



CENTRE FOR
Women's Safety
and Wellbeing

Response to Discussion Paper Volume 1

OBJECTIVES, CONSENT AND MISTAKE OF FACT

APRIL 2023



Acknowledgement of Country

The Centre for Women's Safety and Wellbeing acknowledges the Whadjuk Nyoongar people as the Traditional Owners of the land where our office is located. We acknowledge Aboriginal and Torres Strait Islander peoples of this nation, and we pay respect to Elders past and present. We acknowledge the continued deep spiritual attachment and relationship of Aboriginal and Torres Strait Islander peoples to this country and commit ourselves to the ongoing journey of reconciliation.

Recognition of Victims and Survivors

The Centre for Women's Safety and Wellbeing recognises the strength and resilience of adults, children, and young people who have experienced domestic, family, and sexual violence and acknowledge that it is essential that responses to domestic, family, and sexual violence are informed by their expert knowledge and advocacy.

We pay respect to those who did not survive and acknowledge friends and family members who have lost loved ones to the preventable and far-reaching issue of domestic, family, and sexual violence.

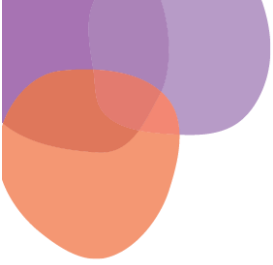
About the Centre for Women's Safety and Wellbeing

The Centre for Women's Safety and Wellbeing is the leading voice for women and children affected by gender-based violence in Western Australia and the peak body for domestic, family and sexual violence services and community-based women's health services in WA.

The Centre for Women's Safety and Wellbeing (the Centre) works to prevent domestic, family and sexual violence against women and their children; promote women's health and wellbeing; and advance gender equity.

The Centre works to ensure that the evidence is taken up in policy and practice to further the safety, health and wellbeing of women and their children. We advocate for systems and structures that enable and support the safety, wellbeing and economic security of women.

The Centre for Women's Safety and Wellbeing also promotes non-violent and respectful attitudes and behaviours towards women and girls in the broader community, and community responsibility for violence prevention.



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Introduction

The Centre for Women’s Safety and Wellbeing (CWSW) welcomes the opportunity to make this submission to the Law Reform Commission of Western Australia in response to the Sexual Offences reform – Volume 1: Objectives, Consent and Mistake of Fact Discussion Paper (Discussion Paper).

The current definition of consent and the current operation of mistake of fact, coupled with pervasive myths and stereotypes about rape and sexual violence that are common within the general community, have significant negative impacts on the reporting, investigation, charge and prosecution of rape and sexual assault, and result in injustice to many sexual assault victim-survivors.

There is a need for Western Australia’s Criminal Code to ensure just outcomes by balancing the interests of victim-survivors and accused persons, responding to the experiences of sexual assault victim-survivors in the criminal justice system, and aligning with recent developments, legislative reforms, and research in other Australian and international jurisdictions. CWSW commends the extensive analysis of issues relating to sexual offences outlined in the Law Reform Commission of Western Australia’s (LRCWA) Discussion Paper to ensure the Code reflects contemporary issues and community standards of consent.

As a reform advocate, CWSW is aware, however, of the conceptual gap that emerges between the intentions of law reform and the practice or implementation of that law. In addition to any changes in legislation, it is critical that the Western Australian Government ensures thorough training on the changes to consent legislation as well as the nature and dynamic of sexual and gender-based violence and sexual offending to all relevant law enforcement personnel and justice system officials. This must be coupled with broad and concurrent education for both the judiciary and the public that address myths, biases and stereotypical beliefs about sexual assault, victim-survivors and perpetrators. If myths about sexual assault exist in the general community, “it is a reasonable assumption that they would also be evident within the courtroom.”¹

To improve just outcomes for victim-survivors, CWSW recommends that the Code:

- Adopt an affirmative model of consent
- Adequately addresses and includes terminology on intimate partner violence
- Specifies objectives and guiding principles concerning sexual offending
- Provides a comprehensive definition of consent that includes stealthing as a circumstance in which consent is negated
- Amends and develops jury directions to be clear and understandable
- Removes the operation of the mistake of fact defence

¹ Bain, R. (2018). Jury Directions under the Abusive Behaviour and Sexual Harm (Scotland) act 2016: A Long Needed Success for Tackling Rape Myths or Another Measure Falling Short. *Aberdeen Student Review* 39, 45.



