

# **Inquiry into current and proposed sexual consent laws**

A submission to the Legal and Constitutional Affairs References  
Committee, 16 March 2023

## About Sexual Assault Services Victoria

Sexual Assault Services Victoria (SASVic) is the peak body for specialist sexual assault and harmful sexual behaviour services in Victoria. We work to promote the rights, recovery and respect for victim survivors and other people impacted by sexual violence and harm. We seek to achieve this by working collectively to address the attitudes, systems and structures that enable sexual violence to occur.

Our vision is a world free from sexual violence.

Our purpose is rights, recovery and respect for people impacted by sexual violence.

Our values are courage, expertise, rights and equity.

SASVic's members bring over 30 years of feminist practice and specialist expertise to the task of reforming system responses to sexual violence and harmful sexual behaviours.

We know that sexual violence is harmful, pervasive, and preventable. Together, we aim to help shape society to ensure all those affected are able to get the support they need where and when they need it.

Members of SASVic include:

Australian Childhood Foundation	Kids First
Ballarat Centre Against Sexual Assault (CASA)	Mallee Sexual Assault Unit/Mallee Domestic Violence Service
CASA Central Victoria	Northern CASA
CASA House	Sexual Assault Crisis Line
Centre Against Violence – Ovens and Murray	South Eastern Centre Against Sexual Assault
CASA	South Western CASA
Eastern CASA	The Sexual Assault and Family Violence Centre
Gatehouse Centre	West CASA
Gippsland CASA	
Goulburn Valley CASA	

## Acknowledgement of Country

SASVic acknowledges Aboriginal and Torres Strait Islander peoples as the traditional and ongoing custodians of the lands on which we live and work. We pay respects to Elders past and present. We acknowledge that sovereignty has never been ceded and recognise First Nations peoples' rights to self-determination and continuing connections to land, waters, community and culture.

## Acknowledgement of victim survivors

We acknowledge victim survivors of sexual harassment, assault and abuse, including those who have experienced family violence, relational violence and violence at the hands of partners, family members, trusted people and people unknown to them. We acknowledge those who have lost their lives through sexual assault and family violence. We acknowledge the resilience, strength and determination of survivors not to be defined by their experiences.

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## Introduction

SASVic welcomes this opportunity to provide a submission to the Inquiry into current and proposed sexual consent laws in Australia. We acknowledge the *Meeting of Attorneys-General (MAG) Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022-27* priority to strengthen legal frameworks to improve outcomes and protections for victim survivors of sexual violence. We note that the work plan works alongside existing and prospective work around prevention, early intervention and recovery for victim survivors of family and sexual violence at the national, state and territory level. Such government efforts, alongside victim survivors' and specialist sexual assault (SA) and harmful sexual behaviour (HSB) services' advocacy, have contributed to a national conversation on violence against women and children and gendered violence in recent years. This includes historic investment in work to prevent and respond to all forms of sexual violence in our state of Victoria. We welcome these changes.

We note past and present work to address sexual violence,<sup>1</sup> such as the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse, Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, and in Victoria, the Victorian Law Reform Commission (VLRC) report into improving the justice system to sexual offences,<sup>2</sup> and in terms of sexual violence in the context of family violence, the Royal Commission into Family Violence.<sup>3</sup> We support their recommendations, and note the ongoing work needed to prevent these forms of violence, hold perpetrators to account and promote recognition, recovery and restitution for victim survivors.

Until recently, sexual assault laws across jurisdictions commonly directly or indirectly placed the onus on the complainant or victim survivor to show they refused sex either verbally, or physically, through evidence of injuries,<sup>4</sup> rather than on the actions and responsibilities of the alleged perpetrator or defendant. This approach failed to recognise that freezing, where victim survivors find they cannot speak or fight off an assailant, is a common trauma response,<sup>5</sup> or that there is no evidence of physical injuries in most sexual assault experiences.

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<sup>1</sup> SASVic notes that the scope of reference is sexual consent laws. SASVic's preferred term is sexual violence, as it is aligned with international approaches that consider sexual violence a human rights violation. International definitions of sexual violence state that coercion is central to sexual violence and constraints on consent include threats, intimidation, fear and abuse of power. It includes a wide range of acts, including sexual slavery, enforced sterilisation and sexual harassment. Sexual violence can occur as a form of family violence and child abuse, as well as in many settings, such as schools and workplaces.

SASVic also recognises that sexual violence occurs along a continuum. There are common and less common types, with the latter treated as aberrant acts committed by individuals who are considered outside society. Understanding sexual violence as a continuum provides an important foundation for combatting sexual violence, showing the enabling link between the common types, such as street-based sexual harassment, and rare but extreme types. For example, girls and young women's experiences of street-based sexual harassment often teaches them that men's violence will not be taken seriously, undermining their confidence in reporting other forms of sexual violence. Recognising the continuum of violence highlights the importance of responding to all sexual violence, not just criminal acts, as non-criminal acts have a chilling effect on women and girls' participation in society and create the impression on victim survivors and perpetrators that perpetrators can act with impunity. Criminal justice responses to sexual violence have limited preventive value if they do not adequately address the continuum.

