AFFIRMATIVE CONSENT AND PATRIARCHAL PARADIGMS OF POWER IN THE CRIMINAL LAW

INGRID MATTHEWS* AND NIGEL STOBBS**

Recent affirmative consent amendments are accompanied by ambitious political claims and public campaigns. Patriarchal paradigms of power shape and determine reforms along a continuum – from pre-drafting submissions and recommendations to parliamentary debates and media coverage, through to criminalisation and punishment. These processes are run by colonial institutions – parliaments, police, courts, prisons – which, in turn, are on a timeline from invasion. Drawing on the scholarship of therapeutic jurisprudence and feminist perspectives informed by Indigenous epistemologies, this article interrogates the criminal law as a function of colonial white patriarchy. By 'stretching the timeline' to its foundations in carceral colonialism, the criminal law can be revealed as unfit for the purpose of reducing or stopping male violence. By situating the criminal process as law of the colonising power, affirmative consent amendments and public awareness initiatives are examined against the known needs of victims.

I INTRODUCTION

This article examines the structural limitations of legislative reform in the area of sexual violence with a focus on two Australian jurisdictions: Queensland and New South Wales ('NSW'). The analysis draws on feminist perspectives informed by Indigenous epistemologies and the scholarship of therapeutic jurisprudence to review changes enacted by, and acceptable to, patriarchal societies. One technique for applying a decolonial lens to the laws of the colonising power is 'stretching the

* Ingrid Matthews is a lecturer in criminology and law at the University of New South Wales Faculty of Law and Justice and associate of the Australian Human Rights Institute. She specialises in decolonial curriculum development, the jurisprudence of colonisation and the creation of criminality in colonised populations.

** Nigel Stobbs is a barrister, senior lecturer and Director of the Compassion Informed Law Research program, Queensland University of Technology. He specialises in therapeutic jurisprudence, publishing Method and Practice of Therapeutic Jurisprudence in 2019. The authors thank the anonymous reviewers and Research Assistant Shelly Kolstad for their assistance.

timeline'[1] – looking beyond recent changes to the known outcomes of legislative incrementalism, which are defined by the values and norms of colonial white patriarchy[2] established from 1788 in violation of Aboriginal laws of place.[3] The capacity of criminal law to stop, reduce or mitigate sexual violence, and to prevent compound traumas perpetuated by its own processes, is assessed on terms. These terms include the normative architecture of institutions of crime and justice; pre-drafting inquiries, reports and submissions; the formally stated purposes of statutory amendments and political promises regarding the scope of their impact; and the utility of public awareness initiatives. This article presents evidence that the expansion of the criminal law does not prevent, decrease or halt male violence, interrogates the means by which criminality is created and measured, and argues that reform of the criminal process is not fit for the stated purposes of affirmative consent amendments, which is to increase the rate of convictions and decrease the rate of sexual violence. Feminist perspectives informed by Indigenous epistemologies recognise the ontology of legal pluralism, where sovereignty and the laws of the land are unceded and the material and emotional needs of victims are prioritised.

A Queensland

In September 2024, Queensland became the latest jurisdiction to legislate an affirmative consent model after a somewhat convoluted and piecemeal reform process that amended the *Criminal Code Act 1899* (Qld) ('*Qld Criminal Code*') to introduce an affirmative model of consent.[4] These changes were enacted as a result of recommendations made by the Women's Safety and Justice Taskforce, partly in response to the minimal and heavily criticised legislative changes which followed the Queensland Law Reform Commission ('QLRC') recommendations in 2020.[5] At the time of the QLRC's investigation, the relevant provisions of the *Qld Criminal Code* had been enacted in 2000 as a result of the 1989 Taskforce

1 This phrase is introduced in Ingrid Matthews and James Arvanitakis, 'Whose Island Home? Art and Australian Refugee Law' [2019] (13) *University of New South Wales Law Society Court of Conscience* 19. Alongside 'surrogate start points', it was developed further in the first author's PhD, in which Matthews and Arvanitakis (n 1) was one of six publications in its examinable portfolio: Ingrid Matthews, 'Digitising and Decolonising Legal Education' (PhD Thesis, Western Sydney University, 2021) (unpublished, copy on file with author). On deep time and colonial time, theorised for the purpose of decentring colonial start points and history written by invaders ('winners'), see Ann McGrath, Laura Rademaker and Jakelin Troy (eds), *Everywhen: Australia and the Language of Deep History* (University of Nebraska Press, 2023).

2 Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015) 3–18 ('*The White Possessive*').

3 Irene Watson, 'Aboriginal Laws and the Sovereignty of Terra Nullius' (2002) 1(2) *Borderlands* <https://webarchive.nla.gov.au/awa/20030624015313/http://www.borderlandsejournal.adelaide.edu.au/vol1no2_2002/watson_laws.html>.

4 *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld). This statute also introduces new criminal offences for coercive control and engaging in domestic violence or associated domestic violence to aid a respondent. Additionally, it establishes a court-based domestic violence perpetrator diversion scheme for adults, which will commence in 2025.

5 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) ('*QLRC Review of Consent Report*').

on Women and the Criminal Code.[6] Prior to 2000, the *Qld Criminal Code* did not contain a definition of consent for the purpose of rape or sexual assault. However, the absence of consent was an express element of both offences, and the elements of rape also referred to 'consent' obtained by means of 'false and fraudulent representations about the nature or purpose of the act'.[7]

The relatively soft amendments following the QLRC recommendations were met with dismay and disappointment by survivor advocacy groups and academic commentators. A common theme among these criticisms was that the position of the professional legal bodies was endorsed by the QLRC and gave the 'superficial appearance of progressive change'.[8] The Queensland Law Society and the Bar Association of Queensland saw an affirmative consent model as both functionally unnecessary and contrary to the interests of justice.[9] This also seems to have been the position of Legal Aid Queensland, which suggested that the 'more appropriate way to bring about social change is through targeted community education'.[10] The Queensland Council for Civil Liberties noted in its submission that a legislative model requiring affirmative consent does not 'adequately recognise the deep subjectivity and diversity of human sexual experience'.[11] Conversely, Women's Legal Service Queensland supported the adoption of an affirmative consent model, highlighting the 'move away from normative understandings of sexual relationships predicated on male assertiveness and female acquiescence and the

---

6 *Criminal Law Amendment Act 2000* (Qld).

7 *Criminal Code Act 1899* (Qld) s 348(2)(e) ('*Qld Criminal Code*'), as amended by ibid pt 3. The 2000 amendments provided that consent, for the purposes of these offences, means 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent': *Qld Criminal Code* (n 7) s 348(1). Additionally, a person's consent to an act is not freely and voluntarily given if it is obtained by force; threat or intimidation; fear of bodily harm; exercise of authority; false and fraudulent representations about the nature or purpose of the act; or a mistaken belief, induced by the accused, that the accused was the person's sexual partner: at s 348(2).

8 Jonathan Crowe, 'Queensland Rape Law "Loophole" Could Remain after Review Ignores Concerns about Rape Myths and Consent', *The Conversation* (online, 4 August 2020) <https://theconversation.com/queensland-rape-law-loophole-could-remain-after-review-ignores-concerns-about-rape-myths-and-consent-141772>.

9 The many and varied expressions of human sexuality, and the many and varied contexts in which sexual interactions take place, mean that assessments of whether consent was given are best made on a case by case basis on the evidence in each case. Prescriptive rules of general application are apt to lead to injustice.

QLRC Review of Consent Report (n 5) 85, quoting the Queensland Law Society.

10 Where it is operative, the current provisions allow a jury to determine the facts and context of the actions having regard to all the circumstances in each case. The use of the general phrase 'freely and voluntarily given' in conjunction with the non-exhaustive, broad list of circumstances ensures the trier of fact can apply the definition in section 348 in a flexible and meaningful way … the current provisions provide a suitable framework within which actions can be appropriately measured against community standards on a case by case basis.

QLRC Review of Consent Report (n 5) 84, quoting Legal Aid Queensland, Criminal Law Practice.

11 [The Queensland Council for Civil Liberties] submitted that creating an affirmative consent model would involve a practical reversal of the onus of proof. This, it was submitted, would particularly be the case if legislation were introduced requiring the person seeking to engage in sexual activity to take steps to ascertain consent.

QLRC Review of Consent Report (n 5) 85, citing the Queensland Council for Civil Liberties.

constraints of binary and traditional roles' and asserting that this would 'change the way that victims relate [to] and believe in the legal system'.[12]

The new statutory regime in Queensland now includes a detailed definition of consent for the purposes of rape and sexual assault offences.[13] Consent means 'free and voluntary agreement', where such consent may be withdrawn at any time.[14] Dispelling one archaic rape myth, there is now express provision that a person who does not offer physical or verbal resistance to an act is not, by reason only of that fact, to be taken to consent to the act.[15]

Furthermore, all participants must consent to sexual activity, meaning that each person must say or do something to seek the relevant consent and that consent must be communicated to the party who seeks consent.[16] Consent is deemed not to be present where a person is asleep, unconscious,[17] or significantly affected by drugs or alcohol to the extent that they are unable to provide consent.[18] Stealthing, the act of removing or tampering with a condom without the other person's knowledge or consent, now constitutes the offence of rape in relation to what may have otherwise been a consensual sexual act.[19]

It is heartening that in what has often been seen as a relatively conservative criminal jurisdiction, the Queensland statute now expressly provides that there is a lack of consent where a participant is a sex worker and 'participates in the act because of a false or fraudulent representation that the person will be paid or receive some reward for the act'.[20]

New provisions modify the defence of mistake of fact[21] for the purposes of rape and sexual assault offences. The *Qld Criminal Code* now provides that if a defendant asserts that they held an honest and reasonable, but mistaken, belief that another person consented to the act, such belief will not be reasonable unless the defendant took active steps to confirm it.[22]

B New South Wales

On 23 November 2021, the NSW Parliament passed the Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021 (NSW) ('NSW Sexual Consent Reforms Bill'), codifying what is widely referred to as 'affirmative consent'. The NSW Sexual Consent Reforms Bill is 13 pages long and inserts painstaking details of what is not to be assumed as consent, presumably to statute-bar excuses commonly raised to defend clients on trial for sexual violence-related charges.

---

12 *QLRC Review of Consent Report* (n 5) 84, quoting the Women's Legal Service Queensland.
13 *Qld Criminal Code* (n 7) s 348.
14 Ibid ss 348(1)–(2).
15 Ibid s 348(3).
16 Ibid s 348AA(1)(a), which expressly provides that a person does not consent to an act where that person does not say or do anything to communicate consent.
17 Ibid s 348AA(1)(e).
18 Ibid s 348AA(1)(c).
19 Ibid s 348AA(1)(n).
20 Ibid s 348AA(1)(l).
21 Ibid s 24.
22 Ibid s 348A(3).

The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) ('*NSW Consent Reforms Act*') commenced on 1 June 2022 alongside Phase 3 of a campaign branded #MakeNoDoubt.[23] Both initiatives were recommendations from the NSW Law Reform Commission ('NSWLRC') report *Consent in Relation to Sexual Offences*.[24]

A week prior to commencement, the New South Wales Bar Association ('NSW Bar Association') released a media statement asserting the amendments 'are likely to result in significant injustice'.[25] Troublingly, these claims appear to assume that, in many instances, people in established respectful relationships will falsely report an allegation of sexual violence.[26]

The NSW Bar Association stated:

> Frequently instances of consensual sexual intercourse occur in the absence of words where it cannot be said that such instances are problematic. 'The Attorney General's proposals would mean that many instances of sexual activity would be considered non-consensual and criminal sanctions for a wide range of unproblematic sexual activity would follow, particularly within established respectful relationships' Mr McHugh [SC] said.[27]

While this language is gender-neutralised, the sentiment is a function of patriarchal values such as protecting male reputation and liberty and positioning powerful males like Mr Michael McHugh SC as a 'knower'.[28] This comes at the direct cost of sexual violence victims who do engage with the criminal process – a tiny minority – being presumed liars by the profession.

