14 March 2023

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

**Re: Current and proposed sexual consent laws in Australia**

Thank you for the opportunity to make a submission to this important Inquiry. Our submission will focus on two aspects of the terms of reference:

b. the operation of consent laws in each jurisdiction

e. the efficacy of jury directions about consent

## Background

By way of background, we are currently undertaking an ARC funded project '*Intoxication Evidence in Rape Trials: A Double-Edged Sword?'* (DP200100101) which aims to assess the effectiveness of Australian criminal law reforms that have attempted to break the 'rape myth' nexus between intoxication and assumed consent. Focusing on intoxication evidence in rape[1] trials in selected Australian jurisdictions this project is the largest qualitative analysis of rape trial transcripts in Australia since the completion of the landmark NSW Department of Women, *Heroines of Fortitude: The experience of women in court as victims of sexual assault* report in 1996. The project aims to produce significant new knowledge about whether existing laws and court room practices are optimally adapted to achieving the important objective of justice for sexual violence victims.

In addition to this research, we have also recently completed a commissioned report for the Victorian Law Reform Commission in relation to their inquiry 'Improving the Response of the Justice System to Sexual Offences' (Quilter & McNamara 2021). We are also currently finalising a research report into the experiences of complainants in adult sexual offence trials in NSW, commissioned by the NSW Department of Communities and Justice (NSW), analysing 75 NSW sexual offence trials.

This submission is based on what we have learned from this research together with past work undertaken by Professor Quilter who has been researching and writing on sexual assault law reform since completing her PhD in the area in 2000 ('Re-inventing rape: an analysis of legal, medical, feminist and governmental discourses').

[1] We use the term 'rape' in this submission noting that some jurisdictions (such as NSW) have changed the name of the primary sexual violence offence to 'sexual assault'.

## 1. The operation of consent laws in each jurisdiction

Rape law has been extensively and progressively reformed in Australia in the past 40+ years from its common law history (on the background to the history of such law reform see Quilter 2011; Brown et al 2020, ch 8). Legislatures across the country have responded in particular to (ongoing) concern that complainants continue to experience system abuse as a result of engaging with the criminal justice system. A significant area of such reform has focused on getting the law of consent 'right' with most jurisdictions transforming the substantive law of consent from the common law focus on 'resistance' to versions of 'free and voluntary agreement' – often referred to as a 'communicative consent' model (Quilter 2021). There have also been significant statutory reforms to move the fault element towards a 'no reasonable belief in consent' standard and to assess the 'steps taken' by the accused (eg *Crimes Act 1958* (Vic) s 36A). More recently there has been an attempt to introduce an 'affirmative consent' model (such as in NSW with recent changes made by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW)). Such changes aim to shift the focus from what the complainant said or did towards what the accused did to affirm consent. While this Inquiry has terms of reference to consider the benefits of national *uniformity* in relation to consent laws, any such move must confront the reality that whatever laws are 'on the books', there is a documented problem with the *incapacity* of law reform to positively transform the *practices* of the law. Our research reflects that progressive statutory changes are repeatedly undermined by what happens in practice in courtrooms.

We make the following observations in relation to the operation of consent laws.

First, despite significant law reform attempts to transform the substantive law of consent from the common law focus on 'resistance' to versions of 'free and voluntary agreement', in courtrooms these concepts have little visibility. Both Crown and Defence cases continue to rely heavily on 'real rape' scripts (Estrich 1987; Quilter 2011) such as by focusing on physical and verbal resistance (Quilter & McNamara 2021, pp.34-46). We have also found that defence counsel continue to deploy notions of inferred consent, with a focus on flirtation (Quilter & McNamara 2021, pp.46-57).

Secondly, and relatedly, in our Victorian study, common cross-examination lines were regularly *contrary* to expressed legislation relevant to proof of non-consent. The most vivid example related to the *Crimes Act 1958* (Vic) s 36(2)(l), which attempts to turn a classic rape myth on its head – by providing, in essence, that a person that says or does nothing *does not consent* (a provision which NSW recently adopted in the 2021 reforms). In our report for the VLRC we observed:

> Section 36(2)(l) of the *Crimes Act 1958* (Vic) – 'a person does not consent' if 'the person does not say or do anything to indicate consent to the act' – appeared to be largely ignored. In fact, complainants continue to be questioned on what they did to demonstrate non-consent – whether by words or acts of physical resistance or both. (Quilter and McNamara 2021, p 149) …
>
> In the face of s 36(2)(l) – and its predecessor provisions (s 34C(2)(k) of the *Crimes Act 1958* (Vic), and s 37AAA of the *Crimes Act 1958* (Vic)) – we were surprised to observe lines of questioning during complainant cross-examination that were underpinned by the traditional expectation of verbalised demonstration of non-consent, and which attempted to infer consent on the basis of silence:
>
> *DEFENCE COUNSEL: What I suggest – … you didn't say anything to him to indicate you weren't consenting, did you?*
>
> *COMPLAINANT: No.*
>
> *DEFENCE COUNSEL: I'm sorry?*
>
> *COMPLAINANT: No.*
>
> ***

