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28th January 2025

# THE CONCEPT OF CONSENT IN RELATION TO VIOLENCE AGAINST WOMEN AND GIRLS

*We note that the Special Rapporteur on Violence against Women and Girls put out a call for input to the addendum to her thematic report to the Human Rights Council at its 59th session in June 2025, on the concept of 'consent'. We submit the following to the Special Rapporteur in relation to this request:*

On behalf of 39,104 individual signatories and 542 organisations across 160 countries, Women's Declaration International (WDI) submits to the Special Rapporteur that the currently dominant 'contractual' model of consent should be replaced with a 'totality of circumstances' model that considers the individual and social harm of the act; and that situations in which consent is irrelevant include those in which a woman or girl is under coercion from an authority figure to participate in the claimed 'female gender identity' of a man in that environment.

## Submissions

### *Apply 'consent' to a broader scope of contexts*

In preface, we ask the Special Rapporteur to support a broadening of the concept of sex-based consent to acts that are contingent on biological sex, and not merely those that involve some form of sexual or reproductive act.

For instance, medical interventions performed on a girl who 'identifies' as male are dependent on biological sex: the interventions are directed to her sex markers and reproductive system, and studies of trans-identifying youth indicate that these girls are disproportionately likely to be considered insufficiently feminine by their societies (also known as 'gender nonconforming'), to be young lesbians, to be the victims of sexual abuse or the trauma of sexual objectification, or a combination of these.

In line with this, these submissions will refer to 'sex-contingent' situations or acts, when referring to this broader category.

# Key questions from the Special Rapporteur considered

## Definition

*1. How has the concept of consent been defined in general, including in the different jurisdictions?*

### *Contractual model of consent*

'Consent' in relation to sex-contingent activities in most of the Global North centres on a contractual model of offer and voluntary acceptance that privileges individual autonomy and is thought to provide evidence that the 'will' has not been overcome. We see across many jurisdictions a version of "free and voluntary"[1] agreement, with an embedded precondition of information or understanding of the act to which the person is agreeing.

This model is inadequate. It fails to account properly for the coercive pressure put on women and girls, most specifically in situations where their *femaleness* is a necessary feature of the act being proposed or done to them. Much of this coercion is not overt, in the sense that it is often not constituted by threats or physical violence, but it instead arises through culture, relationships, or the opportunity cost to the woman of saying 'no'.

The contractual model is premised on the following four flawed presumptions:

#### Unidirectional offer and acceptance

The model assumes the identification of offer and acceptance, and therefore assumes an act that is not a mutually or organically initiated one, but rather something that one party offers and the other either accepts or refuses. This neither matches nor models the behaviours of healthy intimacy.

Because of its historical origins and the evolved normative differences in sex behaviour between women and men,[2] the model casts women as the satisfiers or withholders of sex, and men as takers or demanders. In a patriarchal society, there is a default barrier to women and girls refusing the demands of men, which unfairly weights the model in favour of men from the very beginning.

A model of 'offer and acceptance' also encourages social practices such as persistent offers, despite refusal, in the hopes of wearing down opposition – the 'acceptance' of offer #100 is functionally the same as acceptance of the first, because the model fails to consider the cumulative weight of persistent offers, and the way that true free will and capacity diminish with each one.

#### Private agreement

The model characterises the relationship as a private agreement that involves minimal public interest considerations and in which parties outside the agreement have minimal right to intervene. This maintains

[1] See, for instance, s36AA of the *Crimes Act 1958* (Vic) for this language; or, alternative semantic formulations such as s74 of the *Sexual Offences Act 2003* (UK), which defines consent as agreeing "by choice," with "the freedom and capacity to make that choice."

[2] Chapter 15 of Book 4 of William Blackstone's Commentaries on the Laws of England, 1769: Blackstone traces the crime of rape back to Biblical Jewish law in the Pentateuch and the Saxon laws of England, and defines it as "the carnal knowledge of a woman forcibly and against her will." Rape could only be committed by males, and victims could only be females.

the partition between the public and domestic spheres that was criticised by the Second Wave feminist movement, and that allows domestic violence to continue even when tacitly known by the community, on the basis that it is a 'private' matter.