In a media release headlined 'Education the Key to Embedding Respect in Intimate Relationships', the Law Society of New South Wales ('NSW Law Society') expressed a different set of reservations while foregrounding, as did the Women's Legal Service Queensland, the role of public awareness. President of the NSW Law Society, Joanne van der Plat observed the likely outcome of affirmative consent amendments, stating: '[T]he Law Society remains concerned that the new "affirmative consent" model, may result in lengthier trials, more potential

---

23 We return to the #MakeNoDoubt campaign below: see below Part III(B)(2). Its website remains current at the time of writing: Department of Communities and Justice, 'No Doubt about Consent Campaign' (Media Release, 13 April 2023) <https://dcj.nsw.gov.au/news-and-media/media-releases-archive/2022/no-doubt-about-consent-campaign.html>.

24 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) ('*NSWLRC Consent Report*').

25 New South Wales Bar Association, 'Consent Proposals Could Result in Significant Injustice' (Media Release, 25 May 2021) <https://inbrief.nswbar.asn.au/posts/08b347d11316f1372f3414b4c466afe4/attachment/25.5.21%20MR%20CONSENT.pdf> ('Consent Proposals Injustice').

26 Rape myths about the likelihood of false accusations persist among a significant proportion of the general public. The National Community Attitudes towards Violence against Women Survey (NCAS) found in 2017 that 42% of people believe it is common for sexual assault allegations to be used as a way of 'getting back at men' and 31% believe that allegations are due to women regretting a consensual sexual encounter: Australia's National Research Organisation for Women's Safety, *Are We There Yet? Australians' Attitude towards Violence against Women and Gender Equality* (Summary Report, 2017) <https://ncas.anrows.org.au/wp-content/uploads/2019/04/300419_NCAS_Summary_Report.pdf>.

27 'Consent Proposals Injustice' (n 25).

28 Aileen Moreton-Robinson, 'Towards an Australian Indigenous Women's Standpoint Theory' (2013) 28(78) *Australian Feminist Studies* 331, 341 <https://doi.org/10.1080/08164649.2013.876664>.

for appeals and retrials, or increased focus on the conduct of complainants during sexual assault trials'.[29]

While restrained in her language, the sentiment is clear. A model that adds pages of definitions to what comprises sexual acts and what does not comprise consent is an open door to practitioners who prioritise winning over wellbeing in ways that produce antitherapeutic effects.

The stated objects of the *NSW Consent Reforms Act* are: '[T]o amend the *Crimes Act 1900* in relation to consent to certain sexual activities that, in the absence of consent, are sexual offences; to amend the *Criminal Procedure Act 1986* in relation to directions to juries; and for other purposes'.[30]

According to the explanatory note, the objects of the amendments are to recognise that:

> (i) every person has a right to choose whether to participate in a sexual activity, and
> (ii) consent to a sexual activity must not be presumed, and
> (iii) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.[31]

The *NSW Consent Reforms Act*, and the division where its provisions now sit ('[s]exual offences against adults and children'),[32] open with detailed definitions of sexual acts. The first few subsections define 'sexual intercourse'[33] and 'sexual touching'.[34] Eventually, 'sexual assault' is defined in subdivision 2: 'Any person who has sexual intercourse with another person without the consent of the other person *and who knows that the other person does not consent to the sexual intercourse* is liable to imprisonment for 14 years.'[35]

One way to signal that sexual violence is taken seriously by the criminal law would be to repeal the knowledge element emphasised above and redefine sexual assailants as *any person who has sexual intercourse with another person without the consent of the other person*. This would dramatically shift the organising logic of defence arguments in sexual violence cases without abolishing the capacity to create reasonable doubt because the same two elements – sexual intercourse without consent – must be proven. Current cultural norms, such as believing

---

29 Law Society of New South Wales, 'Education the Key to Embedding Respect in Intimate Relationships' (Media Release) <https://www.lawsociety.com.au/news-and-publications/news-media-releases/education-key-embedding-respect-intimate-relationships>.

30 *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) ('*NSW Sexual Consent Amendment Act*').

31 Explanatory Notes, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021 (NSW) 1.

32 *Crimes Act 1900* (NSW) div 10 ('*NSW Crimes Act*'). We do note the shift to more precise language in the division. The division where these amendments now sit was previously headed, in part, as '[o]ffences in the nature of rape'. The new division heading moves away from naturalising language that is a central feature of rape myths, minimisation and denial. Namely, the 'boys will be boys' and 'male urges' school of cliches and excuses. Contemporary versions of naturalising and excusing sexual violence continue to be produced, particularly among 'incels' (short for 'involuntary celibacy', where a core belief is male rights of access to women's bodies for sex).

33 Ibid s 61HA.

34 Ibid s 61HB.

35 Ibid s 61I (emphasis added).

accused men while treating victims as presumed liars,[36] would not be entrenched by statutory implication. The law would require affirmative consent by default.

Instead, the knowledge element is retained, which means that reasonableness and belief continue to regulate 'knowledge about consent'.[37] These concepts emerge from a complex interplay of parliamentary supremacy, judicial authority to define or redefine legal terms, and social construction of meaning.[38] The institutions and relationships involved in this process produce and maintain sexual and racial hierarchies of a colonial white patriarchy, established only relatively recently in 1788.[39]

Referring to the reform package of legislative amendments and #MakeNoDoubt campaign, then NSW Attorney General Mark Speakman promised that 'consent reforms are not just about holding perpetrators to account, but changing social behaviour with clearer rules of engagement to drive down the rate of sexual assaults'.[40] 'Social behaviour' here refers to sexual violence and 'clearer rules of engagement' are codification of affirmative consent, while the 'rate of sexual assaults' is a statistical output based on police data. As with other public pronouncements noted above, these stated purposes are gender-neutralised despite widely documented evidence that almost all sexual violence is committed by adult males against women and children.[41]

---

36 There are a great many sources, with contemporary literature on this dating back at least to the germane work of Carol Smart, *Women, Crime and Criminology: A Feminist Critique* (Routledge, 1976). For a recent overview, see Jan Jordan, *Tackling Rape Culture: Ending Patriarchy* (Routledge, 2022) <https://doi.org/10.4324/9781003289913>. Specific studies of police and judicial attitudes summarised in this sentence (where police and the judiciary belong to the same society and culture as produces the norms, yet cause far more direct damage by enacting these attitudes towards victims) in England and Wales, North America, Australia and online include: Louise Ellison and Vanessa E Munro, 'Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process' (2016) 21(3) *International Journal of Evidence and Proof* 183 <https://doi.org/10.1177/1365712716655168>; Deborah Tuerkheimer, 'Incredible Women: Sexual Violence and the Credibility Discount' (2017) 166(1) *University of Pennsylvania Law Review* 1; Holly Johnson, 'Why Doesn't She Just Report It? Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police' (2017) 29(1) *Canadian Journal of Women and the Law* 36; Caroline Dick, 'Sex, Sexism, and Judicial Misconduct: How the Canadian Judicial Council Perpetuates Sexism in the Legal Realm' (2020) 28(2) *Feminist Legal Studies* 133 <https://doi.org/10.1007/s10691-020-09431-5>; Camilla Nelson, 'The "Most Maligned" Witness in the Christopher Dawson Case: Gender, Power, Media and Legal Culture in the Digitally Distributed Live-Streamed Court' (2024) 20(1) *Crime, Media, Culture* 83 <https://doi.org/10.1177/17416590231168330>.

37 *NSW Crimes Act* (n 32) s 61HK(1)(c).

38 See Kylie Burns, 'Judges, "Common Sense" and Judicial Cognition' (2016) 25(3) *Griffith Law Review* 319 <https://doi.org/10.1080/10383441.2016.1259536>.

39 Moreton-Robinson, *The White Possessive* (n 2). The characterisation of patriarchy as relatively young in Australia reflects the historical reality that colonial white patriarchy came to Kamay (Botany Bay) and Warrane (Circular Quay) on Dharawhal and Darug lands and waters, with the British invasion and colonisation from 1788 onwards. Patriarchy is much older elsewhere, estimated to be between 6,000 and 10,000 years old: Marilyn French, *Beyond Power: On Women Men, and Morals* (Abacus Books, 1986).

40 Department of Communities and Justice, 'Affirmative Consent Becomes Law in NSW' (Media Release, 1 June 2022) <https://dcj.nsw.gov.au/news-and-media/media-releases-archive/2022/affirmative-consent-becomes-law-in-nsw.html>.

41 The Australian Bureau of Statistics (ABS) reports that 97% of sexual assault offenders are male: Australian Bureau of Statistics, '97 Per Cent of Sexual Assault Offenders Are Male' (Media Release, 2 February 2022) <https://www.abs.gov.au/media-centre/media-releases/97-cent-sexual-assault-offenders-are-male>. The ABS has also cross-verified reported crime data with its Personal Safety Survey (victim self-report data) to find that approximately four times as many women (1.6 million) as men (385,000) had experienced sexual assault; and more than twice as many women (1 million) as men (412,000)

In Speakman's telling, 'perpetrators' of sexual violence are implied to be confused or ignorant rather than asserting power and control according to current norms and values. Confusion or ignorance, however, remain within the scope of available defences in the legal language of reasonableness and belief in NSW and mistake of fact in Queensland. It is not that any single sentiment expressed by a Bar Association President or conservative Attorney-General indicates unfitness for purpose when it comes to sexual violence and the criminal law. The problem is a system designed and run for and by this demographic – white males born into privilege – who repeatedly indulge in 'moves to innocence'[42] (implied confusion, codified mistake) and prioritise institutional reputation (headmasters, cardinals, executives of all kinds) over victim well-being.[43]

This article opens with an account of male violence and the criminal law from a feminist perspective informed by Indigenous epistemologies, in contradistinction to carceral white feminist viewpoints.[44] It reviews alternative approaches within the architecture of the criminal law before returning to questions about the impact and efficacy of legislative incrementalism to reduce sexual violence and deliver justice. The discussion then turns to the urgent needs of victims, in the form of material and emotional support, which are too often missing from legal debate, arguing that legal debate must be anchored in, and accountable to, meaningful change outside and beyond the criminal law. We conclude that legislative changes and the surrounding public discourse continuously reconstitute the paradigmatic power dynamics of the criminal law and its host society.

II MALE VIOLENCE AND LESS THAN HUMAN VICTIMS

A Feminist Perspectives and Indigenous Epistemologies

Understanding colonial white patriarchy as a form of social organisation draws on the work of Goenpul Quandamooka Distinguished Professor Aileen Moreton-Robinson and others.[45] Among the epistemologies and worldviews shared by First Nations scholars and knowledge keepers are understandings of more than

---

reported their first instance of sexual assault before 15 years old: 'Sexual Violence: Victimisation', *Australian Bureau of Statistics* (Web Page, 24 August 2021) <https://www.abs.gov.au/articles/sexual-violence-victimisation>. For an international overview of persistent, known facts about rape, see Kathleen Daly and Brigitte Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) 39(1) *Crime and Justice* 565 <https://doi.org/10.1086/653101>.

42 Eve Tuck and Wayne Yang, 'Decolonization Is Not a Metaphor' (2012) 1(1) *Decolonization: Indigeneity, Education and Society* 1.

43 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 2017) <https://www.childabuseroyalcommission.gov.au/final-report>.

44 See Ann Deslandes et al, 'White Feminism and Carceral Industries: Strange Bedfellows or Partners in Crime and Criminology?' (2022) 4(2) *Decolonization of Criminology and Justice* 5.