<sup>2</sup> VLRC, *Improving the justice response system to sexual offences: report* (Melbourne: VLRC, 2021), <https://www.lawreform.vic.gov.au/publication/improving-the-justice-system-response-to-sexual-offences-report/>.

<sup>3</sup> While sexual violence can and does occur outside of the context of the family, such as in institutional settings, and family violence can occur without sexual violence, they are frequently connected. Perpetrators of family violence use sexual violence to establish control over victim survivors, and victim survivors of family violence are more likely to experience sexual violence in future, and vice versa.

<sup>4</sup> Kate Minter, Erin Carlisle and Christine Coumarelos, "*Chuck her on a lie detector*": *Investigating Australians' mistrust in women's reports of sexual assault* (Sydney: Australia's National Research Organisation for Women's Safety (ANROWS), 2021), <https://www.anrows.org.au/publication/chuck-her-on-a-lie-detector-investigating-australians-mistrust-in-womens-reports-of-sexual-assault/read/>.

<sup>5</sup> Judith Herman, *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror* (New York: Basic Books, 1992).

Every day, specialist SA and HSB services see the harm inflicted from sexual acts forced on someone without their consent, and again when this violence is trivialised or denied by families, communities or the criminal justice system. We see the impacts of victim-blaming attitudes that persist in our community, and which are too often internalised by victim survivors and perpetrators. Affirmative consent laws provide an opportunity to ‘raise the bar’ for how we as a community, and individuals, understand sexual consent. The 350 expert therapists that work with specialist SA and HSB services in Victoria work with over 17 000 victim survivors a year – from children as young as four to young people and adults of all ages. Too many of our adult and older adolescent clients have told us the same thing – they could not seek justice, because the violence against them was not adequately recognised in law. Enshrining affirmative consent in law addresses this historic injustice.

### Key element of affirmative consent law

An affirmative consent model focuses on the actions of the accused person in seeking consent, rather than on what the victim survivor did or did not say or do. Leading research supports a nationally consistent statutory definition of sexual assault and sexual consent that promotes communicative, affirmative and ongoing sexual consent.<sup>6</sup> Affirmative consent requires a person who wants to have sex with another person to actively take steps to confirm that the other person also wants to have sex. Further, consent is ongoing each and every time people have a sexual encounter, regardless of whether or not they have been intimate before; consent applies only at the time it was given and not for any future events.

Legal reforms must also include circumstances where consent is not present. Circumstances must include:

- family violence
- when there is abuse of a relationship of trust or authority
- stealthing (non-consensual removal or disruption of a condom prior to or during a sexual act)
- non-payment of sex workers in fraudulent circumstances.

It is also important to balance the protection of people, including those with a cognitive disability or mental or physical impairments, with the need to not interfere with their right to sexual autonomy. Provisions in sexual consent laws that refer to a person’s capacity may sufficiently address this balance. For example, in Victoria, the reasonable belief in consent requirement does not apply if the person has a cognitive impairment or mental illness (other than the effects of self-induced intoxication) that was a substantial cause of them not saying or doing anything to find out if the other person consent.

### Recommendation

That the Legal and Constitutional Affairs References Committee (the Committee) recommend:

- 1) national harmonisation must aim at an affirmative consent model.
- 2) national harmonisation must provide legal clarity on circumstances where consent is not present.

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<sup>6</sup> Minter, Carlisle and Coumarelos, “Chuck her on a lie detector”, <https://www.anrows.org.au/publication/chuck-her-on-a-lie-detector-investigating-australians-mistrust-in-womens-reports-of-sexual-assault/read/>.

- 3) legislative reforms include safeguards for people with cognitive impairment or mental illness.

We refer you to the recent Victorian legislative reforms to support the above recommendations.<sup>7</sup>

Equally importantly as legislative reform is the need to implement initiatives with a whole-of-community approach. Research into the affirmative consent model in Tasmania shows that the legislative spirit of the reforms is not being fully realised. This is because legislative reform did not include education for members of the legal community that were implementing the changes, and broad attitudinal change at the societal level.<sup>8</sup>

### Recommendation

That the Committee recommend:

- 4) legislative reforms are accompanied by a whole-of-community approach.

We refer you to our submission on the draft National Plan to reduce violence against women and children.<sup>9</sup>

### Summary of recommendations

That the Committee recommend:

1. national harmonisation must aim at an affirmative consent model.
2. national harmonisation must provide legal clarity on circumstances where consent is not present.
3. legislative reforms include safeguards for people with cognitive impairment or mental illness.
4. legislative reforms are accompanied by a whole-of-community approach.
5. national harmonisation includes image-based sexual offences.
6. a monitoring and evaluation framework with an intersectional gender equity lens to track and report on the implementation of consent laws in each jurisdiction and focus on assessing whether and to what extent:
  - the new consent laws have been utilised, including reasonable belief in consent<sup>10</sup>
  - they have been used against victim survivors by perpetrators as a form of systems abuse, particularly for victim survivors who are over-represented in the criminal justice system, such as Aboriginal and Torres Strait Islander women and girls, and women and girls with a disability
  - they impact victim survivor experiences through each stage of the justice system
  - any other unintended consequences have arisen which should be addressed.

