



Women
With
Disabilities
Australia
(WWDA)

Winner, National Human Rights Award 2001
Winner, National Violence Prevention Award 1999
Winner, Tasmanian Women's Safety Award 2008
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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

To the Senate Legal and Constitutional Affairs Committee.

I write to you on behalf of Women With Disabilities Australia (WWDA) concerning the Senate inquiry into the current and proposed sexual consent laws in Australia. This letter is informed by feedback from our membership, including women and girls with disability, their parents, carers, support people and representative networks; as well as our existing library of research and publications on the sexual and reproductive health and rights of women and girls with disability.

As you may be aware, WWDA is the National Disabled People's Organisation (DPO) and National Women's Alliance (NWA) for women, girls, feminine identifying, and non-binary people with disability in Australia. As a DPO¹ and an NWA,² WWDA is governed, run, led, staffed by, and constituted of, women, girls, feminine identifying, and non-binary people with disability. WWDA uses the term 'women and girls with disability', on the understanding that this term is inclusive and supportive of, women and girls with disability along with feminine identifying and nonbinary people with disability in Australia.

While it is well established that women and girls with disability are more likely than non-disabled women and girls to be subject to all forms of gender-based violence,

¹ Disabled People's Organisations (DPOs) are recognised around the world, and in international human rights law, as self-determining organisations led by, controlled by, and constituted of, people with disability. DPOs are organisations of people with disability, as opposed to organisations which may represent people with disability.

² There are six National Women's Alliances (NWA's) funded by the Office for Women (OFW) in Australia. WWDA is the NWA for women with disability <<https://www.pmc.gov.au/office-women/grants-and-funding/national-womens-alliances>>.

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state and national sexual violence law reform reviews have rarely explored the specific dynamics of their experiences of sexual violence, including dynamics of consent, capacity and control.³ In this letter, WWDA attempts to highlight some of the ways that women and girls with disability have been omitted from current conversations around reforming sexual consent legislation in Australia, and provides recommendations for how these can be addressed. Noting the specific scope of the inquiry, this letter will refer specifically to the considerations for women with disability when determining their consent to sexual activity. However, we emphasise that there is also an urgent need to investigate the barriers that prevent women and girls with disability from exercising autonomous decision making on a broad array of matters concerning their sexual and reproductive health, such as their use of contraception, ability or willingness to bear children, means of managing menstruation and more.

National Harmonisation

Although the Australian Government has made an ongoing committed in all iterations of the 'The National Plan to Reduce Violence against Women' (National Plan) to tackling all forms of violence against women and girls at a national level;⁴ there remains minimal consistency across states and territories in their laws concerning gender-based violence. Despite national advocacy efforts to respond to sexual harassment and violence in recent years for example, there is vast differences in state and territory sexual violence legislation.

Alongside many other sector advocates, WWDA endorses the move to harmonise sexual assault and consent legislation, noting that all proposed models to date require work to ensure they are inclusive of the broad range of ways and settings in which women and girls with disability experience sexual violence.

³ E.g. New South Wales Law Reform Commission, Consent in Relation to Sexual Offences (Report No 148, September 2020) 29

⁴ Australian Government (2022) 'The National Plan to End Violence against Women and Children 2022-2032.'

<https://www.dss.gov.au/ending-violence>

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While most definitions of consent refer to sexual consent within intimate partner sexual relations in private, home settings, for example, legislation will only be protective of women with disability if it recognises that perpetrators can also be parents, carers, support workers and medical professionals and that sexual violence occurs across both private and public institutions. As WWDA has consistently stated in response to continuous government inquiries, any reforms to legislation should also incorporate a human rights framework that aligns with Australia's obligations under United Nations instruments such as the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* ([1983] ATS 9) and the *United Nations Convention on the Rights of the Child (CRC)* ([1991] ATS 4).⁵

The Affirmative Consent Model

Across the government and non-government sector and among advocates for gender equality, there is a significant shift across states towards adopting an affirmative consent model, which means that consent must be actively sought and given, rather than assumed. Notably, 'affirmative consent model' places the onus on each individual person participating in a sexual act to actively seek consent from the other person (or persons), rather than relying on the other person to provide consent.