45 Moreton-Robinson, *The White Possessive* (n 2). See also Alison Whittaker, 'White Law, Blak Arbiters, Grey Legal Subjects: Deep Colonisation's Role and Impact in Defining Aboriginality at Law' (2017) 20 *Australian Indigenous Law Review* 4.

human kin[46] and more than human sovereignties.[47] Kombumerri and Wakka Wakka philosopher Aunty Dr Mary Graham writes: 'The land, and how we treat it, is what determines our human-ness. Because land is sacred and must be looked after, the relation between people and land becomes the template for society and social relations. Therefore all meaning comes from land.'[48]

To unceded Aboriginal lands, the colonising power brought a rigid class hierarchy that, for almost its entire history, excluded everyone from full 'human-ness' except propertied adult males. In their form of social organisation, full 'human-ness' is signalled by the enfranchisement of citizenship.[49] It was not until 1928 that the United Kingdom finalised parity in the franchise across gender, age and property ownership. Indeed, the myth of egalitarianism in Australia can be traced to the drafters of the *Australian Constitution* choosing not to exclude white women and not to exclude unpropertied men from the franchise. Yet 'universal' suffrage has not, to date, seen colonial white patriarchal society recognise everyone as fully human. The Anglo-original first-class citizen, propertied (literally 'entitled') and enfranchised white male adult, remains the most privileged of persons, who makes and remakes institutions and processes in his image and his interests.

The archetypal persistence of the fully human citizen is also evidenced by Australian and British politicians using 'non-citizen' as a powerful rhetorical device to rationalise contemporary transportation of asylum seekers and refugees.[50] The less than human designation of unpropertied, impoverished and dispossessed people, of racialised and disabled people, and of women and children, is reflected in onshore and offshore incarcerated populations. Colonial white patriarchy achieves protection of the rights and interests of propertied white males through exercising civic, legislative and discretionary powers, from consultation and pre-drafting stages, parliamentary debates, law making, political narratives and media coverage, and through each step of a fundamentally unchanged criminalisation process. In this context, the criminal law of all Australian jurisdictions is situated as

---

46 Zoe Todd, 'Fish, Kin and Hope: Tending to Water Violations in *Amiskwaciwâskahikan* and Treaty Six Territory' (2017) 43 (Spring–Summer) *Afterall* 102 <https://doi.org/10.1086/692559>.

47 Shaa Smith et al, 'Ethics and Consent in More-than-Human Research: Some Considerations From/With/As Gumbaynggirr Country' (2022) 47(3) *Transactions of the Institute of British Geographers* 709 <https://doi.org/10.1111/tran.12520>.

48 Mary Graham, 'Some Thoughts About the Philosophical Underpinnings of Aboriginal Worldviews' (1999) 3(2) *Worldviews* 105, 106.

49 The language of full human-ness directly reflects Indigenous epistemologies around 'more-than-human' kin or species kin: Todd (n 46). See also ibid; Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) ('*Raw Law*') <https://doi.org/10.4324/9781315858999>. This worldview has then been turned back on to the patriarchy generally, and the English class system in particular, as the version of patriarchy imposed on Aboriginal and Torres Strait Islander peoples here. These systems create classes of persons who are less than human, to rationalise seizing control of their lives and their lands. For a history of the English model, see Dale Spender, *Women of Ideas: And What Men Have Done to Them* (Routledge, 1982) <https://doi.org/10.4324/9781003537557>. For the creation of sub- or non-human categories of person by colonisers, see Frantz Fanon, *The Wretched of the Earth*, tr Constance Farrington (Grove Press, 1963) 38–40. On patriarchy relegating women to sub- or non-human status, see French (n 39) 79–80.

50 Maria Giannacopoulos, 'Offshore Hospitality: Law, Asylum and Colonisation' (2013) 17(1) *Law Text Culture* 163, 171 <https://doi.org/10.14453/ltc.815>; see Matthews and Arvanitakis (n 1).

the law of the colonising power, encompassing police investigations, prosecutions, pleas, trials, sentencing and punishment. This is not the law of the land. A defining distinction between the two is more than human obligations and less than human designations.

B Continuum of Carceral Colonialism

The foundational structure of Australian society is the penal colony.[51] As Amangu Yamatji historian Crystal McKinnon articulates, its central organising principle is carceral colonialism.[52] These structures and principles of colonial white patriarchy shape and determine Australian institutions and processes, simultaneously remaining ubiquitous and largely invisible to their beneficiaries. When threatened by exposure or disruption – such as truth-telling or shrinking the carceral footprint by raising the age of criminal responsibility – the establishment can be seen assessing the cost of obstruction and delay against the strategic reassertion of control through postponement, exoneration and reversal.[53]

This pattern is evident in obstruction and resistance to lengthy, resource-intensive and emotionally costly campaigns to criminalise domestic violence and rape in marriage.[54] Neither reform has ended male violence. Indeed, the expansion of the criminal law into domestic violence directly correlates with a rapid rise in the over-incarceration of women and an even more rapid over-incarceration of Aboriginal and Torres Strait Islander women, as noted by the Australian Law Reform Commission in its 2017 *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal*

---

51 During the post-war, pre-'history wars' era, white males like Geoffrey Blainey, Robert Hughs and Thomas Kenneally debated the national character in these terms: should the British colonies that now constitute the Commonwealth of Australia be understood as convict outposts or as nation-building projects, albeit within an empire? From the 1980s, this period was disrupted by historian Henry Reynolds, whose research on the Frontier Wars reached a huge audience. Reynolds exposed the 'Great Australian Silence', first theorised by WEH Stanner some 30 years earlier, and was directly involved in bringing *Mabo v Queensland [No 2]* (1992) 175 CLR 1 against the state of Queensland. These earlier iterations of the Australian story are beyond the scope of this article, except to observe that – unless and until it is dismantled – colonial white patriarchy continues to shape and determine contemporary Australia and its criminal law.

52 Crystal McKinnon, 'Enduring Indigeneity and Solidarity in Response to Australia's Carceral Colonialism' (2020) 43(4) *Biography* 691, 694 <https://doi.org/10.1353/bio.2020.0101>.

53 Since 2008, when Kevin Rudd delivered the National Apology to the Stolen Generations, formal apologies and crafted apologia as damage control have become increasingly popular with senior police. In recent years, the Victoria Police Commissioner delivered an apology at the Yoorrrok Justice Commission, the Northern Territory Police Commissioner apologised at the annual Garma Festival, and the Western Australian Police Commissioner apologised to the family of Ms Dhu, who was killed in custody by inhumane treatment and medical neglect.

54 In 2016, Australian Women's History Network managing editor Lisa Featherstone reviewed this phenomenon with the headline question: '[r]ape in marriage: [w]hy was it so hard to criminalise sexual violence?': Lisa Featherstone, 'Rape in Marriage: Why Was It So Hard to Criminalise Sexual Violence?', *Blog of the Australian Women's History Network* (Blog Post, 7 December 2016) <https://www.auswhn.com.au/blog/marital-rape/>. For a more scholarly account, see Lisa Featherstone, '"That's What Being a Woman Is for": Opposition to Marital Rape Law Reform in Late Twentieth-Century Australia' (2017) 29(1) *Gender and History* 87 <https://doi.org/10.1111/1468-0424.12281>.

and Torres Strait Islander Peoples report.[55] More than forty years of feminist advocacy for effective responses by the criminal law to male violence in the home has seen domestic violence continue unabated. The criminalisation and incarceration of domestic violence victims is consistent with the values and logic of colonial white patriarchy: coopting changes it cannot obstruct, regrouping and reasserting modes of control.[56] As noted by Legal Aid NSW:

> Police officers are responding to domestic violence related call-outs by arresting female defendants or making dual arrests. This has been the case even where men are unable to demonstrate they are fearful of their female partner or that their female partner's violence is characterised by control.[57]

Expansion of the criminal law via policing powers invariably results in excessive impacts on colonised, racialised and impoverished populations, particularly children and young people.[58] This known outcome is conventionally described as 'disproportionate' or 'over-representation' in the literature, suggesting the solution lies in representation or proportionality.[59] Disproportionate incarceration of

---

55 Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017) 351–2 [11.19]–[11.21].

56 Susan Faludi, *Backlash: The Undeclared War against Women* (Vintage Publishing, 1993); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (Penguin Books, 2010).

57 Legal Aid NSW, Submission No 34 to Standing Committee on Social Issues, Parliament of New South Wales, *Inquiry into Domestic Violence Trends and Issues in NSW* (19 September 2011) 17.

58 In 2023, the NSW Law Enforcement Conduct Commission ('NSW LECC') reported its findings on disproportionate targeting of both Aboriginal and Torres Strait Islander peoples and young people by police under consorting laws: see Law Enforcement Conduct Commission, *Review of the Operation of Amendments to the Consorting Law under Part 3A Division 7 of the Crimes Act 1900* (Report, February 2023) ('*LECC Consorting Report*'). Targeted criminalisation of Aboriginal and Torres Strait Islander peoples and of young people intersects to produce the outcome of First Nations children being targeted under the laws. This is reflected in the rate at which First Nations children are incarcerated, which is even more 'disproportionate' (more than half of all children in every jurisdiction) than adults (around a third, nationally): see 'Youth Detention Population in Australia 2024', *Australian Institute of Health and Welfare* (Web Report, 13 December 2024) <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2024/contents/summary/first-nations-young-people-in-detention>; 'The Health and Wellbeing of First Nations People in Australia's Prisons 2022' (Publication, Australian Institute of Health and Welfare, 29 May 2024) 1 <https://www.aihw.gov.au/getmedia/9e2c3486-1c45-40e6-883f-ed2d3e329da2/aihw-phe-342-The-health-and-wellbeing-of-First-Nations-people-in-Australia-s-prisons-2022.pdf?v=20240508153645&inline=true>.

59 Almost all criminology literature describes targeted criminalisation and incarceration of Aboriginal and Torres Strait Islander peoples as 'over-representation' or 'disproportionate' – from renowned scholars in leading journals to specialist scholarly books and first year text books: see, eg, Rob White, Santina Perrone and Loene Howes, *Crime Criminality and Criminal Justice* (Oxford University Press, 3rd ed, 2019); Ana Rodas et al, *Crime, Deviance and Society: An Introduction to Sociological Criminology* (Cambridge University Press, 2020). Government campaigns, eg, Closing the Gap, and agencies, eg, the NSW Bureau of Crime Statistics and Research ('BOCSAR'), also ensure this misleading characterisation is continuously reinscribed in public discourse: 'Aboriginal Over-representation in the NSW Criminal Justice System', *NSW Bureau of Crime Statistics and Research* (Web Page, 8 April 2025) <https://bocsar.nsw.gov.au/topic-areas/aboriginal-over-representation.html>. We contend that this usage misrepresents perhaps the best known fact about the criminal process: that we incarcerate the people of this country at horrific rates. Prisons are not democracies and passive voice phraseology obscures the racism of the criminal law and its function in maintaining colonial rule. The language also does not support its own implications – unless 'proportionate' or 'representative' incarceration of Aboriginal and Torres Strait Islander peoples is somehow a solution to sexual violence. This is no more the case for Aboriginal and Torres Strait Islander peoples than for other instances of sexual violence, as argued throughout.

Indigenous people, however, is a function of the criminal law and enforcement as colonial institutions. This issue is global – affecting Māori people in New Zealand, Palestinians in Israel, and Native American people in Canada and the United States of America – because colonisation perpetually seeks elimination, containment and replacement of "the Native".[60] Domestic and Family Violence 'protection' order regimes in every Australian jurisdiction are on the same continuum as custodial sentences imported into the *Summary Offences Act 1988* (NSW) ('*NSW Summary Offences Act*'), the NSW Police Suspect Targeting Management Plan ('STMP'),[61] and the reintroduction of consorting laws;[62] mandatory minimum custodial sentences in Western Australia,[63] 'paperless arrests' in the Northern Territory,[64] criminalisation of youth bail breaches in Queensland;[65] and harsher and stricter bail and parole conditions,[66] sentences[67] and 'post-sentence detention'[68] across jurisdictions. When politicians promise carceral expansion as a solution, usually in the form of more police powers and harsher sentences, experts predict the harmful impacts on targeted populations.[69] Typically, these predictions are reported as

60 Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387 <https://doi.org/10.1080/14623520601056240>.

61 Vicki Sentas and Camilla Pandolfini, Youth Justice Coalition, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan* (Report, 2017). Six years, and many thousands of unlawful stops later, the NSW LECC released its report into STMP: Law Enforcement Conduct Commission, *An Investigation into the Use of the NSW Police Force Suspect Targeting Management Plan on Children and Young People: Operation Tepito* (Final Report, October 2023). This report was so damning the NSW Police agreed to suspend use of STMP operations against all minors immediately, in October 2023; and against adults as well by end December 2023.