The framework must be coordinated, and findings shared for continuous improvement.

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<sup>7</sup> “Justice Legislation Amendment (Sexual Offences and other Matters) Act 2022”, accessed March 2, 2023, <https://www.legislation.vic.gov.au/as-made/acts/justice-legislation-amendment-sexual-offences-and-other-matters-act-2022>.

<sup>8</sup> Helen Cockburn, “The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials” (PhD thesis, University of Tasmania, 2012), <https://eprints.utas.edu.au/14748/2/whole-cockburn-thesis.pdf>.

<sup>9</sup> SASVic, “Submissions”, accessed February 13, 2023, <https://www.sasvic.org.au/submissions>.

<sup>10</sup> SASVic is particularly interested in court interpretation of the clause that ‘a belief is not reasonable, if within a reasonable time before or at the time the act takes place, the person does not say or do anything to find out whether the other person consents’ in Victoria.



7. jury directions that target misconceptions about sexual violence to improve victim survivor access to justice.
8. jury directions should be given by the judge at the earliest opportunity and throughout the trial.
9. federal and state governments commission SA services, in partnership with other relevant experts, to design, develop and deliver an intersectional community education and awareness campaign suitable for multiple settings.
10. any such campaign includes accessible resources, including in plain language and multiple languages.
11. federal and state governments commission SA services, in partnership with other relevant experts, to design, develop and deliver education and training for people working in the criminal justice system.
12. a monitoring and evaluation framework that includes tracking and reporting of the effectiveness of community awareness and education campaign.
13. consent education is part of comprehensive and inclusive RSE that sits within a whole-of-school approach.
14. an education strategy that encourages different types of schools and students disengaged from learning to participate in comprehensive and inclusive RSE.
15. federal and state governments fund SA services to contribute to school-based RSE programs.
16. raising the minimum age of criminal responsibility to at least 14 years.
17. additional funding for HSB services to meet demand, address waitlists and deliver best practice HSB treatment programs.
18. education for lawyers, police, judges and magistrates regarding HSB treatment programs and their efficacy.
19. reviewing existing bail legislation in each state or territory with a view of providing presumption in favour of bail unless there is an immediate and specific risk to a person's safety or the community.

Our recommendations align with many of the recommendations in the submission by National Association of Services against Sexual Violence (NASASV), which we also refer you to.

## Inconsistencies in consent laws across different jurisdictions

As the discussion paper notes, there are inconsistencies in sexual consent laws across state and territories in Australia. Some jurisdictions, such as Tasmania, Victoria and New South Wales, adopted an affirmative consent model.

### Reasonable but mistaken belief in consent

Queensland applies specific tests for whether a defendant has a reasonable but mistaken belief in consent, known as the excuse of mistake of fact (section 24 of the *Criminal Code*). This allows defendants to claim that they honestly and reasonably believe the other person consented to sex, even if the other person did not. The Queensland Law Reform Commission (QLRC) report recommended that there will be no 'extensive changes' to the existing law.<sup>11</sup> Lawyers, survivor advocates and community organisations are concerned about the 'loophole',<sup>12</sup> which falls short of 'requiring (original emphasis) defendants [to] show they took positive steps to ascertain consent'.<sup>13</sup> The Women's Safety and Justice Taskforce identifies the same finding,<sup>14</sup> and recommends an affirmative consent model with safeguards for people with cognitive impairments, mental health impairments and those with other impairments.<sup>15</sup> This is aligned with our above recommendation on the importance of an affirmative consent model.

### Stealthing

Most jurisdictions have made recent legislative changes to criminalise stealthing either through creating an offence of stealthing or to amend the definition of consent within the existing Crimes Act.<sup>16</sup> While the prevalence of stealthing is unclear, a Monash University study of patients at a sexual health clinic in Melbourne found that 32 percent of women and 19 percent of men who have sex with men had experienced stealthing.<sup>17</sup> Stealthing, alongside other forms of reproductive coercion such as forced abortion and forced sterilisation of women and girls with disabilities, removes women's reproductive autonomy in a context where women bear the overwhelming responsibility for pregnancy and parenting.<sup>18</sup> As recommended, national harmonisation must include stealthing as non-consensual sexual activity.

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<sup>11</sup> QLRC, *Review of consent laws and the excuse of mistake of fact* (Brisbane: Queensland Government, 2020), [https://www qlrc.qld.gov.au/\\_data/assets/pdf\\_file/0010/654958/qlrc-report-78-final-web.pdf](https://www qlrc.qld.gov.au/_data/assets/pdf_file/0010/654958/qlrc-report-78-final-web.pdf), p.iv.

<sup>12</sup> Jonathan Crowe, "Queensland rape law 'loophole' could remain after review ignores concerns about rape myths and consent", *The Conversation*, August 4, 2022, <https://theconversation.com/queensland-rape-law-loophole-could-remain-after-review-ignores-concerns-about-rape-myths-and-consent-141772>. Also, see Jonathan Crowe and Bri Lee, "The mistake of fact excuse in Queensland Rape Law: Some problems and proposals for reform", *University of Queensland Law Journal* 39, no.1 (2020), <https://journal.law.uq.edu.au/index.php/uqlj/issue/view/293> and Women's Health Queensland, *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (Bill)* 2020 (Brisbane: Women's Health Queensland, 2020), <https://www.womenshealth.org.au/wp-content/uploads/2021/04/WHQ-Submission-Consent-and-Mistake-of-Fact-21.12.2020-1.pdf>.