Language

What language should we use in our future publications to refer to incidents of sexual violence, the people who experience sexual violence, and the people who commit acts of sexual violence?

CWSW understands that there are differences between legal and non-legal language used to refer to sexual violence, victim-survivors and perpetrators, and that this language differs when describing a particular criminal act or speaking generally about the issue. CWSW tends to communicate to the broader public about these issues and does not utilise specific legal descriptions.

CWSW advocates for the inclusion of intimate partner violence directly within the legislation. Sexual assault that occurs within the context of intimate partner relationships often forms part of a larger pattern of coercive and controlling behaviours that are intended to dominate, humiliate and denigrate.² Domestic and family violence creates a climate of ongoing fear such that consent, arguably, cannot be freely given.³ In a relationship involving family and domestic violence, sexual assault is often part of a pattern of violence and controlling behaviour across multiple aspects of a victim-survivor's life. The fear of force or harm felt by a victim-survivor of family and domestic violence can be ongoing. It can be maintained by the accused through subtle and non-verbal ways, meaning that consent for sexual activity is not given freely and voluntarily.

It is critical that our sexual assault laws consider the broader context of the relationship when determining free and voluntary consent to engage in sexual activity. In the context of sexual assault, domestic and family violence would most commonly be intimate partner violence, however, some women may participate in sexual activity under duress to protect other members of the family.⁴

We believe that the Code should explicitly define the following terms:


Sexual violence: sexual activity that happens where consent is not obtained or freely given. It occurs any time a person is forced, coerced or manipulated into any unwanted sexual activity, such as touching, sexual harassment and intimidation, forced marriage, trafficking for the purpose of sexual exploitation, sexual abuse, sexual assault and rape.

Intimate partner violence: any behaviour by a man or a woman within an intimate relationship (including current or past marriages, domestic partnerships, familial relations,

² Toivonen, C., & Backhouse, C. (2018). National Risk Assessment Principles for domestic and family violence (ANROWS Insights 07/2018). Sydney, NSW: ANROWS; Cox, P. (2015). Sexual assault and domestic violence in the context of co-occurrence and revictimisation: State of knowledge paper (ANROWS Landscapes, 13/2015). Sydney, NSW: ANROWS.

³ Cox, P. (2015). Sexual assault and domestic violence in the context of co-occurrence and revictimisation: State of knowledge paper (ANROWS Landscapes, 13/2015). Sydney, NSW: ANROWS.

⁴ Tarrant, S., Tolmie, J., & Giudice, G. (2019). Transforming legal understandings of intimate partner violence (Research report 03/2019). Sydney, NSW: ANROWS.



or people who share accommodation) that causes physical, sexual or psychological harm to those in the relationship. This is the most common form of violence against women.

Non-partner sexual assault: sexual violence perpetrated by people such as strangers, acquaintances, friends, colleagues, peers, teachers, neighbours and family members.⁵

Objectives and Guiding Principles

Should the Code specify objectives and/or guiding principles concerning sexual offending? Why/why not?

CWSW supports the introduction of objectives and guiding principles to the Criminal Code.

In line with the Australian Law Reform Commission (ALRC), CWSW believes that:

“Statements of objectives and guiding principles can perform an important symbolic and educative role in the application and interpretation of the law, as well as in the general community. While much more is required to change culture, such statements provide an important opportunity for governments and legal players to articulate their understanding of sexual violence and provide a benchmark against which to assess the implementation of the law and procedure.”⁶

CWSW believes the Code should serve both a regulatory and educative function. As understandings of sexual consent and sexual assault within the community are often shaped by pervasive stereotypes, myths and misconceptions about rape, sexual violence, people who experience it, and people who perpetrate it, it is imperative that the Code clearly articulate guiding principles that factually correct myths and misconceptions about the nature of sexual assault and victim-survivors.