62 *NSW Crimes Act* (n 32) s 93X. The provision specifically excludes children under 14 years old; and in its statutory 10 year review the NSW LECC recommended the relevant section be amended to exclude all children and young people: see *LECC Consorting Report* (n 58) 29 (Recommendation 2).

63 *Criminal Code Amendment Act (No 2) 1996* (WA) s 4, with s 5 prohibiting suspension of the mandatory minimum penalty of 12 months' imprisonment.

64 *Police Administration Amendment Act 2014* (NT) s 7; *Police Administration Act 1978* (NT) div 4AA. The laws were challenged in 2015 after a senior Warlpiri man, Kumanjayi Langdon, died three hours after being detained by police using the powers: *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569.

65 *Strengthening Community Safety Act 2023* (Qld) ('*Qld Community Safety Act*'); *Bail Act 1980* (Qld) s 29(3) ('*Qld Bail Act*').

66 *Bail Act 2013* (NSW) ss 22C–22D.

67 The South Australian government has introduced a complex regime of 'indeterminate' sentences for those designated serious child sex offenders where, in certain circumstances, the sentence does not expire by the passage of time but must be extinguished by order of the Supreme Court: *Criminal Law Consolidation Act 1935* (SA) s 5AB

68 See *Crimes High Risk Offenders Act 2006* (NSW). A challenge to the Western Australian *High Risk Offenders Act 2020* (WA) failed to persuade the High Court that post-sentence detention breaches separation of powers: *Garlett v Western Australia* (2022) 277 CLT 1.

69 An excellent overview of the establishment of Apprehended Violence Order ('AVO') regimes can be found in Jane Wangmann, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34(4) *Sydney Law Review* 695. The use of 'regime' here may be queried by some. This word choice is justified in the context of a growing body of evidence that police have used AVOs as an instrument of criminalisation, in particular, the criminalisation and incarceration of Aboriginal women, as documented by Anna Kerr and Rita Shackel, 'Equality with a Vengeance: The Over-incarceration of Women' (2018) 147 *Precedent* 20. That the rapid recent rise in incarceration of women directly correlates with the rise and expansion of AVO regimes is an outcome of the criminal law

warnings, concerns or risks. Sometime later, as in the examples below, the 'risk' is found to have been realised exactly as predicted.[70] Each step tends to receive less media coverage than the initial 'trigger' for the expansionist crime policy.[71]

- In the following six months after the introduction of the *NSW Summary Offences Act*, there was a 293% increase in police reports of offensive behavior (compared to July 1986–January 1987). In the period 1988–91, prisoners per 100,000 adult population rose by 45% and the number of prisoners rose by an average of 15% per year, a tripling of the average 5% annual increase in 1986–88.[72]
- 'The STMP exacerbates the marginalising impacts of extensive police contact for Aboriginal and Torres Strait Islander peoples by further stigmatising young people in their communities.'[73]
- 'During the review period, 1,797 (42%) of the 4,257 people who were the subject of the consorting law identified as Aboriginal. When looking at use of the consorting law by general duties officers, the proportion of people subject to the consorting law who were Aboriginal was 46%.'[74]
- Research indicates that 81% of the 119 juveniles dealt with under Western Australia's mandatory sentencing laws are Aboriginal and there is clear evidence that Aboriginal youth are less likely to access diversionary

---

and consistent with the argument in this article, that the criminal law is not (and cannot be) a violence prevention mechanism. The continuing reliance of some (white, or carceral) women on criminal law as a vehicle for [their] safety is critiqued by Ann Deslandes et al, 'White Feminism and Carceral Industries: Strange Bedfellows or Partners in Crime and Criminology?' (2022) 4(2) *Decolonization of Criminology and Justice* 5 <https://doi.org/10.24135/dcj.v4i2.39>.

70 Arguably the most tragic and ongoing example of this pattern can be observed in recent changes to bail and police detention in Queensland, where the same government that passed the *Queensland Human Rights Act 2019* (Qld) subsequently suspended it, twice, to pass laws that criminalise and incarcerate more children and young people through criminalisation of bail breaches including breaches by young people (*Qld Community Safety Act* (n 65); *Qld Bail Act* (n 65) s 29(3)) and through designating police watchhouses as youth detention centres (*Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Act 2023* (Qld)). As predicted, these changes have directly enabled severe trauma and led to severe overcrowding as documented by submissions to the Queensland Police Service *Watch-House Review* (announced on 6 August 2024): see, eg, Aboriginal and Torres Strait Islander Legal Service (Qld), Submission to Queensland Police Service, *Watch-House Review* (17 December 2024); Queensland Family and Child Commission, Submission to Queensland Police Service, *Watch-House Review* (December 2024); Queensland Council of Social Service, Submission to Queensland Police Service, *Watch-House Review* (10 December 2024). A similar story in New South Wales accompanied the one-year review and extension of its harsher bail conditions for young people, as directly captured by this headline: Rudi Maxwell, 'The Number of Kids Refused Bail in NSW Has Spiked. The Premier Sees It as a Win, but Critics Say It's a Fail', *NITV* (online, 21 February 2025).

71 A moral panic tends to follow the power curve mode of media coverage: see Bob Hodge and Ingrid Matthews, 'Critical Incident Analysis and the Semiosphere: The Curious Case of the Spitting Butterfly' (2011) 17(2) *Cultural Studies Review* 300 <https://doi.org/10.5130/csr.v17i2.1722>.

72 Roseanne Bonney, NSW Bureau of Crime Statistics and Research, *NSW Summary Offences Act 1988* (Report, 1989) 15–17.

73 Sentas and Pandolfini (n 61) 32.

74 *LECC Consorting Report* (n 58) 39.

options and more likely to be processed through the courts than non-Aboriginal youth.[75]

- 'Since their introduction, the disproportionate application and effect of the arrest and detention powers on Indigenous people in the N[orthern] T[erritory] has been alarming.'[76]

These knowable and predictable outcomes reflect the colonial violence of the criminal law and its enforcement by police. Far from the solution lying in proportionality or representation, the problem lies in seeking change from or holding faith in constitutively violent institutions and agents of colonial white patriarchy.

C Lawmakers

When Speakman told ABC Radio that affirmative consent reform is designed to 'make sure women feel safe in our society',[77] he projected far beyond what criminal law reform can achieve. His claim is a political promise alone, resting on a chain of false assumptions: that redefining consent will result in more convictions; that more convictions will result in more reports to police; that police will deal sensitively and adequately with reports of sexual violence; and that flow-on effects will have a deterrent impact on violent men. Between initial reports to police and incarceration are sexual violence suspects, accused and defendants, who have been investigated, arrested and charged; who have entered a guilty plea or received a guilty verdict; and, finally, been sentenced to 'do time' in an institution that is culturally defined, *inter alia*, by the constant threat – and material reality – of sexual violence.[78] Each step is obstructed or enabled through the exercise of discretionary powers of police, prosecutors and the judiciary, and contested by lawyers whose professional bodies have characterised affirmative consent as unnecessary or against the interests of justice. People who are incarcerated for acts of sexual violence are a minuscule proportion of the sexually violent population.[79]

Material safety for women and children can only be realised by stopping male violence. The guarantee offered by Speakman assumes that sexual assailants who are reported, investigated, arrested, charged and prosecuted are now less likely to be acquitted, more likely to plead guilty or more likely to be found guilty, and that this projected result will reduce sexual violence in the community. This is the purported operational utility of the amendment. Each of these steps requires

---

75 Neil Morgan, Harry Blagg and Victoria Williams, Aboriginal Justice Council, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (Report, December 2001) 6–7.

76 Anna Rienstra, 'The "Paperless Arrest": Chapter III and Police Detention Powers in the Northern Territory', *Australian Public Law* (Blog Post, 9 November 2015) <https://www.auspublaw.org/blog/2015/11/the-paperless-arrest>.

77 'New Consent Laws in NSW', *Radio National Breakfast* (ABC Radio National, 1 June 2022) <https://www.abc.net.au/listen/programs/radionational-breakfast/new-consent-laws-in-nsw/13909498>.

78 Andy Kaladelfos and Yorick Smaal, 'Sexual Violence and Male Prisons: An Australian Queer Genealogy' (2019) 31(3) *Current Issues in Criminal Justice* 1 <https://doi.org/10.1080/10345329.2019.1641881>.

79 Nationally, only around 8% of sexual assaults are reported to police: 'Sexual Violence', *Australian Bureau of Statistics* (Web Page, 23 August 2023) <https://www.abs.gov.au/statistics/people/crime-and-justice/sexual-violence/latest-release> ('Sexual Violence Statistics'). See also Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, 2018).

public time and money, along with exhaustive emotional and financial costs borne by victims, and for violent males to respond to political pronouncements, legal processes and criminal sanction for others. It is worth noting that if each stage of the envisioned criminalisation process and punishment regime is completed, the assailant is incarcerated and disappears from public view, unless or until media outlets cover their impending release.

D Enforcement

> 'An estimated 8.3% of women (61,100) who experienced sexual assault by a male said the police were contacted about the most recent incident, including 7.7% (56,500) who contacted the police themselves.'[80]

Victims of sexual violence rarely report to the police. They may not tell anyone at all, they may disclose to a trained professional, or they may confide in friends, family, colleagues or neighbours. There is usually a lengthy time lag between victimisation as a child and disclosure as an adult, with some studies reporting that disclosure occurred for the first time during research interviews.[81] Police are among the last responders to sexual violence – other women are almost always the first.

As a male-dominated institution, police forces reflect and align with the patriarchal value of believing violent males. Police attitudes toward victims of sexual violence are notoriously selective.[82] 'Your toes would curl the way some people in those stations talk about domestic violence, or god forbid sexual assault victims,' one officer told the Australian public broadcaster, on condition of anonymity, while describing extreme misogyny and violence toward colleagues in the NSW Police Force.[83]

The leap of logic from increasing the number of convictions to more victims reporting to the police assumes that police are not part of the problem, and indeed, that police are available and willing to investigate rape complaints effectively. Perhaps the most troubling element of such promises is when more women, who become 'willing to trust that "things have changed"', are exposed to 'real rape' myths that continue to shape and determine public attitudes and police responses,[84]

---

80 'Sexual Violence Statistics' (n 79).

81 Catherine Esposito, 'Child Sexual Abuse and Disclosure: What Does the Research Tell Us?' (Research Paper, New South Wales Department of Family and Community Services, 2014) 15 <https://dcj.nsw.gov.au/documents/service-providers/deliver-services-to-children-and-families/child-protection-services/child-sexual-abuse-disclosure-research.pdf>.

82 Deborah Tuerkheimer, 'Incredible Women: Sexual Violence and the Credibility Discount' (2017) 166(1) *University of Pennsylvania Law Review* 1 <https://dx.doi.org/10.2139/ssrn.2919865>; Jodie Murphy-Oikonen et al, 'Unfounded Sexual Assault: Women's Experiences of Not Being Believed by the Police' (2022) 37(11–12) *Journal of Interpersonal Violence* NP8916 <https://doi.org/10.1177/0886260520978190>.

83 Lia Harris and Sarah Gerathy, 'Current and Former NSW Police Force Officers Reveal "Toxic" Workplace Culture, Bullying and Sexism', *ABC News* (online, 25 September 2024) <https://www.abc.net.au/news/2024-09-25/stateline-nsw-police-current-former-officers-bullying-culture/104390418>.