<sup>13</sup> Rape and Sexual Assault Research and Advocacy (RASARA), *QLRC's draft bill to reform consent and mistake of fact. Our response*. (RASARA, 2021), <https://www.rasara.org/news/qlrcs-draft-bill-to-reform-consent-and-mistake-of-fact-our-response>.

<sup>14</sup> Women's Safety and Justice Taskforce, *Hear her voice report two: volume one. Women and girls' experiences across the criminal justice system* (Brisbane: Women's Safety and Justice Taskforce, 2022), <https://www.womenstaskforce.qld.gov.au/publications>, p.215.

<sup>15</sup> Women's Safety and Justice Taskforce, *Hear her voice*, p.217.

<sup>16</sup> Sienna Parrott and Brianna Chesser, *Stealthing: Legislating for change* (Canberra: RMIT and the Australia Institute, 2022), <https://australiainstitute.org.au/report/stealthing-legislating-for-change/>.

<sup>17</sup> Rosie Latimer et al., "Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia", *PLoS ONE* 13, no.12 (December 2018), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0209779>.

<sup>18</sup> Note that sexual assault co-occurs with other forms of family violence. Physical assault while pregnant is a serious risk factor in family violence, which may indicate an increased risk of a victim survivor being killed or almost killed. Victorian Government, "Evidence-based risk factors and the MARAM risk assessment tools", accessed March 2, 2023, <https://www.vic.gov.au/maram-practice-guides-foundation-knowledge-guide/evidence-based-risk-factors-and-maram-risk>.

## Image-based abuse

Another inconsistency in consent laws pertains to image-based abuse. Sentencing Advisory Council points out that South Australia is inconsistent with other jurisdictions.<sup>19</sup> In South Australia, image-based abuse offences are summary offences under the *Summary Offences Act 1953*.<sup>20</sup> This means there are limits on police investigative powers, so police are unable to gather sufficient evidence to lay charges, contributing to at least some attrition between recorded and sentenced offences. Relocating image-based sexual offences so that they are indictable sexual offences enhances police investigative powers.<sup>21</sup> This would also ensure national consistency in responding to image-based sexual offences.

## Recommendation

That the Committee recommend:

- 5) national harmonisation includes image-based sexual offences.

## The operation of consent laws in each jurisdiction

Success of reforms depends on the scope and quality of monitoring and evaluation of the jurisdictions' progress. A monitoring and evaluation framework should be developed to track and report on the implementation and impact of consent laws. It is crucial that the framework considers victim survivor experiences through each stage of the justice system. The framework must be coordinated and findings shared for continuous improvement.

The framework must also consider systems abuse, which is when perpetrators use systems to further abuse victim survivors. Perpetrators may make various complaints in different systems, like Centrelink and the courts, to drain victim survivor financial resources and emotional wellbeing.<sup>22</sup> An example is a perpetrator threatening to use an intimate image to undermine the victim survivor's parenting credibility if the victim survivor seeks support. The perpetrator then reports being a victim survivor to police, resulting in the actual victim being misidentified as the perpetrator. Effects can be devastating for victim survivors, including child removal, financial debt and loss of dignity.

Victim survivors from diverse communities, including people with a disability, Aboriginal and Torres Strait Islander people, those from culturally and linguistically diverse backgrounds, and lesbian, gay, bi-sexual, transgender, intersex and queer (LGBTIQ) people, experience barriers to reporting and accessing justice, and are at a higher risk of being misidentified as the perpetrator.<sup>23</sup> A perpetrator may use common misconceptions against the victim survivor. For example, in same-sex relationships, a perpetrator may use the misconception that perpetrators are more masculine and make vexatious claims that their partner is a perpetrator. This is why an intersectional lens is critical. An intersectional approach recognises how factors, such as gender and class, intersect to

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<sup>19</sup> Sentencing Advisory Council, *Sentencing image-based sexual abuse offences in Victoria* (Melbourne: Sentencing Advisory Council, 2020), <https://www.sentencingcouncil.vic.gov.au/publications/sentencing-image-based-sexual-abuse-offences-in-victoria>, p.xi. Victoria was also mentioned. However, Victoria has inserted image-based sexual offences into the Crimes Act since the VLRC report.

<sup>20</sup> Legal Services Commission South Australia, "Distribution of invasive images (image-based abuse)", accessed March 2, 2023, <https://lawhandbook.sa.gov.au/ch12s09s03s02.php>.

<sup>21</sup> Sentencing Advisory Council, *Sentencing image-based sexual abuse offences in Victoria*, p.xii.

<sup>22</sup> The Australasian Institute of Judicial Administration Inc, "National Domestic and Family Violence Bench Book: Systems abuse", accessed March 2, 2023, <https://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/systems-abuse/>.