Unlike previous definitions and models of consent, examples of consent under this model are more inclusive in the sense that they include non-verbal means of providing consent such as: a physical gesture such as a nod or reciprocating a move such as removing clothing.⁶ However, while WWDA supports this move to a more inclusive understanding of what consent encompasses, WWDA is concerned that

⁵ Commonwealth of Australia (2019) Fourth Action Plan—National Plan to Reduce Violence against Women and their Children 2010–2022, Commonwealth of Australia, Department of Human Services, Canberra, ACT.

⁶ E.g. Skye Rose, Sophie Cusworth & Laura Hook (2022) '[A change in consent laws: The adoption of an affirmative consent model in Victoria](#),' Moores, Victoria; Pillar, J (2022) '[Guide To The New Affirmative Consent Laws In Australia](#),' 01 September 2022, Elle Australia.

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proposed models have not encompassed full consideration of the diverse experiences and communication needs of women with disability.

For example, while seeking consent in the form of a nod may be appropriate for a person who is deaf, hard of hearing or otherwise non-verbal, it may not be for a person who is paralysed, paraplegic or has a condition like Tourette Syndrome (TS) that causes involuntary movements. Additionally, for people with disability who have sensory processing differences such as people with intellectual and cognitive disabilities and members of the Autistic community, it needs to be recognised that communication can often be misunderstood or interpreted in ways that are not Atypical. For these communities, this means that nodding in a response to question about a sexual activity, may not always indicate a full understanding of the proposition; especially when considering that disabled women and girls have often been taught to abide by directions and requests. In order to include and protect the experiences of these individuals, WWDA urges the implementation of affirmative consent models in legislation must be accompanied efforts to improve judicial and community understandings of disability and the various communication differences among the disabled community.

Additionally, it must be recognised that sexual violence against women and girls with disability is more often than not, precursed by power imbalances between the perpetrator and victim-survivor. For example, compared to their non-disabled peers, women with disability are more likely to rely on their perpetrator for physical, emotional or monetary support, and are more likely to be assaulted by a parent, caregiver, support worker or medical professional.

Considering these experiences, it is encouraging that most proposed models of Affirmative Consent recognise power imbalances. For example, in the Affirmative Consent model adopted by the Victorian parliament in 2022, it is specified that the

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agreement must be 'free and voluntary,' meaning free of any form of coercion, force, harm, fear, abuse of authority or misleading information. However, it is important the implementation of these principles are also nuanced with methods to ensure that the agency and autonomy and abilities of women with disability are recognised and upheld.

Women with disability and sexual agency

In too many cases, it is assumed that women with disability do not have the capacity to make their own decisions around sex, relationships, and their bodies. While it is recognised in international human rights instruments that sexual and reproductive rights are fundamental human rights, which include the rights of women to make free and informed decisions about their body, sexuality, relationships, and if, when and with whom to partner, marry and have children;⁷ women with disability are often denied these rights because of widespread ableist and discriminatory attitudes that they do not have the capacity to make decisions that are in their 'best interests.' In the context of sexual consent, it is often assumed that women with disability, especially women with intellectual and cognitive disability, do not have the ability to understand and therefore, consent to sex or sexual interactions.

In reality, women and girls with disability express desires for and have capacity to have romantic, sexual and intimate relationships, bear children and be caring parents, but are often denied the opportunity by parents, caregivers or guardians. While, as one of the most likely groups to experience sexual violence, it is essential that consent legislation includes means to protect women with disability, it is therefore essential that that sexual violence legislation does not also further prevent women with disability from realising their sexual and reproductive autonomy.