84 See Holly Johnson, 'Why Doesn't She Just Report It? Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police' (2017) 29(1) *Canadian Journal of Women and the Law* 36, 59 <https://doi.org/10.3138/cjwl.29.1.36>.

despite the 'increasing emphasis ... placed on improving the training police receive in responding to family, domestic and sexual violence'.[85]

E Criminal Process and Guilt

If the police do take a sexual violence complaint seriously and allocate resources to an investigation, the attitudes and discretionary powers of prosecutors, defence counsel and the judiciary – as encapsulated by legal professional associations – come into play. Prosecutors can determine that a case has no reasonable prospects of success, where reasonableness is defined by the values and norms of a male-dominated judiciary in a patriarchal society. Defence counsel could (but rarely do) decide against hostile cross-examination, which proceeds on the basis that winning is not only the primary goal but also necessitates creating reasonable doubt through the sole strategy of painting the witness-victim as a liar. In addition to myriad decisions on admissibility, dismissal, the framing of summing up and the framing of jury directions, the judiciary is ultimately responsible for setting and following precedents in a system established by the colonial power that conforms to the norms of patriarchal power paradigms.

Affirmative consent amendments must be read in the context of the intimidating formalities of the court, patriarchal values and norms, and perceptions of credibility, weight and probity that have been crystalised by centuries of male-only decision-making. Each step is made more complex by affirmative consent amendments, adding lengthier definitions rather than repealing knowledge elements defined by reasonableness and belief. More layers of complexity expand the scope of argument, where the adversarial system is profitable for the legal profession and detrimental to victims. The literature on attitudes toward victims of sexual violence suggests that legislative incrementalism cannot displace the entrenched norms and values of lawyers operating within the patriarchal power paradigms of the criminal law.

Baked into sentencing acts are guidelines for judges to factor into punishments what someone else may or may not do in an unknown future time and place.[86] There is no more disproven theory in criminology than deterrence. The evidence that harsher sentences have no deterrent effect and that incarceration produces worse life outcomes on every measure is well established.[87] In addition to the illogic of punishing potential future deeds in an unknown time and place, some jurisdictions compound the severity of punishment with 'offence prevalence' provisions.

---

85 Christopher Dowling, 'Police Training in Responding to Family, Domestic and Sexual Violence' (Trends and Issues in Crime and Criminal Justice Paper No 689, Australian Institute of Criminology, 18 April 2024) 2.

86 In New South Wales and Queensland, general and specific deterrence fall under the same provision: see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c).

87 Dieter Dölling et al, 'Is Deterrence Effective? Results of a Meta-analysis of Punishment' (2009) 15(1–2) *European Journal on Criminal Policy and Research* 201 <https://doi.org/10.1007/s10610-008-9097-0>; Damon Petrich et al, 'Custodial Sanctions and Reoffending: A Meta-analytic Review' (2021) 50 *Crime and Justice* 353 <https://doi.org/10.1086/715100>; Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work: And What It Means for Sentencing' (2011) 35(5) *Criminal Law Journal* 269; Alec Karakatsanis, 'The Punishment Bureaucracy: How to Think about "Criminal Justice Reform"' (2018–19) 128 *Yale Law Journal Forum* 848.

As Mirko Bagaric and Theo Alexander have explored at length, offence prevalence also has no logical basis,[88] yet it necessarily compounds the known harms produced by increasing incarceration.

F Prisons

Incarcerating more people for longer cannot result in a safer society ('community safety') because prisons are violent and criminogenic. Sexual violence as part of custodial punishment is a consistent and recurring theme in narratives about prisons and prisoners. Incarceration causes trauma and worse outcomes on every measure, from physical and mental health and drug use to school attendance, employment, civic engagement, housing security and a host of other variables studied by researchers across a wide range of disciplines.[89] Because prison does not result in better outcomes in any area, more convictions and longer custodial sentences cause a net increase in institutionalisation and trauma. Meanwhile, popularising rhetoric ('don't drop the soap') entrenches sexual violence as a desired outcome of the criminal process.[90]

The more violence created by more incarceration, the less safe the society. Almost all prisoners are eventually released and the trauma caused by incarceration is largely absorbed by impoverished families and underfunded services. The political economy of crime and justice primarily directs resources to police, prisons and surveillance industry salaries and products – none of which prioritise women being safe from male violence. The focus on women 'feeling safe' obscures facts about perpetrators, who usually know their victims. Neutralised claims about women's feelings obscure the realities of sexual violence and reproduce 'stranger danger' myths. According to Tom Sullivan et al, the 2021–22 Australian Sexual Offence

88 Mirko Bagaric and Theo Alexander, 'The Fallacy of Punishing Offenders for the Deeds of Others: An Argument for Abolishing Offence Prevalence as a Sentencing Aggravating Consideration' (2016) 38(1) *Sydney Law Review* 23.

89 Michael Muller-Smith, 'The Criminal and Labor Market Impacts of Incarceration' (Working Paper, 18 August 2015) <https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf>; Anna Haskins, Mariana Amorim and Meaghan Mingo, 'Parental Incarceration and Child Outcomes: Those at Risk, Evidence of Impacts, Methodological Insights, and Areas of Future Work' (2018) 12(3) *Sociology Compass* e12562:1–14 <https://doi.org/10.1111/soc4.12562>; Dave Bewley-Taylor, Mike Trace and Alex Stevens, 'Incarceration of Drug Offenders: Costs and Impacts' (Briefing Paper No 7, The Beckley Foundation Drug Policy Programme, June 2005) <https://www.iprt.ie/site/assets/files/5943/incarceration_of_drug_users.pdf>.

90 Kristine Levan, Katherine Polzer and Steven Downing, 'Media and Prison Sexual Assault: How We Got to the "Don't Drop the Soap" Culture' (2011) 4(2) *International Journal of Criminology and Sociological Theory* 674.

Statistical collection shows most alleged sexual offenders[91] were male (93%) and 2 in 3 (66%) were known to the victim.[92]

In women's prisons, almost all incarcerated people are themselves survivors of male violence. As mentioned above, rates of sexual violence, as with all forms of violence, are higher in prisons than in the community.[93] Russell Hogg found that recorded prisoner violence against prisoners 'is about two and a half times the rate of assault in the general community', and an equivalent 'dark figure' (unreported to reported) ratio of 4:1 would make the assault rates in prison 11 times higher than in the community.[94]

Paid staff inside prisons also commit state-sanctioned acts of violence with almost complete impunity. In a swingeing critique of 'the punishment bureaucracy', Alec Karakatsanis observes that in his 'ten years of experience, "law enforcement" essentially ignores uncontroverted evidence of rampant sexual violence against prisoners'.[95] That prison itself operates in an architecture of violence puts the lie to claims for incapacitation as a purpose and function of carceral punishment. For 'incapacitation' to have any meaning as a rationale for incarceration, prisoners who are victimised inside must also be regarded as less than fully human.

While contemplating the harm caused by incarceration, we note that almost all domestic and family abusers and rapists walk freely and anonymously in the community. The notion that a legislative amendment can produce confidence or surety for women to 'feel' that they will no longer be victimised by violent males is absurd. Such notions are produced by a long line of continuously reinscribed and convoluted reasoning, based on false and disproven assumptions about male violence, policing, the criminal process, deterrence, punishment and prisons. Even if a custodial sentence does eventuate, incarceration is as unfit for purpose as the criminalisation process when it comes to stopping sexual violence.

Expanding the scope of male-dominated and male-coded discretionary powers of police, prosecutors and the judiciary is highly unlikely to achieve the stated purpose of reducing sexual violence. There is no evidence to suggest that reformist incrementalism or non-performative speech acts[96] can redress 250 years of carceral

---

91 While this article follows humanising language protocols, it does not substitute or otherwise remove the word 'offenders' from direct quotes or the titles of cited publications. On humanising language, this article looks to Language Guides published by Community Restorative Centre, the National Network of Incarcerated and Formerly Incarcerated Women and Girls and the University of New South Wales Criminology Lived Experience Advisory Panel. Except for the purposes of critique, this article would choose not to reproduce quotes or publications that refer – as do so many politicians, commentators and almost all police – to presumptively innocent people as 'offenders'.

92 Tom Sullivan et al, Australian Institute of Criminology, *Sexual Offending in Australia 2021–22* (Statistical Report No 47, 11 July 2024) 9, 26.

93 Kaladelfos and Smaal (n 78).

94 Russell Hogg and John Scott, 'Masculinity, Sexuality, and Violence in the Australian Convict Colonies' in Tess Bartlett and Rosemary Ricciardelli (eds), *Prison Masculinities: International Perspectives and Interpretations* (Routledge, 2022) 5.

95 Karakatsanis (n 87) 896.

96 See Sara Ahmed, 'The Nonperformativity of Antiracism' (2006) 7(1) *Meridians* 104 <https://doi.org/10.2979/MER.2006.7.1.104>.

colonialism on unceded Aboriginal lands[97] – a system that has yet to be decolonised in any meaningful way. Stretching the timeframe reveals the structural futility of putting forward legislative amendments to address male violence in a system governed by the values of colonial white patriarchy.

III IMPACT

Fears that positive consent would be 'contrary to the interests of justice', 'reverse the onus of proof' and somehow deny the 'subjectivity and diversity of human sexual experience' are social and cultural dynamics worth unpacking and deconstructing.[98] We must interrogate incrementalism as a function of stubborn resistance to change by beneficiaries of the status quo. The architecture of the criminal law derives from and perpetuates the norms of colonial white patriarchy, which continue to centre the accused male as the party whose agency and autonomy require the law's protection.

Additionally, we can ask whether situating the adversarial legal paradigm at the centre of responses to sexual violence legitimises and perpetuates a broader normative adversarialism at the expense of, *inter alia*, victim agency, autonomy and dignity.[99] The liberal political order almost exclusively focuses on the rights and liberties of the individual as the benchmark for human flourishing when the individual is not, by definition, a social unit. This produces incommensurable rationalisations for hierarchies of oppression, which are only reconciled by the group dominating our material and conceptual worlds.

As northern empires rose and fell over millennia, through eras marked by slavery, feudalism and industrial slaughter, more than 500 distinct Aboriginal and Torres Strait Islander societies sustained continental co-existence from Creation, or 'according to the common law from "time immemorial", and according to science more than 60,000 years ago'.[100] Organised around connection to the cosmos, kin and Country; accountability and obligation; and reciprocity and respect, custodians of

97 See McKinnon (n 52).

98 The many and varied expressions of human sexuality, and the many and varied contexts in which sexual interactions take place, mean that assessments of whether consent was given are best made on a case by case basis on the evidence in each case. Prescriptive rules of general application are apt to lead to injustice.

QLRC Review of Consent Report (n 5) 85, quoting the Queensland Law Society.

99 Extending the dynamics of conflict and aggression from the private sphere and into the criminal justice process perhaps inevitably ensures that mere incremental and procedural reforms reflect public policy debates stoked by anger and (to some extent) designed to shock. As David Yamada observes, this results in by-products of fear, anxiety and trauma. He concludes that '[w]hen policymaking processes, outcomes, and implementations fuel these negative emotions, they often constitute denials of human dignity': David C Yamada, 'On Anger, Shock, Fear, and Trauma: Therapeutic Jurisprudence as a Response to Dignity Denials in Public Policy' (2019) 63 *International Journal of Law and Psychiatry* 35, 35 <https://doi.org/10.1016/j.ijlp.2018.06.009>.

100 Referendum Council, 'Uluru Statement from the Heart' (Statement, First Nations National Constitutional Convention, 26 May 2017).

the oldest continuing cultures on earth demonstrate the longest and most successful international and social relations in the history of humanity.[101]

Meanwhile, a culture of conflict continues to hold sway across institutional responses to sexual violence.[102] It has long been accepted that the law itself has agency, which includes a capacity for 'antitherapeutic' effects and consequences.[103] David Wexler and others posit that harmful consequences of the working of the law's agency are often iatrogenic.[104] Given the overwhelming and continuing failure of the legal system to meaningfully protect the safety and dignity of women subjected to sexual violence, the law's tolerance for this ongoing harm begins to look like intention. In a direct challenge to the filtering function of intention in criminal law – where men are believed and their stated intentions accepted – feminists have argued that impact is a more useful and accurate rubric than intention.[105] Similarly, decolonial scholars have theorised 'settler moves to innocence' to capture the privilege of claiming good intentions, even when causing obvious and extreme harm on a mass scale,[106] such as the forced removal of entire generations of children from their Country, kin and culture.[107]

---

101 'International' here refers to Aboriginal and Torres Strait Islander ways of maintaining relations between nations across the continent and populated islands. See Watson, *Raw Law* (n 49).