<sup>23</sup> Victorian Government, "Presentations of family violence in different relationships and communities", accessed March 2, 2023, <https://www.vic.gov.au/maram-practice-guides-foundation-knowledge-guide/presentations-family-violence-different>.

shape people's experiences and compound the negative impact of gendered violence.<sup>24</sup> This approach recognises that sexual abuse exists in relation to multiple forms of discrimination and inequality, including colonialism, ableism and ageism. Focusing on systems abuse for victim survivors who are over-represented in the criminal justice system, such as Aboriginal and Torres Strait Islander women and girls, and women and girls with a disability, is recommended.

## Recommendation

That the Committee recommend:

- 6) a monitoring and evaluation framework with an intersectional gender equity lens to track and report on the implementation of consent laws in each jurisdiction and focus on assessing whether and to what extent:
  - the new consent laws have been utilised, including reasonable belief in consent<sup>25</sup>
  - they have been used against victim survivors by perpetrators as a form of systems abuse, particularly for victim survivors who are over-represented in the criminal justice system, such as Aboriginal and Torres Strait Islander women and girls, and women and girls with a disability
  - they impact victim survivor experiences through each stage of the justice system
  - any other unintended consequences have arisen which should be addressed.

The framework must be coordinated, and findings shared for continuous improvement.

## Any benefits of national harmonisation

Sexual violence is a national problem that requires a national solution, including harmonisation. A national definition of sexual consent can reduce confusion about the law and would underpin criminal justice responses to sexual offences across the country. Applying a national definition of sexual consent as affirmative consent would support fair and equal protection for victim survivors across Australia. It would also communicate clear messages about what is acceptable sexual behaviour, noting that people move and travel across the country.<sup>26</sup>

National harmonisation will also support community awareness and education campaigns, which we discuss below.

## How consent laws impact survivor experience of the justice system

Victim survivors experience multiple barriers to reporting and accessing justice. These barriers undermine confidence in police responses and court processes, leading to high rates of non-reporting, as well as attrition through processes where victims do report. For example, in Victoria from 2009 to 2019, for most sex offences, the ratio of sentenced sex offences to recorded sex

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<sup>24</sup> Kimberlé Crenshaw, "Mapping the margins: Intersectionality, identity politics, and violence against women of color", *Stanford Law Review* 43, no.6 (July 1991): 1241-1299, <https://blogs.law.columbia.edu/critique1313/files/2020/02/1229039.pdf>.

<sup>25</sup> SASVic is particularly interested in court interpretation of the clause that 'a belief is not reasonable, if within a reasonable time before or at the time the act takes place, the person does not say or do anything to find out whether the other person consents' in Victoria.

<sup>26</sup> The 2021 Census identified that 1 in 10 people moved to a different state. Australian Bureau of Statistics, "Population movement in Australia", accessed March 2, 2023, <https://www.abs.gov.au/articles/population-movement-australia#interstate-migration>. Tourism Research Australia identified that Australians took 2.8 million interstate overnight trips in November 2022. Tourism Research Australia, "Domestic tourism November 2022", accessed March 2, 2023, <https://www.tra.gov.au/domestic/monthly-snapshot/monthly-snapshot#:~:text=In%20November%202022%2C%20Australians%3A,12.8%20million%20nights%20away%20interstate.>

offences was about 1 in 5.<sup>27</sup> For rape offences, the ratio was about 1 in 23.<sup>28</sup> Sentencing Advisory Council suggests the discrepancy may be explained in part by the standard required for proving an offence in court. While enshrining affirmative consent in law may not alone significantly improve outcomes for victim survivors, it shifts the onus from the victim survivor's actions and words onto the accused to show that they took steps to confirm a reasonable belief in consent. Therefore, victim survivors are less likely to be subjected to cross-examinations that interrogate the victim survivor's actions or choices. This can improve how victim survivors experience the criminal justice system.

## The efficacy of jury directions about consent

### Misconceptions about sexual violence

Research shows that misconceptions about sexual violence impact court outcomes. Such misconceptions are widely believed in Australia.

Some concerning findings from NCAS include:

- 2 in 5 Australians believe that women make up false reports of sexual assault to punish men,<sup>29</sup> even though false allegations of sexual assault are extremely rare<sup>30</sup>
- 12 percent of Australians believe that women often say 'no' when they mean 'yes'<sup>31</sup>
- nearly 1 in 3 young men believe that many women who say they have been raped led the man on and had regrets.

Additional misconceptions are that strangers commit rape or that a victim survivor would always clearly verbally and physically protest. This is evident in Victoria, where sexual offence cases where the perpetrator is a stranger who commits another non-sexual offence, like physical assault, are more likely to progress through the criminal justice system.<sup>32</sup> International research shows 'overwhelming (original emphasis) evidence that rape myths affect the way in which jurors evaluate evidence in rape cases',<sup>33</sup> proposing that juror education via judicial directions or expert evidence can be a way forward.

### Recommendation

That the Committee recommend:

- 7) jury directions that target misconceptions about sexual violence to improve victim survivor access to justice.

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<sup>27</sup> Sentencing Advisory Council, *Sex Offences in Victoria: 2010-2019* (Melbourne: Sentencing Advisory Council, 2021), [https://www.sentencingcouncil.vic.gov.au/sites/default/files/2021-06/Sex\\_Offences\\_in\\_Victoria\\_2010\\_2019.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2021-06/Sex_Offences_in_Victoria_2010_2019.pdf).