In order to ensure that consent legislation does not result in these unintended

⁷ Women With Disabilities Australia (2016) '[WWDA Position Statement 4: Sexual and Reproductive Rights](#),' WWDA, Hobart, Tasmania, p.8

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affects, WWDA recommends that Federal, state and territory governments conduct comprehensive and targeted consultations on any proposed reforms with women with disability and their representative organisations, as well as key sector stakeholders, such as academics with expertise on guardianship law and substitute decision-making.

Women with disability and the justice system

When proposing reforms to Consent legislation, it is also important that provisions are included or the implementation of other provisions are considered to address the ableism inherent in the court system. In Australia, it is well established that the criminal justice system is inaccessible to and discriminatory against women and girls with disability. When it comes to reporting sexual violence and assault, processes are often inaccessible, police or frontline domestic violence workers are rarely trained in how to support and communicate with women with disability and often doubt the truth of the claims, particularly when they come from women with intellectual or psychosocial impairments.⁸ When women with disability do go through the process to report sexual assault, they face further barriers in the court. Due to discriminatory and ableist attitudes, judicial personnel often do not consider women with disability as having the capacity to testify and are again, not believed or otherwise, have their voice side-lined in favour of that of a guardian or support person, which is particularly problematic when that same person is their perpetrator.

The inaccessibility of court processes is a further barrier for women with disability. For example, the Illawarra Women's Health Service in its report on violence against women with intellectual disability noted in relation to its interviews with women with intellectual disability:

Some women attend court without support and advocacy and don't understand the proceedings or the language or terms used. They are asked to read a lot of

⁸ Women With Disabilities Australia (2016) '[WWDA Position Statement 4: Sexual and Reproductive Rights](#),' WWDA, Hobart, Tasmania, p.8

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paperwork and agree to decisions that they often don't understand or have time to think about. This leads to poor decisions being made which can affect them and their families for years. They cannot be expected to navigate this process by themselves.⁹

For First Nations and culturally and linguistically diverse (CaLD) women with disability, discrimination in the court system is further entrenched by the historical and ongoing racism of the judicial system. While it is well recognised that women with intersectional identities, including First Nations and culturally and linguistically diverse (CaLD) women are at higher risk of experiencing all forms of violence, courts are rarely equipped with the infrastructure in place to provide culturally appropriate support such as language interpreters.

Additionally, WWDA has received anecdotal evidence from many women with disability and sector professionals that compensation schemes for sexual violence are notoriously hard to access. The first and main reason for this is that the processes are usually riddled with hard-to-understand legal jargon and rarely, if ever, available in accessible formats such as Plain English or Easy Read. Secondly, victim support and compensation schemes are often not available to women with disability because they only apply to cases that would constitute violence under criminal law (even if not established by a court),¹⁰ which often do not account for violence perpetrated by anyone other than an intimate partner.

Comprehensive Sexuality Education

Like legislation and the judicial system, sexual consent education, more comprehensively termed, relationships education, has historically been limited in its inclusion of the experiences of people with disability, and in particular, women and girls with disability. In surveys and consultations conducted with members over

⁹ Illawarra Women's Health Centre (2017) [Breaking the Silence: Domestic Violence and Women with Intellectual Disabilities](#), Report.

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decades, WWDA has received anecdotal evidence that there is a significant lack of accessible appropriate education in schools for young people with disability. For example, in the report from WWDA Youth Network survey on menstruation and contraception conducted in 2021 – 2022, it is noted that there is a significant need for Comprehensive Sexuality Education (CSE) with an integrated disability lens that supports young women and girls with disability to understand their rights to self-determination over their sexual and reproductive lives. Consistent with literature, participants also noted that there is an urgent need to increase skills to navigate consent and boundaries. This includes (but is not limited to) interrogating social expectations, promoting communication, and providing education to help young women and girls with disability identify coercion at earlier ages.¹¹

In particular, it is important to note that targeted education is needed for young women and girls with disability who are more likely to experience sexual and reproductive coercion that almost any other group and are significantly more likely to experience coercion in the context of decisions around reproductive health issues such as menstrual management, contraception, abortion and sterilisation. While changing legislation may impact how consent is taught in schools, it will have no bearing on the safety, sexual and reproductive health and rights of women and girls with disability if the education around it is not made accessible to and tailored to meet the specific experiences of the disabled community.

