Crimes

Consent (or the lack thereof) is a central element in sexual crimes but rarely features elsewhere in the NSW *Crimes Act* 1900. One exception is section 154A – taking a conveyance without consent of owner. This is an oddity as other property offences and violent crimes do not explicitly require the prosecution to establish a lack of consent as an element of the offence. It is sensibly presumed that individuals do not generally agree to harm to their person or property. An exception to this general presumption, however, appears to apply to women in relation to sexual activity. It seems the legal system is inclined to regard women as inherently prone to malicious or irrational falsehoods.

In 2018 a new choking offence was added to the Act (section 37(1A)) that introduces lack of consent as an element of that offence. The implicit suggestion is that these are offences where it may otherwise be presumed there was consent, which must be actively rebutted. The implication of this change is that men will increasingly be able to defend acts of violence claiming the woman consented (the 'rough sex' defence). As a result, female victims may be increasingly subjected to inappropriate cross-examination about their sexual proclivities, even in domestic violence matters.

3. Legislation and Jurisprudence

Although some Australian jurisdictions have adopted affirmative consent laws, requiring clear agreement for sexual activity, these laws are still far from perfect and their enforcement is even more problematic. Perpetrators of violence, particularly sexual violence, are overwhelmingly male and as males continue to dominate the police and the judiciary it is hardly surprising that there is a systemic issue with enforcement of these laws.

The manipulation of the concept of consent to defend increasing levels of violence in intimate relationships has acted to increase male entitlement and the ability for men to coerce women into harmful sexual activity. It is making it increasingly difficult to obtain convictions against violent perpetrators – even when there is clear evidence of physical injury.

We are also cynical about the monitoring and evaluation of sex specific laws, particularly considering how crime statistics are increasingly distorted by the failure to accurately report the sex of perpetrators and their victims when transgender individuals are involved.

Australian Courts have a long history of failing to adequately protect female victims of sexual crimes from being effectively put on trial and subjected to lengthy and inappropriate cross-examination. Victim blaming continues to flourish within the Australian community with a failure to comprehend the cultural, psychological, financial and physical disparities between the sexes that operate to compromise the ability of women to effectively resist male violence.

At least in sexual cases involving physical injury, the law must accept a woman's claims that there was coercion. If males choose to engage in forceful sexual practices, they should accept that they are exposing themselves to the risk of prosecution should they inflict physical harm. It is hardly in the public interest to require all victims of violence to have to rebut a presumption that they consented to rough treatment.

4. Recommendations

We recommend that there should be a shift generally from an emphasis on consent to a model that takes account of the power imbalance that exists between men and women and more fully acknowledges the various forms coercion can take. Where consent is to remain an element of sexual offences, it must be framed as 'informed' consent, thereby giving some greater protection to women from male deceit, manipulation and coercion.

This submission is necessarily brief because of our limited time and resources. However, we would be happy to expand on any point if required. We also note a more detailed consideration of the question of consent can be found in this writer's article '*Cups of Tea, Joyriding and Shaking Hands – The Vexed Issue of Consent*' published in the Griffith Journal of Law and Human Dignity in 2019 and in our various previous submissions.²

Thank you again for your important efforts to ensure the safety of women and girls.



Anna Kerr
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Feminist Legal Clinic Inc.
Organization in Special Consultative Status with the Economic and Social Council (ECOSOC) since 2023.

² <https://griffithlawjournal.org/index.php/gjlhd/article/view/1177/1036>
<https://feministlegal.org/wp-content/uploads/2020/01/Consent-Submission.pdf>
<https://feministlegal.org/wp-content/uploads/2020/02/Queensland-Consent-Laws-FINAL.pdf>