The secrecy of a private agreement favours the party with power, and discourages the interest that the wider community might have in preventing harmful behaviours from flourishing and being normalised – such as choking during intercourse, or anal sex that can rupture a woman internally.

### Overreliance on individual autonomy

The model is premised on a flawed concept of pure individual autonomy – save for notable exceptions such as younger children and people with severe intellectual disabilities. This premise omits the social context in which people are placed, and the social, emotional and interpersonal influences that shape their understanding of both the proposed act and their desire or *ability* to consent or refuse.

A high bar is therefore set for state intervention inhibiting an individual's ability to nominally 'consent' to an act, and women and girls may consent to harms such as sado-masochistic sex acts, and the state has little to say about the physical context in which she is usually the smaller and less powerful, and the social context in which she is conditioned to receive or face reprisals. This is despite the secondary harm that flows to society from these acts, such as the cost of mental harm to women and girls, increased hospitalisations, and decreased economic capacity due to trauma.

### Presumption of volition

The volition of the parties is often mapped along a continuum of coercion to voluntarism, depending on the degree to which an individual *does* subjectively desire to give free consent. It does not generally ask whether the individual, in the circumstances, *is able to construct* a desire freely, or the extent to which forces acting on the individual might be influencing that desire.

It is true that considering factors other than the stated will of the individual risks introducing paternalism into the assessment of consent. The presumptions in favour of capacity and free will can be seen in the increased willingness of courts to consider the wishes of the child in family law matters, the decline of arranged marriages, the push for children to gain access to medical interventions without parental or court approval, and the ability for women and children to give uncorroborated evidence in judicial proceedings.

Presumptions of capacity and free will are not in and of themselves negative, and paternalism, infantilisation, loss of agency and public de-personhood are the consequences of eliminating them. Their extremes, however, remove the ability of the surrounding society to safeguard. A key justification for the existence of laws limiting individual action is to set a bar below which even private consent cannot go: we have laws prohibiting consent to one's own murder or cannibalisation, for instance. We seem primarily to relax this duty to protect when it comes to women 'consenting' to their own sex-based harm.

The contractual model of consent places too great an emphasis on the assumptions of both capacity and free will, and does not adequately assess structural and cultural constraints.

## *Communication of consent and 'affirmative consent' models*

Communication of consent is a consequential element, and altering the conditions for communication of consent does not materially change the model used to determine whether consent is present.

Recent developments in 'affirmative consent' seen in countries including Australia and Norway focus on the requirements for expression and communication of that consent: for instance, that "only yes means yes" as used in recent criticisms of the Penal Code Council's proposed model of "no means no" in Norway, or

requirements that an accused must "say or do" something to actively determine whether or not they have consent as used in the Australian state of Victoria.

These requirements for communication do not affect the underlying quality or definition of 'consent', however, despite being championed as solutions to the problem of sexual violence. The state of Tasmania in Australia, for instance, adopted an affirmative consent model of communication in 2004, as one of the first jurisdictions in the world; in the two decades since, the incidents of rape have consistently increased, and in 2020-21 alone the numbers of sexual assault doubled, rising by 100%.

'Affirmative consent' models do not work as a solution because they fail to address the underlying problems of consent as identified above, many of which are inherent in a patriarchy.

## Consent in international human rights and criminal law

*10. Are there any situations envisaged by international law frameworks where the concept of consent is irrelevant?*

### *Overreach of the presumption of capacity*

#### Overreach in 'gender affirming medicine'

A perceived right to 'identity' has overtaken the role of civil society to privilege evidence-based medicine and laws, and to safeguard children and vulnerable adults from irreversible interventions that sterilise them, impair the healthy functioning and reproductive capacity of their bodies, and fail to address the underlying causes of sex-based distress.

'Gender-affirming medicine' has become, in itself, a form of harm enacted against vulnerable girls and women. The consequences are so grave, the population so vulnerable, and the evidence base so poor, that nominal 'consent' is irrelevant. Medical interventions for claims of gender dysphoria are not analogous to simple procedures such as ear piercings, or to complex interventions for conditions such as epilepsy. Their consequences are too great, their outcomes are too unknown or hand-waved by adherents privileging short-term 'identity', and they exist in an environment of highly coercive social contagion and celebration.

