



Submission to the Department of Communities and Justice:
Statutory review of the *Crimes Legislation Amendment
(Sexual Consent Reforms) Act 2021*

INTRODUCTION

The NSW Women's Action Alliance (NSWWAA) is a secular, independent women's rights organisation, unaligned with any political party or religion. We are a member of the Affiliation of Australian Women's Advocacy Alliances ([AAWAA](#)), a national peak feminist advocacy body representing groups from every state and territory. As a member of AAWAA, we maintain an established record of expertise and engagement on sexual violence policy and women's sex-based protections and rights, having made submissions to state and federal inquiries, as well as international bodies including the United Nations Human Rights Council, the CEDAW Committee, the UN Special Rapporteur on violence against women and girls, amongst others.

We thank the Department of Communities and Justice for undertaking this statutory review. The review provides a vital opportunity to assess whether the 2021 sexual consent reforms are functioning as intended and, crucially, whether they adequately protect women and girls from male sexual violence and coercion whilst respecting the dignity and autonomy of all parties.

A. CONCEPTUAL CRITIQUE AND PRACTICAL CONCERNS

Whilst the 2021 reforms represent a necessary improvement in shifting responsibility for ensuring consent onto the accused – moving away from victim-blaming assumptions about 'resistance' and 'passivity' – they operate within a liberal, individualised legal framework that assumes consent can be meaningfully 'freely and voluntarily' given¹ within a social system of entrenched, sex-based inequality in which men subordinate women. This sustains the legal assumption that women can, in principle, choose freely even within unequal social conditions and power dynamics. The concept of consent, then, as a legal boundary between sex and rape, risks legitimising a vast universe of unwanted male sexual activity that women endure out of fear, duty, economic dependence, or socialisation to prioritise male pleasure and avoid male displeasure. The law thus isolates the small fraction of violations it calls 'rape' and 'sexual assault' and

¹ Section 61HI(1) of the *Crimes Act 1900* (NSW)

sanctions all other instances of sexual subordination and engagement as ‘sex’ – and consent then becomes a legal and social burden for women.

Yet in practical, legal terms, the most pressing concern is not whether the concept of consent is flawed: it is whether the current legislative framework adequately recognises and addresses the coercive and controlling contexts in which men pressure women into ‘agreement’. Our analysis below focuses on three serious gaps in the current legislation.

B. SPECIFIC CONCERNS WITH THE CURRENT FRAMEWORK

Concern 1: Inadequate protection for women in contexts of coercive control

The [Crimes \(Domestic and Personal Violence\) Act 2007](#) (NSW) now recognises ‘domestic abuse’ to include behaviour that coerces or controls a person, including unreasonably restricting their liberty and day-to-day activities. Consistent with the Australian Government’s National Principles to Address Coercive Control, coercive control is understood as patterns of abusive behaviour over time that create fear and deny a victim-survivor’s liberty and autonomy.

This is a pervasive feature of many abusive intimate partner relationships. Yet the sexual consent provisions in the [Crimes Act 1900](#) (NSW) do not adequately intersect with this recognition. Section 61HJ(1)(f) of that Act permits a finding of no consent where a person participates in sexual activity “because of coercion, blackmail or intimidation, regardless of when the coercion, blackmail or intimidation occurs, or whether it occurs as a single instance or as part of an ongoing pattern”. This is a positive step.

However, the provision falls short in two critical respects. First, there is no explicit presumption that sexual activity within a relationship characterised by coercive control is non-consensual unless the accused can demonstrate that it was freely given. Current law isolates the sexual act from the relationship, failing to recognise that where a woman’s liberty and autonomy have been stripped by a man’s ongoing coercive control, the conditions required for free and voluntary agreement to sexual activity are effectively absent.

Second, the interaction between sexual consent law and the Crimes (Domestic and Personal Violence) Act remains unclear. A man may be found to be engaging in coercive control or domestic abuse under that statute, yet face no liability under the sexual assault provisions of the Crimes Act if a specific sexual act is found not to meet the narrow threshold of ‘coercion’ as interpreted by the courts. This creates a significant gap whereby systemic abuse can continue without ever triggering sexual assault charges.

In a relationship characterised by ongoing domination, fear, and control, a woman’s compliance with a man’s sexual demand is often a survival strategy, not an expression of free will. As ANROWS has [argued](#), the “climate of ongoing fear created by domestic and family violence means that consent arguably cannot be freely given.” Yet, unless this

climate manifests as a specific threat at the time of the sexual act, the current Crimes Act framework struggles to classify it as non-consensual.