The 2021 National Community Attitudes towards Violence against Women Survey by ANROWS reveals that more than one in three respondents (34 per cent) agreed that sexual assault is commonly used to get back at men, and almost one quarter (24 per cent) agreed that sexual assault allegations could be a response to a regretted sexual encounter.⁷ International studies have similarly shown considerable mistrust in women’s reports of sexual assault.⁸ Such mistrustful attitudes impact whether victim-survivors

⁵ Our Watch (2022). Glossary. Available online at: <https://localgov.ourwatch.org.au/localgovtoolkit/learn/glossary/>

⁶ Australian Law Reform Commission (2010). *Guiding Principles and objects clauses*. Australian Government.

⁷ Coumarelos, C., Weeks, N., Bernstein, S., Roberts, N., Honey, N., Minter, K., & Carlisle, E. (2023). Attitudes matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS), Findings for Australia. (Research report 02/2023). ANROWS

⁸ McMillan, L. (2017). Police officers’ perceptions of false allegations of rape. *Journal of Gender Studies*, 27(1), 9–21. <https://doi.org/10.1080/09589236.2016.1194260>



report sexual violence and whether key stakeholders, including police, judges, and jurors believe victim-survivors in their accounts.

There is overwhelming evidence that demonstrates that juror judgements in rape trials are influenced more by the attitudes, beliefs and biases about rape which jurors bring with them into the courtroom than by their evaluation of the evidence presented, and that these beliefs and attitudes affect verdict choices.⁹

CWSW believes a statement of guiding principles will help counter false and prejudicial beliefs among jurors about what constitutes sexual violence and how genuine victims may act either at the time of the offence, reporting, or in the courtroom. It would also give added weight to any directions or instructions that a judge gives to the jury. By providing accurate, objective information on sexual assault, the Code may assist both jury members and members of the judiciary in their decision-making with the potential to better secure justice outcomes for victim-survivors.

If the Code does specify objectives and/or guiding principles concerning sexual offending, how should the relevant provision(s) be framed?

It is important that objectives and guiding principles provisions serve separate functions and are considered separately. Sexual offence-specific objectives should outline the purpose and intention of the legislation and the model of consent that underpins it. Sexual offence-specific guiding principles should outline specific contextual features of sexual violence. Both should serve to guide legislative interpretation and to educate those applying or engaging with the law.¹⁰

In line with the recently amended Crimes Act 1958 (Vic) (the Victorian Act), CWSW proposes the following framing for the objectives provisions:

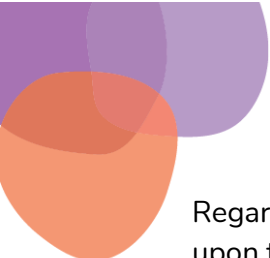
- a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
- b) to protect children and persons with a cognitive impairment or mental illness from sexual exploitation;¹¹
- c) to promote the principle that consent to an act is not to be assumed—that consent involves ongoing and mutual communication and decision-making between each person involved (that is, each person should seek the consent of each other person in a way and at a time that makes it clear whether they consent).¹²

⁹ Leverick, F. (2020). What do we know about rape myths and juror decision making? *The International Journal of Evidence & Proof*, 24(3), 255–279. <https://doi.org/10.1177/1365712720923157>

¹⁰ Australian Law Reform Commission (2010). *Guiding principles and a human rights framework*. Australian Government.

¹¹ Crimes Act 1958 (Vic) s 37A.

¹² Crimes Act 1958 (Vic) s 37A(ab), amended by Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022 (Vic) s 6.



Regarding guiding principles provisions, CWSW believes the principles should expand upon those outlined in the Victorian Act, and proposes the following framing:

It is the intention of Parliament that in interpreting and applying [the sexual offence provisions], courts are to have regard to the fact that:

- a) there is a high incidence of sexual violence within society;
- b) sexual offences are significantly under-reported;
- c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment or mental illness;
- d) sexual offenders are commonly known to their victims;
- e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred;
- f) sexual offences most frequently occur in residential locations;
- g) sexual offences can occur in the context of intimate relationships.