The Special Rapporteur has received further elaboration on this point in our submission to her call for input to the primary report on New and Emerging Forms of Violence.

#### Overreach in all instances of trafficking and detention

Women and girls in situations of detention such as prisons, refugee camps and prisoner of war camps do not have the freedom and autonomy required to give consent to sex acts, most particularly with all persons in positions of authority such as guards and government officials. Nominal consent in these circumstances is irrelevant.

We support the Special Rapporteur in expanding this doctrine of irrelevancy to include the context of prostitution, as contemplated in para 50 of her 07 May 2024 report to the Fifty-sixth session of the Human Rights Council.[3] This would accord with her published description of prostitution as "a form of violence in and of itself" that is incompatible with the dignity and worth of the person, and the entirety of her 2024 report.

[3] Report of the Special Rapporteur on violence against women and girls, its causes and consequences, Reem Alsalem, 'Prostitution and violence against women and girls' (07 May 2024) Report No A/HRC/56/48

The UN Special Rapporteur on Trafficking in Persons observed in 2006 that, for the most part, prostitution as actually practised in the world usually satisfies the elements of sex trafficking, and that the path to prostitution in all but rare cases involves an abuse of power and/or of vulnerability.[4] These comments align with the findings of studies into the experiences of prostitutes under legalised or decriminalised prostitution models in New Zealand and Germany, and with published first-person accounts.[5]

The hypocrisy of this position can be seen in the incompatibility between prostitution laws and age of sexual consent laws. The average age of entry into prostitution in countries in the Global North is thirteen to fourteen years.[6] At fourteen, however, a girl is not deemed to have sufficient understanding of sex acts to have the capacity to give proper consent, and society acknowledges that she is at greater risk of being victimised. However, in 2019, figures from the United States Department of Justice show that at least 290 minors were arrested in the United States of America for a prostitution-related offence, with forty of these children being 14 years or younger.[7]

Women and girls in situations of trafficking and detention, including prostitution *prima facie*, lack the meaningful capacity to consent, and consent is therefore irrelevant.

### *Competing rights not accounted for*

The general right to equality and non-discrimination is protected in human rights documents such as the UN Charter and the Universal Declaration of Human Rights, however this grant fails to consider the situation of competing rights. One manifestation of this is in the competition between claimants of non-discrimination based on 'gender identity', and the rights of women and girls who are compelled to participate in the claimed gender identity of another – for instance, the claimed 'female' identity of a man.

Women in structurally coercive situations cannot give meaningful consent to participating in the cross-dressing male fetish of transvestitism, or to sharing single-sex spaces or her sex class with men who claim to be women. Nor, however, can they often expressly *deny* that consent without suffering reprisals and their own rights infringements. Consent in the common contractual sense, therefore, becomes irrelevant.

This area encompasses, but is not limited to, the following situations:

a. Women housed in prisons with trans-identified men.

b. Women in employment, who face disciplinary action, or termination – such as Maya Forstater, whose contract with the Center for Global Development was not renewed in 2019 due to her expression of gender critical beliefs.

c. Girls and women in education – such as former University of Kentucky swimmer Riley Gaines, who was compelled to compete against male swimmer 'Lia' Thomas, or the young women resident in the Kappa Kappa Gamma sorority house at the University of Wyoming, who filed a lawsuit against the admission of male 'Artemis' Langford.

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[4] Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda, 'Integration of the human rights of women and a gender perspective' (20 February 2006) Report No E/CN.4/2006/62

[5] Caroline Norma and Melinda Tankard Reist (eds), *Prostitution Narratives: Stories of Survival in the Sex Trade* (2016) Melbourne: Spinifex Press

[6] M H Silbert and A M Pines, 'Victimization of Street Prostitutes' (1982) 7 *Victimology* 122; see also D Kelly Weisberg, *Children of the Night: A Study of Adolescent Prostitution* (1985) Mayland, USA: Lexington Books

[7] Figures for each year can be accessed from the Office of Juvenile Justice and Delinquency Prevention: https://ojjdp.ojp.gov/statistical-briefing-book/crime/faqs/ucr

d. Women in intimate relationships with a man who 'transitions', particularly in situations where there is a financial reliance on the male partner, young children, a history of violence or coercive control, and/or social pressure to accept the 'true female identity' of the 'transitioning' male partner.

