Project 113 Sexual Offences Volume 2: Offences and Maximum Penalties.

Full Stop Australia's Submission to the Law Reform Commission of Western Australia

12 May 2023

Full Stop Australia acknowledges the Traditional Custodians of Country throughout Australia, and their continuing connection to land, sea and community. We pay our respects to them and their cultures, and to elders both past and present.

Introduction

Full Stop Australia (FSA) thanks the Law Reform Commission of Western Australia (Commission) for the opportunity to make a submission to *Discussion Paper Volume 2: Offences and Maximum Penalties* (Volume 2) of Project 113: Review of Sexual Offence Legislation.

FSA is an accredited, nationally focused, not-for-profit organisation which has been working in the field of sexual, domestic, and family violence since 1971. We perform the following functions:

- Provide expert and confidential telephone, online and face-to-face counselling to people of all genders who have experienced sexual, domestic, or family violence, and specialist help for their supporters and those experiencing vicarious trauma;
- Conduct best practice training and professional services to support frontline workers, government, the corporate and not-for-profit sector; and
- Advocate with governments, the media, and the community to prevent and put a full stop to sexual, domestic and family violence.

FSA draws upon the experiences of our trauma-specialist counsellors, as well as our clients and other survivor advocates in our National Survivor Advocate Program, to advocate for victim focussed laws and consistent approaches to family, domestic and sexual violence nationally. As a national service, our advocacy work aims to support colleagues in each State and Territory who are working tirelessly on the ground to improve the lives of victim-survivors.

This submission was prepared by Emily Dale, Head of Advocacy, and Taran Buckby, Legal Policy Officer. If you have any questions in relation to this submission, please do not hesitate to contact Emily Dale at emilyd@fullstop.org.au.

About this submission

FSA welcomes and supports the Commission's review of sexual offence legislation in Western Australia.

We have had the privilege of viewing Women's Legal Service WA (WLSWA)'s submission to Volume 2 and fully endorse the recommendations in that submission.

We have addressed issues raised by WLSWA, as well as some additional questions from the Volume 2 discussion paper below. We have not responded to every question, due to time and resourcing constraints, and because some questions do not relate to our organisational expertise. For ease of review, the question numbers below correspond to the question numbers in Volume 2.

Chapter 3: Definitional Issues

Sexual Penetration

1. FSA welcomes the addition of 'analingus' to the definition of 'sexual penetration' in the *Criminal Code Act Compilation Act 1913* (WA) (Code) and otherwise supports the Code's existing broad definition of 'sexual penetration'. FSA supports Pride WA's comments on page 11 of Volume 2, which note that:
    - Exclusion of 'analingus' from the definition of 'sexual penetration' has the effect of limiting protection to LGBTQI+ people, as this practice is "common amongst, and most commonly associated with, men who have sex with men"; and
    - The inclusion of 'cunnilingus' in the Code's definition of 'sexual penetration', while 'analingus' is excluded, is likely "due to historical societal views as to the acceptability of this sexual practice."

    Adding 'analingus' to the definition of 'sexual penetration' would ensure that this term is more inclusive, and expand legal protection available to survivors (in particular, LGBTQI+ survivors).

    Finally, FSA notes that we generally support the harmonisation of sexual offence legislation across the country – to increase clarity for survivors around available protection, and ensure that protection is not arbitrarily dependent on where an offence occurred. To the extent that other jurisdictions' legislative definitions of 'sexual penetration' or 'sexual intercourse' do not include 'analingus,' FSA encourages WA to lead a call for national reform in this area.

Sexual behaviour, carnal knowledge and carnal connection

2. Full Stop Australia supports the removal of the terms 'carnal knowledge' and 'carnal connection' from the Code, owing to the lack of clarity, and gendered and outdated nature, of such terms.

Surgically constructed of altered body parts

5. To ensure that people of all genders, sexes and sexual orientations are protected under the sexual offence provisions of the Code, FSA supports an amendment to make it clear that

surgically constructed or altered body parts are included in definitions of 'vagina', 'penis' and 'urethra'. We welcome the insertion of a provision similar to that in the *Crimes Act 1900* (NSW) s 61H(4):

> *'It is not relevant for the purposes of this Division whether a part of the body referred to in this Division is surgically constructed or not.'*

Once again, we express support for nationally consistent sexual offence legislation. In this regard, we note that the approach of including surgically altered body parts has been taken in NSW, Victoria and the ACT.

Other reforms

6. Volume 2 asks if any other sexual offence-related definitions in the Code should be amended.

The Code defines a child to be:

> *'(a) any boy or girl under the age of 18 years; and*
> *(b) in the absence of positive evidence as to age, any boy or girl apparently under the age of 18 years.'*

FSA supports the replacement of the term 'boy or girl' with the term 'person' to remove unnecessarily gendered language and ensure all genders are protected under the provision.

Chapter 4: Sexual penetration without consent

Change the name of the offence

9. FSA supports WLSWA's recommendation to change the offence name 'sexual penetration without consent' to 'rape,' for the reasons set out in WLSWA's submission to Volume 2.