In addition to the principles outlined in the Victorian Act, CWSW proposes two additional principles (f and g) that refer to sexual offending in the context of intimate partner violence. At present, intimate partner violence has been adequately addressed by the Code. The value of including this terminology directly within interpretive principles is that it emphasises that sexual assault is also committed by intimate partners, that is, it can occur within the context of domestic violence.

Women are more likely to be sexually assaulted by an intimate partner than by a stranger or acquaintance.¹³ Globally, more than a quarter of women aged 15-49 years who have been in a relationship have been subjected to physical and/or sexual violence by their intimate partner at least once in their lifetime since the age of 15.¹⁴ Despite this, intimate partner sexual violence continues to lack public visibility, and there is evidence that the community consistently views intimate partner sexual violence as both less serious and more justifiable than sexual violence by a stranger or acquaintance.¹⁵

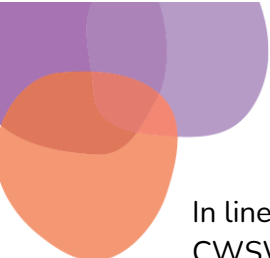
The inclusion of intimate partner terminology within the guiding principles is necessary if the Code seeks to adequately address a context in which sexual violence most frequently occurs.

If the Code does specify objectives and/or guiding principles concerning sexual offending, what should be included or excluded?

¹³ Cox, P. (2016). Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012. (ANROWS Horizons, 01/2016). Sydney, NSW: ANROWS.

¹⁴ World Health Organization (2021). Violence against women. Available online: <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>

¹⁵ Cox, P. (2015). Sexual assault and domestic violence in the context of co-occurrence and revictimisation: State of knowledge paper (ANROWS Landscapes, 13/2015). Sydney, NSW: ANROWS.



In line with the four objectives specified in the Victorian, NSW and ACT Acts, CWSW believes that objectives provisions within the Code should include:

- Upholding the right to choose whether or not to participate in a sexual activity.
- Protecting children and persons with a cognitive impairment or mental illness from sexual exploitation.
- Recognising that the consent to a sexual activity is not to be presumed.
- Recognising that consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the participants.

CWSW believes that guiding principles provisions should include contextual specifications that remain salient for all sexual assault cases, such as:

- The prevalence of sexual offending;
- The under-reporting of sexual offending;
- The circumstances in which sexual offending commonly occurs; and
- The relationship between sexual violence and family and domestic violence.

CWSW believes that features of sexual assault that may be relevant to the circumstances of the case are better addressed in jury directions, including:

- Common misconceptions about sexual offending or consent;
- The various ways in which people may respond to sexual offending; and
- The harmfulness of sexual offending.

Consent

Should the Code define consent? If so, how should it be defined?

This is a historic opportunity to reframe and modernise Western Australia's outdated sexual offence laws, including the definition of consent. Having sexual offences that are well defined supports an effective justice system response to sexual violence. The current definition of consent does not adequately address all instances where consent may not be present, and this has led to injustices for victim-survivors.

CWSW would like to see the Code introduce an affirmative consent model and a definition that reflects this.

The State University of New York provides the following definition of affirmative consent:

“Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The



definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.”¹⁶

In simple terms, it is a clear and unequivocal ‘yes’ (through words or actions) and highlights that it is the responsibility of each person involved in the sexual activity to ensure the affirmative consent of the other to engage in the sexual activity.¹⁷

CWSW submits that the Code should be amended to introduce the affirmative consent model into Western Australian legislation that includes the concept of a ‘knowing, voluntary and mutual agreement’ between two parties. As highlighted in a joint report by the Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC):

“A definition based on agreement properly reflects the two objectives of sexual offences law: protecting the sexual autonomy and freedom of choice of adults; and reinforcing both positive and communicative understandings of consent through use of the term agreement.”¹⁸

Should the Code require participants to say or do something to indicate their consent to a sexual activity? If so, how should this requirement be framed?