Additionally, it must be recognised that the term 'consent education' itself is far too narrow is not comprehensive of the multitude of topics that come under sexual and reproductive safety, health and rights. As a basic starting point for ensuring inclusivity, it is essential that the term 'consent education' be abandoned. In line with international terminology and human rights-based frameworks, WWDA recommends using the term 'Comprehensive Sexuality Education,' which views

¹¹ Women With Disabilities Australia (WWDA) (2022). 'Towards Reproductive Justice for young women, girls, feminine identifying, and non-binary people with disability (YWGwD): Report from the YWGwD National Survey.' Published November 2022. WWDA: Hobart, Tasmania, p. 15.

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'sexuality' holistically and within the context of emotional and social development. It recognizes that information alone is not enough. It is asserted that young people need to be given the opportunity to acquire essential life skills and develop positive attitudes and values. As such, CSE is made up of seven key components: gender, sexual and reproductive health and HIV, sexual rights and sexual citizenship, pleasure, violence, diversity (including disability) and relationships.¹²

Recommendations specific to sexual consent legislation

In summary, WWDA recommends that:

1. The Australian Government work with state and territory governments to conduct comprehensive and targeted consultations on any further proposed reforms to sexual assault and consent legislation with women with disability and their representative organisations, as well as key sector stakeholders, such as academics with expertise on guardianship law and substitute decision-making.
2. The Australian Government work with state and territory governments and sector stakeholders to ensure that there is national consistency across consent and sexual assault legislation that incorporates a revised model of affirmative consent, that is inclusive of intersectional experiences and reflects a human rights framework that aligns with Australia's obligations under United Nations instruments such as the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ([1983] ATS 9)* and the *United Nations Convention on the Rights of the Child (CRC) ([1991] ATS 4)*.

Recommendations for the Australian Government more broadly

¹² Women With Disabilities Australia (WWDA) (2022). 'Towards Reproductive Justice for young women, girls, feminine identifying, and non-binary people with disability (YWGwD): Report from the YWGwD National Survey.' Published November 2022. WWDA: Hobart, Tasmania, p. 15.

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3. That the Australian Government provide resources to ensure that the implementation of affirmative consent models in legislation are accompanied efforts to improve judicial and community understandings of disability and the various communication differences among the disabled community.
4. That Australian Government in association with State and Territory Governments commission a national inquiry into ableism (including gendered ableism), discrimination and segregation experienced by women and girls with disability in Australian legal and justice systems.
5. That the Australian Government and State and Territory Governments commit to the elimination use of substituted decision-making in court and tribunal Proceedings and introduce supported decision-making in justice systems and provide access to associated supports and resources for people with disability to fully participate in court proceedings, including the provision of information in Easy Read, Plain English or other formats, sign and other language interpreters.
6. That the Australian Government develop and deliver mandated disability awareness training for of, all actors in the justice system (including for e.g.: police, judges, lawyers, court officials, prison staff) in co-design with people with disability and their representative organisations.
7. That the Australian Government abandon the term 'consent education,' and adopt the term 'Comprehensive Sexuality Education' (CSE), which views 'sexuality' holistically and within the context of emotional and social development and encompasses seven key components, including: gender, sexual and reproductive health and HIV, sexual rights and sexual citizenship,

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pleasure, violence, diversity (including disability)
and relationships.

8. That the Australian Government work with state and territory governments to implement mandatory intersectional and accessible Comprehensive Sexuality Education, that is inclusive of the experiences of people with disability across the national curriculum.

Thank you for taking the time to read WWDA's submission. We look forward to hearing further about any reforms to sexual consent and assault legislation in 2023.

Your sincerely

Carolyn Frohmader
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