*DEFENCE COUNSEL: You say in that panic you don't do anything or say anything to him?*

*COMPLAINANT: No.*

*****

*COMPLAINANT: Yes.*

*DEFENCE COUNSEL: You did not scream out?*

*COMPLAINANT: No.*

*DEFENCE COUNSEL: You did not shout?*

*COMPLAINANT: No.*

***

*DEFENCE COUNSEL: You didn't call him a rapist?*

*COMPLAINANT: No.*

*DEFENCE COUNSEL: You didn't even say to him, 'I'm not happy with what happened'?*

*COMPLAINANT: Correct.*

***

*DEFENCE COUNSEL: Ms [V16C], you didn't - you'd agreed that you didn't attempt to leave the lounge room?*

*COMPLAINANT: Yeah.*

*DEFENCE COUNSEL: You didn't call out for [V16WC1] [housemate]?*

*COMPLAINANT: No.*

*DEFENCE COUNSEL: You told Mr [V16A] to leave?*

*COMPLAINANT: Yes.*

*DEFENCE COUNSEL: In a normal tone?*

***

*DEFENCE COUNSEL: When this incident occurred with [V19A] … [d]id you scream when this happened?*

*COMPLAINANT: At that time I was just quiet.*

*DEFENCE COUNSEL: You didn't make a sound?*

*COMPLAINANT: Not at that time.*

*DEFENCE COUNSEL: You didn't call out to your brother for help?*

*COMPLAINANT: No, not at the time.* (Quilter and McNamara 2021, pp 37-38)

That such practices persist despite the clear language of the legislation is, in part, a product of the adversarial system: some defence lawyers will continue to push lines of defence unless they are challenged by the prosecutor and trial judge. Our submission is not that nothing can change. Rather, legislative change needs to be *activated* in trials – and prosecutors and judges need to be proactive rather than simply expect defence lawyers to change. For example, where defence cross-examination elicits evidence that the complainant said or did nothing (as in the example above) the prosecution should submit to the judge that the jury should be directed that there is no dispute that non-consent has been

proven. If this begins to occur, provisions like s 36(2)(l) of the *Crimes Act 1958* (Vic) will finally (belatedly) have their intended effect. (This issue is picked up in relation to jury directions below.)

Thirdly, the significant statutory reforms to move the fault element towards a 'no reasonable belief in consent' standard and to assess the 'steps taken' by the accused, did not feature prominently in examination or cross-examination questions or answers in our Victorian study (Quilter & McNamara 2021, pp.57-8). Again, this does not necessarily mean that the fault element for sexual offences should be further reformed. Rather, it is important not to overstate the operational impact that such changes are likely to have.

Finally, while the law of consent has been transformed, the concept of 'relevance' that underpins the admission of all evidence is given such a wide-interpretation in sexual offence trials such as to risk undermining progressive consent law reforms and perpetuating damaging stereotypes. Traditionally, defence counsel are given wide latitude when it comes to deciding what questions they want to ask when cross-examining the complainant. There are limits – *if* the judge chooses to impose them (eg *Evidence Act 1995* (NSW), s 55). Our reading of Victorian and NSW sexual offence trials suggests that the latitude extended to the defence is often too wide. Depending on their pasts, complainants are often cross-examined about their histories of things like alcohol or drug use, sex work, mental illness or having had children removed on welfare grounds. These are frequently gendered stereotypes and they sometimes blur into rape myths. Typically the defence seeks to engage such evidence to support an assertion that the complainant lacks credibility/reliability (ie is lying). Another version is where the complainant is asked about events temporally remote from the events the subject of the charge (eg flirtatious texts exchanged weeks prior) that are used by the defence to infer consent. A third version is where the complainant is asked (sometimes repeatedly) about a detail (eg exactly where a car was parked) of no or marginal relevance. The defence aim appears to be to elicit an 'I don't know' answer – which can then be engaged to raise doubt about the accuracy of other aspects of the complainant's evidence – or to draw attention to a difference ('inconsistency') between how the complainant described the (irrelevant) details in court and on a previous occasion (eg police statement).

In addition to potentially causing unnecessary distress and unfairness to the complainant, one of the other consequences of the wide reign afforded to defence counsel is that cross-examination often takes longer than it should, further exacerbating the distress caused to the complainant.

We would submit that the operation of consent laws needs to be contextualised and assessed in conjunction with other evidence laws (and practices) that may exacerbate rape myths and undermine progressive law reform in relation to consent.