CWSW affirms that the Code should require participants to say or do something to indicate their consent to a sexual activity. Clear verbal or non-verbal communication about sexual activity mandated by the Code will help remove ambiguity from sexual encounters and create a framework in which consent is positioned as an active construct.

Affirmative consent by definition is active, meaning that, a person has indicated permission to engage in mutually agreed-upon sexual activity through the demonstration of clear words or actions. This is particularly significant for the justice process as some victim-survivors may remain silent or present the ‘freeze’ response when they are in a situation of fear and are unable to verbally or non-verbally indicate “no” or “stop” to the perpetrator. It further reduces the potential for assumptions to be relied upon, both interpersonally and legally, when engaging in sexual acts.

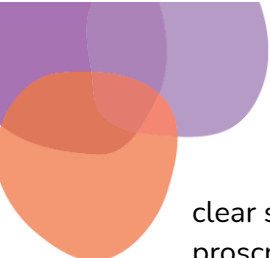
Should the Code clarify the meaning of consent in any way? If so, what matters should be addressed and how should they be addressed? For example, should they be addressed as part of the definition of consent and/or in jury directions?

CWSW asserts that the Code should clarify the meaning of consent and that this should be part of the definition. Clarifying what does not constitute consent helps to set a

¹⁶ The State University of New York (2023). Definition of Affirmative Consent. Available online: <https://system.suny.edu/sexual-violence-prevention-workgroup/policies/affirmative-consent/>

¹⁷ Queensland Law Reform Commission, Review of consent laws and the excuse of mistake of fact (Consultation Paper, December 2019) [88] 21.

¹⁸ Australian Law Reform Commission (2010). Consent. Australian Government.



clear standard to inform jurors, the judiciary and the community about the boundaries of proscribed sexual behaviour.

CWSW believes the Code should make it clear that a person does not consent only because they:


- Failed to verbally resist;
- Consented to a different act with the same person;
- Had previously consented to a sexual activity with that person or someone else;
- Had previously consented to a sexual activity of that kind or any other kind; and/or
- Had entered into an agreement for commercial sexual services.

The Code currently provides that consent is not freely and voluntarily given if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means'. Should this list of circumstances be amended in any way?

CWSW believes that a non-exhaustive list of circumstances where there can be no consent is an important step to support the conception of consent as 'free or voluntary agreement'. Western Australia currently lists the least number of circumstances vitiating consent across Australian jurisdictions. The list of circumstances should be amended to better reflect current Australian legal approaches to consent and modern community standards. CWSW believes that at a minimum, the Code should set out a non-exhaustive list of circumstances that may vitiate consent, that includes:

- 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;
- where a person submits because of threats to harm animals or property;
- where a person consents to a sexual act under a mistaken belief induced by the other person that the other person will use a condom or other safer sex paraphernalia, but the other person does not do so or removes the condom part way through the sexual act;
- where a person submits because of an ongoing pattern of coercive and controlling behaviours causing fear;
- where the person consents to a sexual act under a fraudulent representation/mistaken belief by the other person that there will be a monetary exchange in relation to the sexual act;
- unlawful detention; and
- abuse of a position of authority or trust.

This list slightly expands upon the non-exhaustive list of circumstances that may vitiate consent as recommended by the ALRC and NSWLRC in their joint report, *Family*



*Violence—A National Legal Response.*¹⁹ Additional items include circumstances common within a family and domestic violence context, including ongoing coercive conduct and threats to harm animals and property. The consideration of the cumulative impact of coercive and controlling behaviours and the pattern of behaviour within the context of the relationship is crucial. This approach will support the prosecutor to assess effectively whether a pattern of behaviour amounts to fear that violence will be carried out such that a person engages in an unwanted sexual activity.