<sup>28</sup> Sentencing Advisory Council, *Sex Offences in Victoria*.

<sup>29</sup> ANROWS, "Attitudes to violence against women", NCAS 2017, accessed February 9, 2023, <https://www.anrows.org.au/NCAS/2017/4-attitudes-to-violence-against-women/>.

<sup>30</sup> Minter, Carlisle and Coumarelos, "Chuck her on a lie detector", <https://www.anrows.org.au/publication/chuck-her-on-a-lie-detector-investigating-australians-mistrust-in-womens-reports-of-sexual-assault/read>.

<sup>31</sup> Respect Victoria et al., *NCAS resource five: know the facts about violence against women* (Melbourne: Respect Victoria, 2020), <https://www.respectvictoria.vic.gov.au/national-community-attitudes-violence-against-women-survey-ncas>.

<sup>32</sup> Sarah Bright et al., *Attrition of sexual offence incidents through the Victorian criminal justice system: 2021 update* (Melbourne: Crime Statistics Agency, 2021), <https://www.crimestatistics.vic.gov.au/research-and-evaluation/publications/attrition-of-sexual-offence-incidents-through-the-victorian>, p.8.

<sup>33</sup> Fiona Leverick, "What do we know about rape myths and juror decision making?", *The International Journal of Evidence & Proof* 24, no.3 (May 2020): 255-297, <https://journals.sagepub.com/doi/10.1177/1365712720923157>, p.256.

## Process and timing of jury directions

Jury directions can be effective in challenging misconceptions when used as early as possible and throughout the trial, rather than near the end of the trial.<sup>34</sup> Research shows that the process and timing of jury directions as early as possible has significant influence on the jury's ability to make sense of competing narratives in a rape trial.<sup>35</sup> There are two reasons for this.<sup>36</sup> One is that hearing guidance before the complainant's testimony is more salient, as jurors are less likely at that point to have formed opinions about the complainant's testimony based on their assumptions. The second is that directions provided at the end of the trial become a part of a long summary and detailed instruction on the relevant law, which is given after several days of evidence. This can prevent the jury from remembering and understanding jury directions. Jury directions should be given by the judge at the earliest opportunity and throughout the trial.

## Recommendation

That the Committee recommend:

- 8) jury directions should be given by the judge at the earliest opportunity and throughout the trial.

## The impact of consent laws on consent education

The lack of understanding of consent by many Australians, illustrated by the NCAS findings referred to above, highlights the importance of increased community awareness of and education about consent. Harmonising consent laws would support a shared understanding of consent and consistent approach in preventing and responding to sexual violence.

## Community education and awareness campaign

To best ensure the success of legislative reform, amendments of consent laws must be accompanied by community awareness and education campaigns. Such campaigns must be designed by experts and members of diverse communities, including children and young people. Resources must also be accessible and available in plain English and multiple languages to ensure broadest reach within the community. As experts in prevention, response, education, and training, SA services are uniquely placed to design, develop and deliver a community education and awareness campaign.

## Recommendation

That the Committee recommend:

- 9) federal and state governments commission SA services, in partnership with other relevant experts, to design, develop and deliver an intersectional community education and awareness campaign suitable for multiple settings.
- 10) any such campaign includes accessible resources, including in plain language and multiple languages.

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<sup>34</sup> Emma Henderson and Kirsty Duncanson, "A little judicial direction: can the use of jury directions challenge traditional consent narratives in rape trials?", *UNSW Law Journal* 39, no.2 (July 2016): 750-777, <https://www.unswlawjournal.unsw.edu.au/issue/volume-39-no-2>.

<sup>35</sup> Henderson and Duncanson, "A little judicial direction", p.759.

<sup>36</sup> Leverick, "What do we know about rape myths and juror decision making?", p.273.

The VLRC report also recommends education and training on reforms for people working in the criminal justice system, which we endorse. The National Plan to End Violence against women and children 2022-2032 states that the criminal justice system is not designed to manage violence against women and children. This is despite the fact that in some jurisdictions, majority of police work responds to such violence.<sup>37</sup> Police officers, judicial officers and first responders should receive specialised training to respond to allegations of sexual assault. As stated above, the effectiveness of the affirmative consent model in Tasmania was limited by the lack of education for members of the legal community that were implementing the changes.

## Recommendation

That the Committee recommend:

- 11) federal and state governments commission SA services, in partnership with other relevant experts, to design, develop and deliver education and training for people working in the criminal justice system.

As discussed, success of reforms depends on the scope and quality of a monitoring and evaluation framework. Tracking and reporting on the effectiveness of a community education and awareness campaign must be part of the reforms. This would provide data and evidence about community understanding of sexual violence and respectful relationships, and coordinated efforts across jurisdictions (i.e. federal, state and territory governments) to increase literacy about sexual consent. The framework should adopt an intersectional gender equity lens and focus on assessing whether and to what extent RSE and community awareness campaign:

- are aligned with evidence and best practice
- increases participants' levels of knowledge, skills and confidence to identify and respond to sexual violence.