We understand that the Special Rapporteur has received separate submissions on more than one of the above examples, including in our own submission on New and Emerging Forms of Violence.

International human rights instruments purport to protect and advance the rights of women in each of these situations, but do not envisage the abrogation of rights suffered when a woman or girl is forced to participate in the cross-dressing and 'gender affirmation' of a man in the space who claims to be a woman. Even if the girl or woman does give nominal consent, she is in a situation where an authority figure wields power over her, and has the ability to make decisions to harm her life and opportunities. Consent to participation in the 'gender identity' claims of a man in situations involving "single gender" (note: not biological sex) imprisonment, educational environments, workplace environments, and even intimate relationships is irrelevant: human rights documents protect the rights of women and girls to those very things, but do not adequately consider the impact that the competing privilege exercised by the trans-identifying man has on the woman's enjoyment of them.

## Recommendations

*11. Moving forward, how should States and other relevant stakeholders engage with the issue of consent?*

*12. What alternatives would put the burden of proof on the perpetrators and not the victims, on unequal power relationships?*

*13. Are there alternative frameworks or legal principles to "consent" that could better address certain forms of violence against women and girls?*

### *Reposition consent as a necessary but not sufficient element*

A safeguarding and class-based model of consent must do more than an individualistic contractual model to acknowledge constraints on free and informed consent, such as:

a. The socially-constructed nature of the perceptions women and girls may have of the acts being performed or offered.

b. The socially-constructed nature of the perceptions women and girls may have of the harm or lack of harm that may result from these acts.

c. The emotional and relational barriers to achieving properly free consent.

The explicit inclusion of surrounding circumstances would better accord with obligations under the Istanbul Convention, which in Article 36(2) affirms that 'free will' must be assessed in context. These surrounding circumstances are too often defined narrowly, limited to overt threats and force, and are silent on structural pressures and cultural coercion.

The Special Rapporteur should advocate for a "totality of circumstances" model of consent that considers the provision of free and informed consent *as well as* the impact of the act on the person or persons ostensibly providing that consent. Wrongdoers ought to be liable for choosing to commit acts that place

women and girls in situations of reasonably foreseeable harm, even if the victim of that harm provides a technical acquiescence to it.

This totality model derives from proposals to modify consent under contract law, and ought to be applied across sex-contingent acts, also, where the potential for harm is so much greater. Associate Professor of Law Chunlin Leonhard argues in a 2012 paper on contract law that "contract law abandon its consent-centric focus." She accuses the current model of improper "elasticity" and "easy manipulability," and identifies the ability of marketplace manipulations to control human decision-making biases:

> Is it consent simply because someone signed an agreement? Is it consent if a person signed an agreement without having all the information or without understanding the available information? Is it consent if someone signed an agreement, but unbeknownst to her, the agreement was carefully designed to induce her to sign the agreement?[8]

A form of 'consent' emerges that is analogous with a contract of adhesion, agreement made without adequate equality of the bargaining sides.

The Special Rapporteur should adopt a model that couples consent with a version of the concept of 'reasonable foreseeability' used in tort law, and asks whether the risk of harm is reasonably foreseeable, and whether that risk is material and not merely "far-fetched or fanciful."[9] This test for the probability of harm, and the reasonableness of placing a burden on the potential wrongdoer to take steps to avoid it, is in common use across many countries in the Global North, and has a wealth of jurisprudence guiding its meaning and application. It is also considered appropriate for regulating the behaviour of actors in non-intimate everyday contexts, and therefore places a not onerous burden on actors in intimate or sex-contingent ones.

[8] Chunlin Leonhard, The Unbearable Lightness of Consent in Contract Law, 63 *Case W Rsrv L Rev* 57 (2012) p60, https://scholarlycommons.law.case.edu/caselrev/vol63/iss1/9

[9] The language here has been taken from the Australian negligence case of *Wyong Shire Council v Shirt* (1980) 146 CLR 40, which held essentially that some risks of harm are of such low probability that the reasonable person would ignore them.