102 See Michael Karlberg, *Beyond the Culture of Contest: From Adversarialism to Mutualism in an Age of Interdependence* (George Ronald Publisher, 2004); Lindsay Farmer et al, *The Trial on Trial: Volume 1* (Bloomsbury Publishing, 2004); Geoffrey Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System' (2003) 12(3) *Journal of Judicial Administration* 155; Marc Galanter and Mark Edwards, 'Introduction: The Path of the Law Ands' [1997] (3) *Wisconsin Law Review* 375; John Hostettler, *Fighting for Justice: The History and Origins of Adversary Trial* (Waterside Press, 2006).

103 This is a view largely formulated and championed by the therapeutic jurisprudence approach: see, eg, David B Wexler, 'Two Decades of Therapeutic Jurisprudence' (2014) 24(1) *Touro Law Review* 17.

104 Ibid 21; Nigel Stobbs, 'The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship between Adversarialism and Therapeutic Jurisprudence' (2011) 4(1) *Washington University Jurisprudence Review* 97 <https://doi.org/10.2139/ssrn.2314747>.

105 We refer here in particular to the origins and development of Victim Impact Statements, as a direct response to the crucial element of 'intent' in sexual violence acquittals, emerged from resurgent (third-wave) feminism of the 1970s and 1980s. 'Intention vs impact' as an explanatory framework has since been applied in other areas, most prominently, workplace harassment, psychology and mental health, and sociological studies of transgression, shame and the now-infamous 'non-apology'.

106 Tuck and Yang (n 42).

107 Termed the 'Stolen Generations' in Australia and 'Residential Schools' in North America, these genocidal eugenics programs were deliberately designed to 'kill the Indian and save the man', in the words of architect Reverend Whitmer (1882): Xabier Irujo, 'Genocide, Kill the Indian and Save the Man', *Nevada Today* (online, 8 October 2021) <https://www.unr.edu/nevada-today/news/2021/genocide-kill-indian-save-man>. Yet when inquiries, reports and apologies were eventually undertaken, many protested that children were forcibly removed, institutionalised and abused with 'good intentions'. On this practice in Canada, see Tamara Starblanket, *Suffer the Little Children: Genocide, Indigenous Nations and the Canadian State* (Clarity Press, 2018). On Stolen Generations in Australia, the equivalent saying was 'breed out the colour'. For a frontline account on the policy, its impacts and direct function in relation to colonisation of land, see Barbara Cumings, 'Assimilation, Gender and Land in the Northern Territory After Kruger: Postcards from the Factual Substratum' (1998) 21(1) *University of New South Wales Law Journal* 217. For an official and white-centred account, see Russell McGregor, '"Breed Out the Colour" or the Importance of Being White' (2002) 33(120) *Australian Historical Studies* 286.

In this context, we evaluate incremental reform by its own criteria[108] as well as according to feminist perspectives informed by Indigenous epistemologies – the organising principles of the laws of the land and meaningful material and emotional support for victims outside and beyond the criminal law. Whatever the stated goals of reform, the formal legislative objectives and political promises, our collective goals must remain reducing sexual violence and delivering justice.

In the following sections, we review alternative approaches to the adversarial system, critique the conventional evaluative model that relies on police activity ('crime rates') data and consider the literature on the impact of community legal education. These evaluative fields illustrate how the laws of consent and surrounding public discourse continuously reconstitute paradigmatic power dynamics of the criminal law and its host society – colonial white patriarchy.

A Therapeutic Jurisprudence and Alternative Approaches

Therapeutic jurisprudence ('TJ') perspectives examine how laws, legal procedures and the roles of legal professionals impact the emotional and psychological wellbeing of victim-witnesses in sexual violence related matters. The focus of criminal processes on a forensic determination of criminal responsibility and due process as the core criteria for success produces overwhelmingly antitherapeutic consequences. TJ itself would emphasise a compassionate, victim-centred approach that seeks healing and empowerment for survivors, which is compatible with due process as it currently plays out in the criminal trial.[109]

Those peak professional bodies promoting the view that affirmative consent models are 'both functionally unnecessary and contrary to the interests of justice' and that such a model would give merely a 'superficial appearance of progressive change' (with which anti-carceral feminists can agree)[110] are clearly flagging that the emotional and psychological harm suffered by victims who are left without a resolution or an opportunity to heal is not iatrogenic. It is a self-serving and accepted cost of the way the system works in a society where self-interest is coded as rational. Given that affirmative consent is nevertheless now law, we turn to the question of what other reforms or innovations are possible to centre the wellbeing of the victim.

While multiple options for reform and innovation have been suggested and trialled across jurisdictions, government support and resourcing for these initiatives remain far from guaranteed – especially in contrast to the traditional adversarial trial process. Approaches informed by a TJ perspective include specialised domestic violence and sexual violence courts, diversion and alternatives to

---

108 Incremental changes to legislation reflect the reality that deliberate and conscious changes in policy are not always teleological or goal-oriented. Legal reform is 'often an accumulation of a myriad of minor changes in practice … their extent unnoticed until analytically identified [and] … often contradictory and conflicting, reflecting political and communal ambivalence about the direction of criminal justice policy': see Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2003) 20(2) *Law in Context* 6, 6.

109 David C Yamada, 'Therapeutic Jurisprudence: Foundations, Expansion, and Assessment' (2021) 75(3) *University of Miami Law Review* 660, 678–82.

110 See above nn 9–10.

prosecution, therapeutic sentencing options, trauma-informed judicial approaches and reimagined treatment program designs.[111]

Within the adversarial system, some reforms are being trialled to respond to the need for a deeper and more informed approach to the reception and assessment of evidence in light of reports from Fair Agenda[112] and the Women's Safety and Justice Taskforce report in Queensland.[113] The Fair Agenda model for prerecorded testimony in sexual assault cases is envisioned as a nationwide rollout, while courts in Queensland are piloting the use of a Sexual Offence Expert Evidence Panel to allow for relevantly qualified court-appointed experts to give evidence in proceedings. Input from the expert panel will inform the court, firstly, about whether the accused's cognitive or mental health impairment at the material time was a substantial cause of them not saying or doing anything to ascertain whether the victim consented to the sexual act. Secondly, expert panel members will give 'counterintuitive evidence' about sexual violence to counter the prevalence and persistence of rape myths and the social, psychological and cultural factors that may affect the behaviour of victims.

In some jurisdictions, the police provide mechanisms for victims of sexual violence to report full details of their experience without that report triggering a prosecution. The details provided are then used by the police as 'intelligence' which may be used to inform current or future investigations of other sexual violence reports.[114] Describing its version of this mechanism, the Queensland Police Service claims that Alternative Reporting Options ('AROs') can be

> an extremely useful healing strategy for the survivor and an effective investigative strategy for law enforcement agencies. Survivors can feel empowered by knowing that the information they possess and provide could be used to solve reported offences of a similar nature.[115]

It is debatable whether the main focus of an ARO is an 'extremely useful healing strategy for the survivor' or 'an effective investigative strategy for law

---

111 Catharine Richmond and Melissa Richmond, 'The Future of Sex Offense Courts: How Expanding Specialized Sex Offense Courts Can Help Reduce Recidivism and Improve Victim Reporting' (2015) 21(2) *Cardozo Journal of Law and Gender* 443; Astrid Birgden, 'Maximizing Desistance: Adding Therapeutic Jurisprudence and Human Rights to the Mix' (2015) 42(1) *Criminal Justice and Behavior* 19.

112 See Fair Agenda, *Improving the Court Experience: A Model for Pre-recording Testimony in Sexual Assault Cases* (Report, November 2024); Australasian Institute of Judicial Administration, *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (Report, 2023).

113 Women's Safety and Justice Taskforce, *Hear Her Voice: Report One* (Report, 2021) <https://www.publications.qld.gov.au/dataset/womens-safety-and-justice-taskforce>. The Queensland Government is piloting recommendations 43 and 80.

114 See, eg, Queensland Police Service, 'Adult Sexual Assault' (Brochure) <https://www.police.qld.gov.au/sites/default/files/2020-03/ARO%20Brochure.pdf>.

115 'Alternative Reporting Options', *Queensland Police* (Web Page, 27 July 2023) <https://www.police.qld.gov.au/units/victims-of-crime/support-for-victims-of-crime/adult-sexual-assault/alternative-reporting>. An ARO is lodged by completion of an online form (which can be done anonymously) and the relevant site declares: 'If you *do not* want a suspect prosecuted but would like the police to know about an event of sexual violence for intelligence purposes, please continue using ARO. Your participation with the ARO is voluntary.' Interestingly, the site seems to take the position that reports are assumed to be prima facie genuine, in that it requests the lodger to 'provide as much detail as possible regarding the circumstances leading up to, during and after the sexual assault/rape' and that '[t]he more detail regarding the offender's behaviour and what they did will greatly assist police in how this information is used'.

enforcement agencies'.[116] Given a report is most likely anonymous, the victim would be unaware of what, if any, is the effect of their disclosure and any 'healing' effect is unclear. Additionally, there is no data available on how often the ARO process is accessed by victims and their experiences of it. Survivors are alert to the delays and realities of a system that claims to be keeping them safe. Many do not express a desire for their attacker to go to prison, so research is needed on who would access this option and why.[117]

Although the problem-solving court model has evolved to include a wide range and number of specialist family and domestic violence courts (both in Australia and overseas), dedicated sex offender treatment courts (akin to the drug treatment courts) do not appear to have gained traction.[118] A core element of the specialist domestic violence court in Southport Queensland is the simple court docket, designed for what health services would call 'continuity of care' for the victim. This is the kind of incrementalism we can endorse – a small and not resource intensive change that shifts the way the criminal law and quasi-criminal processes, like Apprehended Violence Order applications, tend to treat victims as a vehicle for saviour narratives.[119] As Nicholas Abercrombie, Stephen Hill and Bryan S Turner have long articulated, it is the state that has asserted a monopoly not only on the authority to inflict punishment through deprivation of liberty, but also on the lawful infliction of violence.[120]

The branding of punishment as 'justice' operates to legitimise the workings of the system and the wages and salaries of its agents, who remain unaccountable for failing to reduce, or even recognise, the trauma experienced by victims of sexual violence. At the same time, penal populism discourse encourages the public to accept the logic of securing punishment as an all-encompassing rationale for violence and trauma inflicted by the system itself.

---

116 Ibid.

117 The Australian Law Reform Commission ('ALRC') notes in its Issues Paper, issued in association with its inquiry into justice responses to sexual violence in Australia, that the range of reasons why victims do not report include: distrust of and lack of faith in the police or the justice system; poor responses from family, friends, carers, or services to an attempted disclosure; living in a regional, rural, or remote area; insufficient information about the justice process and associated support; or fear of consequences in other aspects of their lives (such as loss of employment, impact on family, visa status, or cultural recriminations). However, the ALRC also expressly acknowledges that 'some victim survivors do not want to engage in the criminal justice process because they do not want the person responsible for sexual violence to go to jail'. See Australian Law Reform Commission, *Justice Responses to Sexual Violence* (Issues Paper No 49, April 2024) <https://www.alrc.gov.au/wp-content/uploads/2024/04/ALRC-JRSV-Issues-Paper-2024.pdf>.

118 John Q La Fond and Bruce J Winick, 'Sex Offender Reentry Courts: A Cost Effective Proposal for Managing Sex Offender Risk in the Community' (2003) 989(1) *Annals of the New York Academy of Sciences* 300.

119 The term AVO is used here in a general sense and includes similarly named processes and orders in other jurisdictions, such as Domestic Violence Orders ('DVOs') and Interpersonal Violence Orders ('IPVOs').

120 This definition is quoted in Adrian Barton and Nick Johns, *The Policy Making Process in the Criminal Justice System* (Routledge, 2012) 7: 'A set of institutions comprising the legislature, executive, central and local administration, judiciary, police and armed forces … it acts as the institutional system of political domination and has a monopoly of the legitimate use of violence'.