Perpetrators may inflict or threaten to harm children, animals or property as a strategy to intimidate, coerce or control victim-survivors, and it is important that legislation provide illustrative examples of such circumstances. There is also the danger that when removed from the wider context of domestic and family violence, terms like coercion can be levelled at the victim by the perpetrator of domestic and family violence, creating a false impression of mutuality, rather than seeing the impact of coercion as part of “a pattern of harmful behaviour”.²⁰

Additionally, the mistaken belief item has been expanded upon to specifically address the practice of stealthing. The act of stealthing has implications for the sexual and reproductive health of all people involved. It puts people at risk of sexually transmissible infections, blood borne viruses and unwanted pregnancies. It is important to ensure that any person engaging in sexual activity can indicate that their consent hinges upon the use of a condom or other safer sex paraphernalia irrespective of whether their intended use is to prevent the transmission of sexually transmitted diseases, or for reasons of reproductive control.

CWSW advocates for the Code to take the victimisation of sex workers seriously and offer protections to sex worker sexual assault victims as they would any other person, regardless of their occupation. Consistent research demonstrates that the kinds of contexts and conditions sex workers operate in greatly influence their risk of sexual assault.²¹ There are further barriers for sex workers in reporting assaults to the police for fear of prosecution.²²

Sex workers discuss and negotiate services and costs with clients, consenting to mutually agreed upon terms. As stated by sex worker reform advocates Magenta,

*“When a client does something that wasn’t agreed to, boundaries are broken and consent no longer exists. If a client changes the terms of the booking without talking to the sex worker, consent is broken. It doesn’t matter whether this is done by deceit, fraud, force, threat or intimidation.”*²³

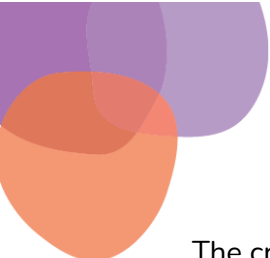
¹⁹ Australian Law Reform Commission (2010). *Family Violence —A National Legal Response Final Report*. ALRC Report 114. Australian Government.

²⁰ Toivonen, C., & Backhouse, C. (2018). *National Risk Assessment Principles for domestic and family violence (ANROWS Insights 07/2018)*. Sydney, NSW: ANROWS.

²¹ Quadara, A. (2008). *Sex workers and sexual assault in Australia: prevalence, risk and safety*. Australian Centre for the Study of Sexual Assault.

²² Ibid.

²³ Magenta (2016). *Sexual Assault: Not stealthing*. Accessed online: <https://magenta.org.au/sexual-assault/>



The criminalisation of stealthing is fundamental to increasing community awareness and education about sexual safety and consent. The current ambiguity around the legality of stealthing may reinforce a survivor's feelings of guilt and shame. As well as increasing awareness and deterrence, law reform on stealthing will arm survivors with the language to describe what has happened to them and the knowledge that it was wrong.

Should the Code explicitly address the withdrawal of consent? If so, how should this be done? For example, should the provision require the withdrawal of consent to be communicated by words or conduct?

CWSW believes that the Code should explicitly address the withdrawal of consent, to be in line with the majority of other Australian jurisdictions. It is important that legislation does not rely on implicit understandings, but rather makes it clear that consent initially given can be withdrawn by words or conduct at any time and that sexual activity that occurs after consent has been withdrawn occurs without consent.

Mistake of Fact

Should the law provide that the mistake of fact defence does not apply to sexual offences?


CWSW advocates that the operation of the mistake of fact defence be rendered inapplicable to the issue of consent in rape and sexual assault cases. Reform advocates and legal practitioners commonly refer to the defence as a 'loophole' that allows accused rapists, including repeat offenders, to escape accountability and conviction. It is likely a contributing factor to the low sexual assault conviction rates in Western Australia that also deters victim-survivors from reporting sexual assaults and police from pursuing charges.