By explicitly recognising domestic and family violence as a context that compromises or negates consent, the law would

- Reflect the reality of coercive control: It would acknowledge that a ‘yes’ given to a male abuser who controls a woman’s finances, housing, and physical and emotional safety is fundamentally different from a ‘yes’ given in a relationship of equality.
- Remove the burden of the ‘perfect victim’: It would relieve women of the burden to prove they resisted or expressed ‘lack of enthusiasm’ in the face of a male abuser whom they know effectively holds power over them.
- Harmonise the law: It would align the sexual consent provisions with the definitions of ‘domestic abuse’ in the Crimes (Domestic and Personal Violence) Act 2007, closing the gap where a man can be legally recognised as an abuser in the family court but treated as a consensual sexual partner in a criminal court.

Recommendation 1: Legislative recognition of coercive control

We recommend a comprehensive package of amendments to integrate coercive control into the sexual consent framework:

(i) Statutory presumption: Insert a new subsection providing that, where there is a finding that the accused has engaged in coercive control or domestic abuse of the complainant (e.g., a conviction for the coercive control offence, or a final ADVO based on coercive/controlling behaviour), any sexual activity between the parties during the period of that abuse is presumed to be non-consensual, unless the accused adduces evidence satisfying the court that the complainant’s agreement was in fact free and voluntary.

(ii) Explicit provision in s 61HJ of the Crimes Act: Amend section 61HJ to explicitly state that a person does not consent to sexual activity if they participate because they are subject to, or fear, coercive control as defined in the Crimes (Domestic and Personal Violence) Act. This includes situations where a woman fears a man’s anger, withdrawal of financial support, or use of children as leverage.

(iii) Mandatory consideration: Amend section 61HI of the Act to require the tribunal of fact to take into account any evidence of domestic abuse or coercive control when determining if agreement was ‘free and voluntary’.

(iv) Reasonable belief: Amend section 61HK to provide that an accused cannot have reasonable grounds to believe in consent where they have engaged in coercive control or domestic abuse of the complainant, unless there is clear, positive evidence of free agreement independent of that abusive dynamic.

These amendments would bring sexual consent law into coherence with the state's own recognition that ongoing coercive control denies a woman's liberty and autonomy. It would also reflect international human rights standards, particularly Article 6 of CEDAW, which requires states to suppress all forms of trafficking and exploitation – this includes sexual exploitation that occurs within intimate relationships.

Concern 2: The 'reasonable steps' test fails to address structural power imbalances

Section 61HK(2) of the Crimes Act requires that the accused's belief in consent is not reasonable unless they "within a reasonable time before or at the time of the sexual activity, said or did anything to find out whether the other person consents".

Whilst this shifts the burden to the accused – a positive reform – it remains a procedural test focused on interpersonal communication rather than social power relations between the sexes, where power resides with males over females. The test does not require an accused man to respect the integrity of a woman's initial refusal. A man may therefore fulfil the legal test by asking repeatedly or applying pressure until a refusal turns into acquiescence. If a woman eventually says 'yes' out of fear, exhaustion, or a desire to end the 'negotiation', the law is satisfied. The test does not ask: Did this man respect the woman's autonomy? Did he accept her first refusal? Did he use subtle forms of pressure or intimidation to extract agreement?

Recommendation 2: Strengthen the 'reasonable steps' test

Amend section 61HK of the Crimes Act to require that an accused take 'all reasonable steps' to ascertain consent, explicitly defining 'reasonable steps' to include:

(i) Respecting the initial refusal: A requirement to accept a 'no' or hesitation immediately, thus prohibiting the use of pressure, badgering, or persuasive coercion to convert a refusal into acquiescence.

(ii) Active verification of capacity: A positive duty to verify the person is not acting out of fear, shock, or passivity, rather than assuming silence implies agreement.

(iii) Contextual assessment: A requirement that the accused consider the power dynamics of the relationship (including any history of domestic abuse) when determining if their belief in consent is reasonable.