We particularly wish to emphasise the following points from WLSWA's submission:

- Using the term 'rape', rather than the more sanitised term 'sexual penetration without consent', would appropriately reflect the seriousness of the offence;
- Sexual offences continue to have the lowest conviction rates compared with other offences.[1] Using the term 'rape,' rather than 'sexual penetration without consent', may contribute to higher reporting of this crime – as the term 'rape' has a clear and readily understood meaning, and distinct sense of reprehensibility attached to it;
- This may create momentum for increasing the maximum penalty that may be imposed for this offence. WLSWA identified in its submission that "jurisdictions where 'sexual

[1] Stella Tarrant, Heather Douglas and Hilde Tubex (2022), Project 113 Sexual Offences: Background Paper, Law Reform Commission of Western Australia, p. 48 < Law Reform Commission - Project 113 - Sexual Offences (www.wa.gov.au)>.

penetration (or 'intercourse') without consent' is termed 'rape' impose higher penalties"; and

- The use of the term 'sexual penetration without consent' has the potential to reinforce dangerous rape myths that still dissuade victim-survivors from reporting sexual violence. Relevant myths include the "real rape myth"[2] and the misguided idea "that if a woman did not communicate her refusal clearly, the man cannot be held responsible."[3] A recent FSA study found that rape myths discouraged 74% of victim-survivors surveyed from disclosing a relevant incident, as they were concerned about being blamed for the sexual violence perpetrated against them.[4]

Finally, FSA emphasises the need for harmonisation of terminology used across Australian jurisdictions, to minimise confusion for survivors who already find criminal justice processes opaque, difficult to understand and disempowering to engage with. As noted in Volume 2, the relevant offence is called 'rape' in Tasmania, Queensland, Victoria and South Australia, 'sexual intercourse without consent' in the ACT and the Northern Territory, 'sexual penetration without consent' in Western Australia, and 'sexual assault' in NSW. Amendment of the Code to replace 'sexual penetration without consent' with 'rape' would be a step in the right direction towards harmonisation of terminology.

Chapter 6: Indecent assault

Address the withdrawal of consent

17. FSA strongly recommends amending the Code to capture withdrawn consent in the prohibition on 'indecent assault.'

Currently, the Code makes it an offence to 'unlawfully and indecently assault' another person, but does not specify that it is also an offence to continue relevant behaviour after consent has been withdrawn.

As identified in FSA's Volume 1 Submission, it is paramount that all reform centres affirmative consent, which is freely and voluntarily given and can be withdrawn at any time. Establishing sexual violence offences from this starting point involves specifying that any act that continues after the withdrawal of consent is an offence. An example of such provision can be found in the *Crimes Act 1900 (NSW)* s 61HI:

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[2] The Queensland Centre for Domestic and Family Violence Research notes that "many people [hold beliefs] about what a 'real', 'credible' or 'genuine' rape looks like (e.g. assaults by strangers in dark places, late at night etc.). Studies show that the more unlike this 'real rape script' the victim's experience is, the greater the chances that blame will be transferred from the perpetrator to the victim." See *Myths and Facts: Sexual Assault* (2019), accessible at: https://noviolence.org.au/wp-content/uploads/2019/07/Myths-and-Facts-SA-DIGITAL.pdf

[3] See WLSWA submission to Volume 2, p 4.

[4] Full Stop Australia *National Inquiry into Current and Proposed Sexual Consent Laws* (Submission, March 2023).

'A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.
(2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.
(3) Sexual activity that occurs after consent has been withdrawn occurs without consent.'

Beyond amending the Code to capture withdrawn consent in the prohibition on indecent assault, FSA recommends including a provision like s 61H in the Code, to more fully adopt an affirmative consent model. FSA has made more fulsome submissions on this issue in its response to Volume 1.

Chapter 7: Sexual offences against children

Reform the lawful marriage defence

27. FSA supports the WLSWA's recommendation that the lawful marriage defence should be repealed from the Code.

Currently, this provision provides a defence for an accused charged with a sexual offence against a child who is of or over 16 if they can prove, on the balance of probabilities, that they were 'lawfully married' to the child.

FSA endorses WLSWA's commentary on this issue, in particular:

- "Marriage should not be a defence to sexual violence at any age… [and] sexual crimes against children should be punishable by the full force of the law;"[5]
- Misunderstandings around the ambiguity of consent in intimate relationships contribute to harmful rape myths. According to WLSWA, "by not repealing the lawful marriage defence, we are sending a message to victim-survivors of intimate partner sexual violence that their claims of abuse will be dismissed;" and
- There is the additional issue that the lawful marriage defence "may inadvertently protect perpetrators of intimate partner sexual violence in forced marriages. The lawful marriage defence may also be a shield for family members and religious and community leaders who facilitate these marriages. As forced and child marriage are criminalised in Western Australia, it is logical that the lawful marriage defence should be repealed."[6]

Reform the offence of persistent sexual conduct with a child under 16 years

29. Volume 2 asks if the offence of 'persistent sexual conduct with a child under the age of 16' should be amended.

[5] See WLSWA submission to Volume 2, p 6.
[6] Ibid, p 7.

FSA recommends adopting the Grace Tame Foundation's recommendation of renaming this offence 'persistent sexual abuse of a child.' The Code's current use of the term 'sexual conduct' rather than 'sexual abuse', in our view, inappropriately sanitises the offence and feeds into the mistaken idea that sexual activity with a child might ever be consensual. As noted by the Grace Tame Foundation, "a child can't consent. Softened wording doesn't reflect the gravity of the crime, it feeds into victim-blaming attitudes, eases the conscience of perpetrators and gives license to characterise abuse as romance."[7]

FSA notes that the objective of the Grace Tame Foundation's Harmony Campaign is to harmonise sexual offence legislation across the country, which FSA fully supports.

[7] Grace Tame Foundation, *The Harmony Campaign,* available at: https://www.thegracetamefoundation.org.au/the-harmony-campaign.