## Recommendation

That the Committee recommend:

- 12) a monitoring and evaluation framework that includes tracking and reporting of the effectiveness of community awareness and education campaign.

## Comprehensive relationship and sexuality education (RSE)

Exploring consent is the starting point of consent education and should be part of RSE. Research shows that isolating consent from broader lessons about bodies, sex and sexuality, communication and relationship is ineffective.<sup>38</sup> There should be discussion of reproductive rights, such as stealthing, contraception and abortion. Comprehensive RSE should also cover topics such as respectful relationships and sex outside of ideas of reproduction.<sup>39</sup> Inclusive and culturally

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<sup>37</sup> Commonwealth of Australia (Department of Social Services), *The National Plan to End Violence against women and children 2022-2032* (Canberra: Commonwealth of Australia, 2022), [https://www.dss.gov.au/sites/default/files/documents/10\\_2022/national\\_plan\\_accessible\\_version\\_for\\_website.pdf](https://www.dss.gov.au/sites/default/files/documents/10_2022/national_plan_accessible_version_for_website.pdf), p.56.

<sup>38</sup> Katrina Marson, "Consent a low bar: the case for a human rights approach to relationships and sexuality education," *Australian Journal of Human Rights* 27, no.1 (August 2021):161-169, <https://www.tandfonline.com/doi/abs/10.1080/1323238X.2021.1956739>, p. 166.

<sup>39</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO), *International technical guidance on sexuality education: an evidence-informed approach* (Paris: UNESCO, 2018), <https://www.unfpa.org/sites/default/files/pub-pdf/ITGSE.pdf>.

sensitive education that broadens an understanding of consent beyond sexual consent is also key for young people.<sup>40</sup> Comprehensive RSE should expand from an understanding of sex and relationships as harm prevention towards a human rights approach: that is, the right to have rich relationships and lead fulfilling lives.<sup>41</sup>

Another element of best practice in consent education is a whole-of-school approach.<sup>42</sup> Such an approach goes beyond the education curriculum and recognises schools as workplaces, education settings, and part of a community that can model respectful relationships.<sup>43</sup> In Victoria, the government mandated the introduction of respectful relationships at every government school from prep to year 12 as part of recommendation 189 of the Royal Commission into Family Violence.<sup>44</sup> To ensure broad reach of RSE, we recommend that any strategy consider the education context of all children and young people, including students in specialist schools, home schooling and students disengaged from formal learning.

## Recommendation

That the Committee recommend:

- 13) consent education is part of comprehensive and inclusive RSE that sits within a whole-of-school approach.
- 14) an education strategy that encourages different types of schools and students disengaged from learning to participate in comprehensive and inclusive RSE.

The expertise of SA services has typically been both under-recognised and under-resourced in prevention work.<sup>45</sup> They have strong links to schools and a long history of delivering primary prevention education focused on consent. Further, services' deep understanding of the context and types of sexual violence commonly used by and against young people, and their ability to recognise trends in sexual violence, places SA services as unique experts in prevention efforts. Often, SA services are called to schools to provide a trauma-informed response to disclosures of sexual violence arising in the context respectful relationships education and sometimes does so for free.

## Recommendation

That the Committee recommend:

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<sup>40</sup> Erin Carlisle et al., *Policy and practice resource "It depends on what the definition of domestic violence is": How young Australians conceptualise domestic violence and abuse* (Sydney: ANROWS, 2022), <https://www.anrows.org.au/publication/it-depends-on-what-the-definition-of-domestic-violence-is-how-young-people-conceptualise-domestic-violence-and-abuse/>, p.4. Also, see VicSRC, "Sexuality and consent education", accessed February 9, 2023, <https://vicsrc.org.au/advocacy/key-campaigns/sexuality-and-consent-education> and Michael Flood, "Best practice in consent education", accessed February 9, 2023, <https://xyonline.net/content/best-practice-consent-education>.

<sup>41</sup> Marson, "Consent a low bar", p. 166.

<sup>42</sup> Flood, "Best practice in consent education", <https://xyonline.net/content/best-practice-consent-education>.

<sup>43</sup> Victorian Government, "Respectful Relationships whole school approach", accessed March 3, 2023,

<https://www.education.vic.gov.au/school/teachers/teachingresources/discipline/capabilities/personal/Pages/respectfulrelapproach.aspx>.

<sup>44</sup> Victorian Government, "Mandate the introduction of respectful relationships education into every Victorian Government school", accessed March 3, 2023, <https://www.vic.gov.au/family-violence-recommendations/mandate-introduction-respectful-relationships-education-every>.

<sup>45</sup> Family Violence Reform Implementation Monitor, *Monitoring Victoria's family violence reforms: primary prevention system architecture* (Melbourne: Office of the Family Violence Reform Implementation Monitor, 2022), <https://www.fvrim.vic.gov.au/monitoring-victorias-family-violence-reforms-primary-prevention-system-architecture>.



- 15) federal and state governments fund SA services to contribute to school-based RSE programs.