Concern 3: Absence of consent versus affirmative communication

Current law defines consent as free and voluntary agreement (s 61HI) but frames the absence of consent largely through a list of negating factors (s 61HJ). This structure preserves an implicit presumption of consent unless a negating factor is proven, effectively placing the burden on the prosecution to prove *why* consent was absent rather than on the accused to demonstrate that agreement was present; in other words, the law still looks for reasons *why sex shouldn't have happened* (e.g., she was asleep, he used

force), rather than requiring positive proof that it *should* have happened (i.e., that she actively wanted it).

This framing is fundamentally misaligned with the stated objective of ‘affirmative consent’. While the 2021 reforms were sold as introducing an affirmative model, they remain structurally tethered to the old paradigm. True affirmative consent requires the accused to have secured an explicit, affirmative indication of agreement – not merely an absence of a ‘no’.

At present, section 61HI says consent is agreement, but the practical work of a trial often revolves around proving one of the section 61HJ factors. If the prosecution cannot prove a woman was “substantially intoxicated” or “intimidated” (s 61HJ), the defence will successfully argue that ‘she agreed’. A genuine affirmative consent model would flip this dynamic: the absence of a communicated ‘yes’ (an affirmative indication) should be sufficient to establish non-consent, without the need to locate a specific negating factor.

Recommendation 3: Enshrine a genuine affirmative consent model

- (i) Reframe the definition: Amend s 61HI to define consent as a “communicated, affirmative indication of willingness rather than just ‘agreement,’ shifting the focus to positive communication.
- (ii) Shift the evidential burden: Amend the Crimes Act to clarify that the absence of a communicated affirmative act (words or unequivocal conduct) is sufficient to establish non-consent, removing the prosecution’s implicit burden to prove a ‘negating factor’ such as force or fear.
- (iii) Remove the ‘presumption of access’: Explicitly legislate that silence, passivity, or the absence of physical resistance can never constitute the ‘affirmative indication’ required for consent.

C. IMPLEMENTATION AND TRAINING

Reforms cannot function effectively without sustained, rigorous training for police, prosecutors, judges, and juries. We note with concern that implementation has been uneven. Legislative change is only as effective as the actors who enforce it. While the 2021 reforms changed the text of the law, they did not automatically change the culture of the criminal justice system. Without deep, structural re-education, the new ‘affirmative consent’ laws will simply be overlaid onto old systemic, patriarchal assumptions.

We are concerned that current training often treats the reforms as a technical update – a checklist of new jury directions or definitions – rather than a fundamental shift in how male sexual violence against women and girls is understood. This technocratic approach fails to address the deep-seated rape myths that persist among police officers, legal practitioners, and jurors: myths that women lie, that silence equals consent, and that ‘real’ rape only happens with a weapon.

To be effective, implementation must go beyond procedural compliance and tackle the substantive gender bias in the system. Frontline officers need specialised training to identify ‘freeze’ and ‘fawn’ responses and the subtle signs of coercive control. If police officers continue to decline to charge cases because a female victim ‘didn’t fight back’ or ‘texted him afterwards’, the legislative recognition of the freeze and fawn responses becomes meaningless.

Recommendation 4: Audit and structural reform of implementation

(i) Independent audit: Commission an independent, qualitative audit of police statements and trial transcripts to assess if rape myths (e.g., victim-blaming for freeze or fawn responses) persist in practice. This research should examine charging decisions in cases involving domestic violence and outcomes where the ‘reasonable steps’ test is disputed.

(ii) Specialised training: Mandate ongoing training for police and prosecutors that explicitly addresses the sociology of coercive control and the freeze and fawn responses, rejecting the false binary between ‘genuine’ consent cases and ‘rape’ cases.

(iii) Judicial direction: Require the Judicial Commission to develop education on the distinction between ‘submission’ and ‘consent’ in contexts of structural inequality, ensuring jury directions are delivered with authority and sociological understanding.

CONCLUSION

The 2021 reforms represent an improvement in the legal framework for sexual assault, but they are incomplete. Recognising that coercive control undermines consent, reframing the definition to require affirmative communication, and ensuring coherence with domestic violence law would strengthen protections for women and girls whilst clarifying the law for all parties.

We urge the Department to adopt these recommendations and to recognise that law reform alone is insufficient. Achieving genuine safety for women and girls requires addressing the structural conditions – economic dependence, social isolation, reproductive coercion – that make females vulnerable to male sexual violence in the first place. Within the scope of this review, however, these legislative amendments represent a necessary step towards a legal framework that prioritises women’s sex-based protections and rights over a procedural model of ‘consent’ that can mask ongoing subordination.