## 2. The efficacy of jury directions about consent

Over the past 40 years much faith has been placed in jury directions as a mechanism to tackle 'rape myths' – such as delay in complaint (see Quilter, McNamara & Porter 2022a) and inconsistencies in a complainant's account being evidence that the allegation is fabricated or the account false. The most recent wave of NSW law reform enacted by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* is an example of an attempt to further 'myth bust' through jury directions (for a discussion of these amendments see Quilter, McNamara & Porter 2022b). From our research we make two observations about jury directions generally and one specifically in relation to consent directions.

First, directions can be useful but it is important that they are used proactively and *at the time* of the evidence in question, rather than simply as part of the judge's summing up to the jury at the end of the trial. Research suggests that, for maximum effect, it is preferable if judges give 'corrective' directions (eg that delay in complaint does not necessarily mean fabrication) at the time this suggestion is raised – ie commonly during the complainant's cross-examination (Quilter, McNamara and Porter 2022b).

Secondly, our Victorian and NSW research has shown that just because a line of questioning might attract a *jury direction* (eg on delay, or on differences in the complainant's account, or on consent) does not mean that the defence will not pursue the rape myth or stereotype that the direction is meant to counter. We put this down to two things: i) jury directions are a fairly weak form of regulation (compared to, say, the blanket prohibition (with exceptions) approach of 'rape shield' – sexual reputation and experience - laws); and ii) their full power is often not deployed by Crowns and trial judges. On the latter, our Victorian and NSW research suggests that more needs to be done to ensure that relevant directions are given in *every* trial where they are warranted. We have seen several examples of where, on our assessment, a direction on delay or differences in account was warranted, but was not given. We recommend a much more active role for prosecutors in making submissions on required directions.

Finally, current directions on consent tend to be weakly drafted in many jurisdictions and have the capacity to run contrary to the substantive law of consent. For example, the recently introduced NSW jury directions on consent have the capacity to be inconsistent with the amendments to the substantive law of consent. The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* amended the *Crimes Act 1900* (NSW) s 61HJ (circumstances of no consent) to include s 61HJ(1)(a):

> 61HJ Circumstances in which there is no consent
>
> (1) A person does not consent to a sexual activity if—
>
> (a) the person does not say or do anything to communicate consent, or

This was meant to overcome the 'freeze response' in particular, and was modelled on s 36(2)(l) of the *Crimes Act 1958* (Vic) (discussed above). Yet, the new jury direction in s 292B of the *Criminal Procedure Act 1986* (NSW) provides the following direction:

> 292B Responses to non-consensual sexual activity
>
> Direction—
>
> (a) there is no typical or normal response to non-consensual sexual activity, and
>
> (b) **people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and**
>
> (c) **the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.** (emphasis added)

Put simply, we submit that in circumstances where a person freezes and does not say or do anything, the judge should be directing that the element of non-consent is proven not providing a suggestion that persons may respond in different ways. Furthermore, this direction does little to counteract the common cross-examination technique we observed in Victorian trials (discussed above) where complainants were asked lines of questioning underpinned by the traditional expectation of verbalised or physical demonstrations of non-consent and which attempted to infer consent on the basis of silence.

We also question whether the new jury direction in s 292C of the *Criminal Procedure Act 1986* (NSW) (see also *Jury Directions Act* (Vic) s 47D), designed to educate juries that victims of sexual violence are not commonly injured, is fit for purpose:

> 292C Lack of physical injury, violence or threats
>
> Direction—
>
> (a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and
>
> (b) the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence.

In the face of continued lines of cross-examination (discussed above) that focus on physical resistance, it is unclear what beneficial effect this direction will have on a jury's understanding of consent.

We would be happy to provide any further information or comment that might be useful to your Inquiry.

Yours sincerely

Dr Julia Quilter

Professor
School of Law
University of Wollongong

Dr Luke McNamara

Professor
Faculty of Law & Justice
University of New South Wales

**References**

Brown, D et al (2020) *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed)

Estrich, S (1987) *Real Rape* (Harvard University Press)

Quilter, J (2011) 'Re-framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform' 35 *Australian Feminist Law Journal* 23-56

Quilter, J (2021) 'Getting Consent "right": Sexual Assault Law Reform in New South Wales', *Australian Feminist Law Journal*, 46(2), 225-248, DOI: 10.1080/13200968.2021.1930434

Quilter, J & McNamara, L (2021) *Qualitative Study of Rape Trials in the County Court of Victoria, 2014-2019* (August).

Quilter, J, McNamara, L & Porter, M (2022a) 'The Most Persistent Rape Myth?: A Qualitative Study of "Delay" in Complaint in Victorian Rape Trials', *Current Issues in Criminal Justice* (published online 12 July) https://doi.org/10.1080/10345329.2022.2090089

Quilter, J, McNamara, L & Porter, M (2022b) 'New Jury Directions for Sexual Offence Trials in NSW: The Importance of Timing', *Criminal Law Journal*, 46(3), 138-150