Judges and court staff can play a therapeutic role by acknowledging the harm experienced by survivors, validating their trauma and expressing empathy. However, calls for training judges in social and cultural skills, rather than implementing law reforms, are less prominent than the frequent and mostly fruitless calls for the police to undertake cultural competency or awareness training. This is no less urgent, given the combined and highly discretionary powers of both the judiciary and the police to determine life outcomes for a mostly colonised, racialised, impoverished and relatively young underclass of criminalised persons. In its report on affirmative consent amendments, the NSWLRC explicitly added the need for education programs targeting judicial officers (and prosecutors, defence lawyers and police officers) in its public awareness campaign recommendations.[121]

It may well be that, in contrast to resource-intensive initiatives like #MakeNoDoubt, the activism of high-profile survivors can better capture the public imagination; and have a greater impact on legal literacy and rape myths.[122] A noticeable development in the long-running saga of accused and adjudicated rapist Bruce Lehrmann was widespread coverage noting the trauma-informed approach of Lee J in what was, procedurally, a defamation trial.[123] The choices of the main character in this saga reflect a known dynamic, as Astrid Birgden observes:

> [T]he criminal justice system with its emphasis on punishment, retribution, and incapacitation (i.e., punishment and protection) often provides disincentives for sex offenders to undergo treatment. The confrontational adjudicative process of traditional courts encourage advocacy of innocence, discourage acceptance of responsibility, and influence subsequent acceptance of treatment once sentenced.[124]

One option for reforming the sentencing process could involve the relevant victims of crime agency offering a structured reparative mediation process initiated at the request of the victim. The dialogue and outcomes of that process could then be considered by the court when determining the sentence. This would be akin to the victim impact statement procedure but more kinetic, in that the victim would have the opportunity to seek answers directly.[125]

---

121 *NSWLRC Consent Report* (n 24) 199 [10.32].

122 High profile survivor activism and government expenditure on awareness raising are not necessarily mutually exclusive, as high profile campaigners for action on sexual violence intersect with government funded awareness raising in various ways. Chanel Contos, who established the Teach Us Consent campaign, was promised $8 million by the Morrison government for the campaign – it was later reported the money did not eventuate. Survivor and activist Grace Tame, as Australian of the Year, was committed to a range of public events. The work of Sharna Bremner at End Rape on Campus Australia led to the establishment of the National Student Ombudsman which opened in March 2025.

123 See, eg, Olivia Cleal, 'Consent Advocates Praise "Trauma-Informed" Findings from Justice Michael Lee against Bruce Lehrmann', *Women's Agenda* (online, 16 April 2024) <https://womensagenda.com.au/latest/consent-advocates-praise-trauma-informed-findings-from-justice-michael-lee-against-bruce-lehrmann/>.

124 Astrid Birgden, 'Therapeutic Jurisprudence and Sex Offenders: A Psycho-Legal Approach to Protection' (2004) 16(4) *Sexual Abuse: A Journal of Research and Treatment* 351, 354 <https://doi.org/10.1177/107906320401600407>. On the language of 'offenders', see above n 91.

125 On distinguishing restorative and reparative processes, see Kathleen Daly, 'Reparation and Restoration' in Michael Tonry (ed), *Oxford Handbook of Crime and Criminal Justice* (Oxford University Press, 2011) 207. On the Indigenous origins and co-option of restorative justice, and therefore the need to explore alternative frameworks in this space, see Juan Tuari, 'The Plastic Shamans of Restorative Justice' in Chris Cunneen et al (eds), *Routledge International Handbook on Decolonizing Justice* (Routledge, 2023) 43.

B Conventional Measures

Evaluation and impact are, or should be, central to all reform processes. Yet the digital age has seen the rise of actuarialism to rationalise ever-widening techniques of social control.[126] Metrics become an end with no means, uncoupled from the material needs and conditions of overlapping and intersecting criminalised and victimised populations. Meeting bail and parole conditions, such as attendance at appointments or submission of urine samples, are logged as key performance indicators without any connection to quality of life for the person subjected to these forms of state surveillance.[127] Obedience of the criminalised subject defines success for the system, with even non-compliance resulting in reincarceration, repackaged as the system 'working' as designed. Similar models can be seen elsewhere: helplines and complaints systems where 'success' is measured by contact volume rather than resolving disputes or providing material support; media outputs designed for 'outrage eyeballs' and 'hate harvesting', badged as 'engagement' regardless of public interest or the integrity of institutions.

Stanley Cohen has theorised that 'net-widening' extends the reach of the carceral state by ensnaring people who would previously have been dealt with by 'catch and release'.[128] As the sprawling bureaucracy of programs, orders, breaches, monitoring and compliance reaches further into impoverished and heavily policed communities, prison populations remain stagnant or increasing, while criminalised people are trapped in cycles of poverty, stigma and surveillance under oppressive state control.

As highlighted by Jonathan Simon and Giane Silvestre, the flipside of these shifts is a malleable middle class 'managed by fear of crime and the increasing validity of victim ideal'.[129] The beneficiaries are those drawing income and profits from carceral institutions and agencies, from the billions of public and household and business dollars funnelled into the securitisation industry – wealth that ultimately derives from production of fear and commodification of the criminalised underclass. What goes unmeasured in a metric dominated penology includes the opportunity cost of redirecting public resources away from victims of male violence, who are primarily women and children, to surveillance industry spending. Technologies like ankle monitors, which in NSW are monitored by prison ('corrections') staff who call in breaches to the police, entrust victim safety to male-dominated sectors without pre-screening or oversight as to their attitudes, such as contempt for women or empathy with violent men.

---

126 Malcolm Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30(4) *Criminology* 449 <https://doi.org/10.1111/j.1745-9125.1992.tb01112.x>.

127 Tabitha Lean, 'Why I Am an Abolitionist', *Overland Literary Journal* (Web Page, 8 June 2021) <https://overland.org.au/2021/06/why-i-am-an-abolitionist/#:~:text=Going%20to%20prison%20is%20like,That%20life>.

128 Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Polity Press, 1985).

129 Jonathan Simon and Giane Silvestre, 'Governing through Crime' in Pat Carlen and Leandro Ayres França (eds), *Alternative Criminologies* (Routledge, 2018) 75.

1 Police Activity Data

Leaving aside the imponderability of counting 'crimes' not committed and evaluations muddied by metrics, the primary measure of crime policy impact remains medium- and long-term trends derived from analysing police activity data. The criminal law can punish, and official agencies can measure changes in the number of sexual assaults reported to the police over time. Neither punishment nor reporting data is a measure of reducing sexual violence. As previously mentioned, prisons are a site of heightened sexual violence, making it a mathematical certainty that incarcerating more people for longer produces a net increase in sexual violence. This material reality is in stark contrast to the political claim that affirmative consent reforms – legislative and educative – aim to 'drive down rates of sexual assault'. This goal is not realised through reducing the frequency, severity or prevalence of sexual violence. It is realised through analysis of police activity data. Notwithstanding that presumptive innocence is the cornerstone principle of criminal law, this analytic output is misleadingly labelled 'crime rates'. While many criminological studies triangulate police data with self-reports and other victim corpora, 'crime rates' remain the dominant metric in the public domain, where crime narratives are disseminated, and fear of crime is produced.

Recorded increases in police reports of male violence are bookended by the possibility (or likelihood) that the increase reflects greater awareness and, therefore, higher reporting rates. In this example, an increase in the frequency or prevalence of male violence is listed last among the four possible reasons for 'changes in crime rates': 'Changes in crime rates may be due to changes in reporting behaviour, increased awareness about forms of violence, changes to police practices, and/or an increase in sexual assault incidents.'[130]

This is a typical disclaimer for upward trends in male violence reporting data. Administrative criminology agencies like the NSW Bureau of Crime Statistics and Research ('BOCSAR') are careful to not assume an uptick in reports of male violence reflect increased rates of assault – because statisticians know the data are solely comprised of reports to the police.

Statisticians know the data are comprised of reports to the police, yet increased reporting rates are used as a measure of reform impact – whether tied to legislative change, policing practices or public education campaigns. At the same time, even long-term trends produced and mediated by statistical criminologists are carefully bookended by the possibility that increases in sexual assault 'rates' reflect increases in victims reporting to police rather than an actual rise in sexual violence.[131]

---

130 'Sexual Assault Reported to Police', *Australian Institute of Health and Welfare* (Web Page, 9 December 2024) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/police/sexual-assault-reported-to-police>.

131 At the time of writing, the BOCSAR website explains its source data as follows: 'BOCSAR's crime data consist of criminal incidents reported to, or detected by, police and recorded on the NSW Police Force's Computerised Operational Policing System (COPS)'. At the top of the page there is reference to 'how we count "crime"' where the quotation marks around 'crime' signal that actual criminal convictions (guilty pleas or verdicts) and what BOCSAR calls 'crime data' or 'crime statistics' are two very different things. Even before the paragraph disclosing that all 'crime data' derives from police activity reports (COPS), the website states:

It is frustrating to continuously reiterate that actual changes in sexual violence-related 'crime' can only be measured by guilty pleas and verdicts. High-profile figures like Bruce Lehrmann and Christian Porter are carefully reported as 'allegedly' guilty, having not yet disproven the 'presumption of innocence' and with 'no findings against' them.[132] Yet every data point that makes up so-called 'crime rates' also represents a person with the legal right to presumptive innocence. The data point is an interaction with the police, not with a tribunal of fact.

The reliance on 'sexual assault rates' as a measure of impact is problematic on multiple and entrenched levels. Disclaimers regarding low numbers of reports relative to sexual violence prevalence imply that the preferred action for victims to take is reporting to the police. This, in turn, implicitly reinscribes victim-blaming: did she report it to the police? Why didn't she report to the police at the time? These questions derive directly from the patriarchal norm of disbelieving women (victims) and protecting the reputation, liberty and livelihoods of men (perpetrators). In addition to obscuring the fact that the police and courts systematically inflict trauma on victims and that victims reach evidence-based positions on who (if anyone) to tell, the system itself would be rapidly overwhelmed if every act of sexual violence was reported to the police.

Disclaimers about reporting rates and potential increases in awareness also provide an in-built excuse for the predictable failures of incremental reform. This is not merely a function of the fact that very few victims report sexual violence to the police. The statement above refers to 'changes' in reporting and policing or increases in awareness or assaults. This seemingly minor detail reveals a glaring omission: lower reporting of sexual violence during a given period is not generally attributed to deteriorating policing practices or the absence of awareness campaigns like Only 100% is Consent (Queensland) and #MakeNoDoubt (NSW).

2 Public Awareness and Community Education Campaigns

The #MakeNoDoubt campaign was rolled out in three phases (December 2018, May 2022 and October 2022).[133] There are multiple intersecting and overlapping

---

> There are a few cautionary notes that are important to know before using BOCSAR's crime statistics. Irrespective of how trends in recorded crime are presented, their interpretation is a difficult task. Recorded crime statistics for *some* offence categories *DO NOT* accurately reflect the actual level of crime in the community.

'Using Crime Statistics', *NSW Bureau of Crime Statistics and Research* (Web Page) (emphasis in original) <https://bocsar.nsw.gov.au/statistics-dashboards/crime-and-policing/using_crime_statistics.html>.

132 A small-scale media search (15 April – 24 June 2024) while drafting this article returned 24 mentions of the phrase 'no findings against [Bruce Lehrmann]'. This indicates significant re-inscription of presumptive innocence, not as a function of actual innocence or successful defence but deriving from juror misconduct.