In practice, the mistake of fact defence has been used across Australian jurisdictions by sexual assault defendants to secure an acquittal in rape cases involving the 'freeze' response, intoxication of either the defendant or complainant, mental incapacity or language barriers. It has been used by defendants including repeat violent offenders and those who argued that a woman's behaviour, including previous flirting or visiting a man's home, could be taken as consent.²⁴ In Western Australia, the mistake of fact defence has succeeded in sexual offence cases even where there is a history of violence between the parties.²⁵

Furthermore, defendants with mental impairments can rely on the mistake of fact defence even where the complainant actively expressed a lack of consent. A person cannot

²⁴ Robertson, J. (2019). Queensland will abolish rape defence 'loophole' if law reform experts recommend it. ABC News.

²⁵ Crowe, J. and Burgin, R. and Edwards, H. (2023) Affirmative Consent and the Mistake of Fact Excuse in Western Australian Rape Law. University of Western Australia Law Review 284: <https://ssrn.com/abstract=4381029>



generally rely on a mental impairment to deny the fault element of an offence.²⁶ This issue is complex and requires careful consideration to ensure that a defendant is not unduly punished for their mental impairment, while also ensuring that there is legal recognition of the actions perpetrated against a non-consenting complainant. CWSW suggests issues of mental impairment are best dealt with through mechanisms other than the mistake of fact defence.

If the Code is to move towards an affirmative consent standard, the mistake of fact defence undermines this approach as it allows a defendant to argue mistaken belief rather than requiring the defendant to show the positive steps they took to gain consent. As stated by Crowe et al., (2023):

“A legal framework that treats alleged mistakes about consent based on these factors as reasonable legitimises understandings of consent that are directly at odds with an affirmative consent model. This problem has been documented in several Australian jurisdictions, including Queensland, Victoria and New South Wales.”²⁷

Researchers have found that even where reforms have been introduced that restrict the application of the mistake of fact excuse to issues of sexual consent, such as in Tasmania, there are limitations to this approach.

“The most prominent criticism of the Tasmanian provision dealing with sexual consent and mistake of fact since its enactment is that its intended effect has been thwarted, as trial judges have been slow to modify their practices. This shows the importance of coupling consent law reforms with follow up measures to ensure consistent adoption and, if necessary, cultural change among judges and police.”²⁸

Excluding the operation of the mistake of fact defence in sexual offence cases would avoid serious injustices occasioned by the current Code, without compromising the defendant’s right to a presumption of innocence or a fair trial. It would still fall on the prosecution to prove that the defendant did, or did not, do or say things to establish the complainant was consenting. A jury would still need to be convinced beyond all reasonable doubt.

Failing the exclusion of the mistake of fact defence in sexual offence cases, CWSW recommends mistake of fact defence and special verdicts are only used in exceptional circumstances that are informed by the use of expert witnesses and evidence.

Jury Directions


Should Western Australia legislate jury directions for sexual offence trials?

CSWS advocates that jury directions be codified and supports the development of judicial directions and the admission of expert evidence to address myths and misconceptions in

²⁶ Criminal Code 2002 (ACT) s 29(1)

²⁷ Crowe et al. (2023).

²⁸ Ibid.



sexual offence proceedings. As previously mentioned, research has demonstrated that myths and stereotypes about violence against women persist into the courtroom and influence juror decision-making.²⁹ Jury directions may serve to educate the jury, assist jurors to understand and apply the legal definition of consent, to counter the myths and misconceptions that jurors may hold about sexual assault, and to reinforce an affirmative model of consent.

It is imperative, however, that jury directions are clear, consistent and as comprehensible as possible, and not overly legalistic or technical, so that they may be effective and functional. Research indicates that jurors may struggle to understand trial judges' technical directions.³⁰ If the judicial directions fail to connect with the jury's understanding and are in turn ineffective, the danger of unfair prejudice has not been reduced. It is critical that the development of legislated jury directions is combined with research to determine the utility of those directions as effective.³¹

CWSW supports the recommendations of the Victorian Law Reform Commission (VLRC) in their *Improving the Justice System Response to Sexual Offences: Report*, to:

- give more jury directions;
- give jury directions more effectively;
- improve jury education when someone becomes a juror;
- improve research on juror understanding, countering misconceptions and supporting the jury's task in sexual offence trials; and
- ensure a greater use of independent experts and expert evidence.³²