133 There is no single government website with composite information on the campaign, or not that we were able to locate. The dates were gathered from multiple point in time sources, including advertising industry sites and tender documents. We were alerted to the stages design (and number of for-profit agencies involved) by an industry report at Mumbrella. See Kalila Welsh, 'DCJ Launches New Affirmative Consent Education Campaign "Make No Doubt"', *Mumbrella* (online, 27 May 2022) <https://mumbrella.com.au/dcj-launches-new-affirmative-consent-education-campaign-make-no-doubt-739127> ('Mumbrella Make No Doubt').

explanations for running these types of campaigns in conjunction with policy development and legislative change. Parallel awareness campaigns concede that the public at large do not – and cannot be presumed to – know the law, regardless of the convenient legal fictions over which the judiciary may disagree.[134] It acknowledges that if the question is legislation or education, the answer is both.

As part of the affirmative assent policy development process, the NSWLRC recommended 'information about the changes to the law resulting from our recommended reforms be incorporated in consent education initiatives in the broader community'[135] and notes that this would be a long-term project.[136] A number of submissions expressly supported the need for community education.[137] Distinct from community education was a recommendation to target education programs to judicial officers, prosecutors, defence lawyers and police officers.[138]

It is difficult for sector advocates to publicly oppose a comprehensive legislative and education package with the stated goal of reducing sexual violence. Law Reform Commission recommendations (in each jurisdiction) are the primary vehicle for mobilising legislative reform. Enormous amounts of work go into literature reviews and compiling compelling evidence of the need for change. When the subject matter is male violence, much of this work is done by dedicated women working for underfunded organisations, as well as by feminist activists, advocates and academics. Despite the fact these are repeatedly proven propositions, another round of submissions sets out the vast and urgent need for behavioural and attitudinal change, resources, education, and for the law to take male violence seriously. This time, surely, the master's tools will dismantle the master's house.[139]

---

134 As famously (or perhaps infamously) declared by Barwick CJ in *Watson v Lee* (1979) 144 CLR 374, 379 [5], 'to bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny'. Unfortunately – and indeed, by patriarchal design rather than unintended consequence – the criminal law continues to extend and re-extend the benefit of doubt to powerful men long past the point that principles of charity should apply and doubt has been exhausted. A notable sexual assault case in this context is that of Jarryd Hayne, an Aboriginal man who would normally be subject to targeted criminalisation by agents of the law of the colonising power. Hayne had reached such status that he instead enjoyed the benefit of doubt normally reserved for white males, with one jury failing to reach a verdict and two subsequent jury convictions overturned on appeal. See *Hayne v The King* [2024] NSWCCA 97.

135 *NSWLRC Consent Report* (n 24) 194 [10.7].

136 Ibid 203 [10.42].

137 Ibid 203 [10.43]. See, eg, NSW Young Lawyers Criminal Law Committee, Submission No 86 to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (3 December 2019) 8. See also:

> The development and implementation of an extensive evidence-based education campaign about the drivers of gender-based violence, respectful relationships and ethical sexual practice, developed by experts, that challenges rape myths, male entitlement and victim-blaming attitudes. This needs to be part of a comprehensive primary prevention strategy which includes preschools, schools, tertiary institutions, workplaces, sporting clubs, media and entertainment. Significant and ongoing investment is required.

Women's Legal Service, Submission No 27 to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (22 February 2019) 8.

138 *NSWLRC Consent Report* (n 24) 199 [10.32].

139 This somewhat despairing call references the now-famous phrase and eponymous essay by Audre Lorde, 'The Master's Tools Will Never Dismantle the Master's House' in Cherríe Moraga and Gloria Anzaldúa (eds), *This Bridge Called My Back: Writings by Radical Women of Color* (Third Woman Press, 1981).

Under the first National Action Plan to Reduce Violence against Women and their Children (2010–22) $40.8 million was allocated over four years for 'Stop it at the Start' campaign.[140] Internal evaluative criteria included influencers recalling or talking about the campaign and reconsidering or changing a behaviour towards others. On this measure, '49% of all influencers took an action as a result of the campaign'.[141] In contrast, the BOCSAR reports that police-recorded incidents of domestic violence-related assault 'have steadily increased over the mid to long term (five, ten and 15 year periods) to 414.2 per 100,000 population in the 12 months to December 2022'.[142]

In this way, presumed awareness campaign impacts are reified in research outputs. The practice is understandable, given male violence against women is consistently estimated by criminologists to reflect the largest of estimated 'dark figures' – the gap between reported actions (such as rape) and their prevalence in the community. The disclaimer is also self-defining. As mentioned, what statistical criminologists refer to as 'crime statistics' are, in fact, aggregations and analyses of police records of police activity. Guilty pleas and verdicts – charges that have been conceded or proven and are therefore actual crimes – are recorded separately.

The 'dark figure' is thus a direct function of a patriarchal system not holding violent men to account. The fact that most victims do not report male violence to the police is not the reason male violence has not stopped. What would law enforcement do with all these reports? How many prisons would be built if every violent male were punished by the most serious of sentences – incarceration? The criminal law is ultimately a patriarchal system maintained by its 'monopoly on the legitimate use of violence'.[143] It is illogical to expect armed agents of this system, with their wide discretionary powers to enact violence against the public, to be fit for the purpose of stopping male violence in a patriarchal society. The master's tools will never dismantle the master's house.[144]

The evidence rarely shows a net reduction in male violence, and data indicating an increase in reports is silent on the effectiveness of police responses. Inquiries into police responses to male violence, in contrast, are invariably damning. A consistent feature of such investigations is the problem of police themselves being perpetrators and protecting their colleagues, who are reported for domestic

140 See 'Stop It at the Start Campaign', *National Plan to Reduce Violence against Women and Their Children* (Web Page, 1 October 2021) <https://plan4womenssafety.dss.gov.au/initiative/stop-it-at-the-start-campaign/>.

141 Ibid.

142 Karen Freeman, 'Domestic and Family Violence Trends in NSW: July 2010 to June 2022' (Bureau Brief No 167, NSW Bureau of Crime Statistics and Research, October 2023) 2.

143 Barton and Johns (n 120).

144 Lorde (n 139).

violence, from accountability.[145] This pattern reflects the wider workplace culture of protecting each other from accountability for enacting violence ('use of force') against members of the public.[146]

From a feminist perspective, public money spent on advertising – while the budget line item is labelled 'domestic violence' or 'consent' – represents gendered redistribution of tax revenue. Most victims of male violence are women and children, whereas the campaign ad-spend goes to male-dominated industries and beneficiaries in advertising, media and politics. Most advertising and media executives are men and male-dominated industries have their own lengthy record of protecting violent males.[147] Meanwhile, male violence directly causes hardship and poverty, including homelessness, for women and children.[148]

In addition to creative, production and marketing costs, there are ad-placement strategists and media platforms. This redirects public money away from victims and support services to for-profit sectors. A mainstream ad-buy also invariably coincides with free, positive coverage in news bulletins and on chat shows, where media outlets benefit from government advertising revenue. This makes awareness campaigns attractive to politicians who want to be seen as taking action on male violence.

> Developed by strategic creative group Frost* collective and production agency Entropico, with market research from Snapcracker, the campaign is aimed at empowering young people to check consent before engaging in sexual activity … [The digital campaign] will run for 12 weeks across social media, including Instagram, Facebook, TikTok and Snapchat, as well as Spotify, YouTube and Tinder.[149]

This is a description of #MakeNoDoubt Phase 3, with its launch coinciding with the NSW affirmative consent amendments coming into force.[150] The question is whether this transfer of resources to industry results in greater public good than, say, essential services for victims. From a feminist perspective informed by

---

145 These problems are persistent and well-established. For recent findings in New South Wales see Law Enforcement Conduct Commission, *Review of NSW Police Force Responses to Domestic and Family Violence Incidents* (Report, June 2023) ('*LECC DV Report*'). For recent findings in Queensland, see Independent Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence, *A Call for Change* (Report, November 2022) ('*A Call for Change*').

146 *LECC DV Report* (n 145); *A Call for Change* (n 145).

147 For a horrific selection of first-hand accounts of sexual violence in the advertising industry, see Zoe Scaman, 'Mad Men. Furious Women.', *Musings of a Wandering Mind* (Blog Post, 4 July 2021) <https://zoescaman.substack.com/p/mad-men-furious-women>.

148 Kate Fitz-Gibbon et al, *National Plan Victim-Survivor Advocates Consultation* (Final Report, February 2022); 'Housing', *Australian Institute Health and Welfare* (Web Page, 25 February 2025) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/housing>.

149 'Mumbrella Make No Doubt' (n 133).

150 The *NSW Sexual Consent Amendment Act* (n 30) came into force on 1 June 2022. Phase 3 of #MakeNoDoubt ran for 12 weeks from 25 May 2022: see 'No Doubt about Consent Campaign' (Media Release, 31 October 2022) <https://dcj.nsw.gov.au/news-and-media/media-releases-archive/2022/no-doubt-about-consent-campaign.html>; Tasmin Rose, 'New Affirmative Consent Campaign Tackles Issue Head-On, Experts Say', *The Guardian* (online, 25 May 2022) <https://www.theguardian.com/australia-news/2022/may/25/new-affirmative-consent-campaign-tackles-issue-head-on-experts-say>.

Indigenous epistemologies, the answer is to ask, and transfer resources to, Aboriginal Community-Controlled Organisations delivering essential place-based services.[151]

IV CONCLUSION

The criminal law and its host system, the common law, directly reflect rigid class hierarchies of the colonising power. Population size and methods of oppression may shift, but the discretionary power to criminalise and punish remains concentrated in the hands of a judiciary drawn from the upper echelons and police forces founded in the colonial logic of the elimination of the native.

In this article, we have drawn on the scholarship of therapeutic jurisprudence and feminist perspectives informed by Indigenous epistemologies to analyse legislative incrementalism as fundamentally unfit for the purpose of reducing sexual violence. We argue that affirmative consent reforms rely on disproven assumptions of deterrence and problematic metrics derived from police activity data within a system that itself produces and distributes trauma through ridicule and disbelief, hostile cross-examination and punishment by incarceration at sites of known and heightened sexual violence.

For many decades, research findings have reported 'disproportionate' impacts of the criminal law on Aboriginal and Torres Strait Islander peoples, including criminal law reforms that are said to be enacted in response to male violence. Conventional analyses routinely conclude that the expansion of the criminal law impacts more heavily on 'marginalised' or 'vulnerable' communities. This misses the point. Criminalisation *is* a form of marginalisation. Criminalisation *causes* poverty for some while delivering power, victims and secure incomes to others.

The assumption is that such changes are well-intentioned and enacted in good faith – despite evidence of disutility and harm, some of which we have listed here. Yet the law of the colonising power has not been decoupled from its organising logic of elimination, containment and replacement. It is not enough to redefine sexual acts and roll out awareness campaigns when expanding the reach of the criminal law invariably also expands and redistributes violence across society. Institutional power relationships are entrenched, not shifted, when new laws and associated narratives are compromised by prioritising male reputation and male liberty. Stepping back from the currency of reform and zooming in on the iterative logic of colonial carcerality throughout the criminal process offers an explanatory framework independent of vested interests and bold claims made by those whose livelihoods derive from violent systems designed to dispense punishment.

Finally, we turn to the question of recommendations, which we ultimately answered in the negative. One suggestion canvassed during the writing of this article was a carceral evaluation mechanism for criminal law reform, similar to

151 Dechlan Brennan, 'Culturally Safe Support More Important than Ever as Aboriginal Organisations Promote Indigenous-Led Solutions', *National Indigenous Times* (online, 8 July 2024) <https://nit.com.au/08-07-2024/12417/culturally-safe-support-more-important-than-ever-as-aboriginal-organisations-promote-indigenous-led-solutions>.

the oversight established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). We venture that such a proposal carries the same shortcomings as other kinds of reformist incrementalism. It has no veto power. Nobody is compelled to listen to or follow what such a committee recommends. It may open up decarceral conversations – but we know 'public debate' does not produce good law. Indeed, the 'balance' model of mainstream media guarantees that toxic and harmful views are widely broadcast. Even a decolonial model, comprised of Elders and other knowledge keepers, would not be authorised to nullify or override the structural dominance of those who prioritise reputation and freedom of the powerful. As such, we can only recommend that no serious strategy to genuinely reduce the incidence and prevalence of sexual violence rely on expansion of the criminal law.