The timing of jury directions is also important. The VLRC believes it can help to give jury directions earlier in the trial and repeat them during the trial. As suggested by Women's Legal Services WA in their submission, CWSW recommends that jury directions are developed similar to section 52 of the Jury Directions Act 2015 (Vic) that would empower a judge to give a mid-trial direction, temporally adjacent to the evidence in question, but required ('as soon as is practicable').³³

Other Matters

Everyone who works on sexual offence matters, including judges, magistrates and barristers, should be specialists. Juries need better directions from the judge about rape myths, and more access to expert witnesses. As in the broader community, education about gender inequality, sexual assault and the impact of trauma is required for those working

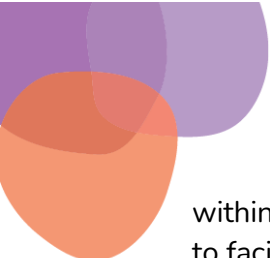
²⁹ Leverick, F. (2020). What do we know about rape myths and juror decision making? *The International Journal of Evidence & Proof* 2020, Vol. 24(3) 255–279.

³⁰ Boniface, D. (2005). The common sense of jurors vs the wisdom of the law: Judicial directions and warnings in sexual assault trials. *UNSW Law Journal*, 28(1): pp.261-271.

³¹ Ibid.

³² Victorian Law Reform Commission (2021). *Improving the Justice System Report to Sexual Offences: Report*. Victorian Law Reform Commission.

³³ Jury Directions Act (2015) Vic, s 52.



within the justice system, and in particular is needed to target police, lawyers, and judges, to facilitate the evolution of a legal system that is trauma-informed and that eschews victim blaming.

Law reform must be accompanied by broad and concurrent education that addresses the changes to the law of consent and persistent myths and misconceptions around sexual violence and improves understanding and recognition of intimate partner sexual violence.

The Victorian Government's *Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022* that adopts an affirmative consent model, for example, was supported by community-based education delivered by local organisations and specialist services, as announced in the Victorian Budget 2022/23.³⁴

CWSW strongly recommends that an extensive community education campaign should support any changes to the law that specifically includes professionals in the criminal justice system, including the police, and enhances their understanding of sexual and domestic violence-related trauma to assist better responses. Any changes to the law should also be accompanied by a broader community awareness campaign that informs the community about the legal changes, counter rape myths and victim blaming, and promotes respectful relationships.

Any changes to sexual offence laws must be accompanied by a funding boost to specialist sexual assault services, to help respond to increasing reporting and demand. The funding will allow services to hire extra staff, provide more specialist support sessions and provide help to hundreds more women and children.

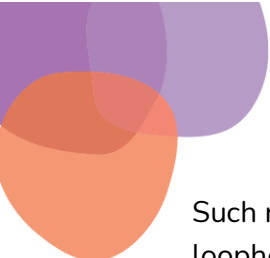
Conclusion

This is an important opportunity for reform to ensure that the Criminal Code both reflects contemporary issues and community standards of consent and increases the likelihood of just outcomes for victim-survivors.

CWSW believes that there are several key areas in which the Code should be reformed, that include:

- Adopting an affirmative model of consent
- Addressing intimate partner violence
- Specifying objectives and guiding principles concerning sexual offending
- Providing a comprehensive definition of consent that includes stealthing as a circumstance in which consent is negated
- Developing jury directions to be clear and understandable
- Removing the operation of the mistake of fact defence

³⁴ Victoria State Government (2022). Affirmative Consent Model Now Law in Victoria. Media Release. State Government of Victoria.



Such reforms will help to: provide legal clarity around the concept of consent; close legal loopholes that facilitate repeat offenders to escape accountability and conviction; and reduce the perpetuation of stereotypes, myths and biases that influence decision making by police, prosecution and jurors. Justice system responses to sexual offences must make it clear that there is no place for sexual violence of any kind in Western Australia. Laws and institutions must effectively deliver justice to victim-survivors and keep the community safe.