## Any other relevant matters

### Raising the age of criminal responsibility

There are complex issues to consider in relation to problematic and harmful sexual behaviours (HSBs) by children and young people.<sup>46</sup> While problematic and HSBs are significantly underreported, studies in Australia find that between 30 and 60 percent of all childhood sexual abuse is committed by children and young people who exhibit problematic and HSBs.<sup>47</sup> Children and young people exhibiting problematic and HSBs often present with experiences of trauma, family instability, and cognitive and learning impairments.<sup>48</sup> RMIT University research finds that prior experiences of harm perpetrated by adults was the most common and presenting need for children who exhibit problematic and HSBs.<sup>49</sup> As discussed below, HSB services are the experts in therapeutic care and case management, as well as in understanding and supporting children and young people with problematic and HSBs in the criminal context. HSB services should therefore be at the forefront of designing service and justice responses.

Evidence shows that labelling and responding to children and young people with problematic and HSBs as ‘sex offenders’ or ‘perpetrators’ does not take into account their age and developmental stage, thereby undermining their motivation for change.<sup>50</sup> In order to address this issue, a consistent cross-jurisdiction age of criminal responsibility that is based on a firm understanding both of children's developmental stages and children's rights is needed. SASVic notes that MAG is considering raising the age of criminal responsibility from 10 to 12.<sup>51</sup> While SASVic strongly supports raising the age of criminal responsibility, raising the age to 12 undermines children's rights and still falls short of international and state or territory calls for Australia to raise the age of criminal responsibility to at least 14.<sup>52</sup> We support raising the minimum age of criminal responsibility to at least 14. The current minimum age of criminal responsibility across most jurisdictions, and an overrepresentation of Aboriginal and Torres Strait Islander children in all

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<sup>46</sup> Harmful sexual behaviours are ‘sexual behaviours expressed by children and young people under the age of 18 years old that are developmentally inappropriate, may be harmful towards self or others, or be abusive towards another child, young person or adult’. There is a continuum of sexual behaviours that range from normal to violent, as well as a continuum of responses to responding to problematic or HSBs. National Society for the Prevention of Cruelty to Children, “Harmful sexual behaviour framework: an evidence-informed operational framework for children and young people displaying harmful sexual behaviour”, accessed March 15, 2023, <https://www.icmec.org/wp-content/uploads/2019/04/harmful-sexual-behaviour-framework.pdf>.

<sup>47</sup> Alissar El-Murr, *Problem sexual behaviours and sexually abusive behaviours in Australian children and young people: a review of available literature* (Melbourne: Australian Institute of Family Studies, 2017), <https://aifs.gov.au/resources/policy-and-practice-papers/problem-sexual-behaviours-and-sexually-abusive-behaviours#:~:text=Australian%20studies%20find%20that%2030,experiences%20in%20childhood%20and%20adolescence>.

<sup>48</sup> Antonia Quadara et al., *Good practice in responding to young people with harmful sexual behaviours* (Sydney: ANROWS, 2020), <https://www.anrows.org.au/publication/good-practice-in-responding-to-young-people-with-harmful-sexual-behaviours-key-findings-and-future-directions/>.

<sup>49</sup> Elena Campbell, *Adolescents using family violence: MARAM practice guidance project 2022: review of the evidence base* (Melbourne: Centre for Innovative Justice RMIT University, 2022), <https://cij.org.au/research-projects/download-publications-here/>.

<sup>50</sup> Quadara et al., *Good practice in responding to young people with harmful sexual behaviours*, and Campbell, *Adolescents using family violence*.

<sup>51</sup> The Hon Mark Dreyfus KC MP, “Standing Council of Attorney-General Communiqué”, Australian Government, accessed February 9, 2023, <https://ministers.ag.gov.au/media-centre/standing-council-attorneys-general-communicue-09-12-2022/>.

<sup>52</sup> Human Rights Law Centre, “Australia rejects UN call to raise the age of criminal responsibility”, accessed February 9, 2023, <https://www.hrlc.org.au/news/2021/7/8/australia-rejects-un-call-to-raise-the-age-of-criminal-responsibility>. Parliament of Victoria's Inquiry into Victoria's criminal justice system recommendation 10 is to raise the minimum age of criminal responsibility to at least 14.

jurisdictions, are unacceptable.<sup>53</sup> The minimum age of criminal responsibility must be raised to at least 14 years in all jurisdictions.

### Recommendation

That the Committee recommend:

- 16) raising the minimum age of criminal responsibility to at least 14 years.

### Harmful sexual behaviour (HSB) services

HSB services provide specialist therapeutic responses, focusing on children and young people with problematic and HSBs, including sexual assault.<sup>54</sup> In many cases, HSB treatment programs, rather than youth custody, are a more appropriate method of early intervention and prevention of HSBs.<sup>55</sup> There are many referral pathways to HSB programs, such as by Child Protection, schools and families. In Victoria, all services that are funded to deliver programs have long waiting lists and surpass their funding requirements.<sup>56</sup> Ensuring that lawyers, police, judges and magistrates are aware of HSB treatment programs is also fundamental.

### Recommendation

That the Committee recommend:

- 17) additional funding for HSB services to meet demand, address waitlists and deliver best practice HSB treatment programs.
- 18) education for lawyers, police, judges and magistrates regarding HSB treatment programs and their efficacy.

### Bail reforms

While there is no clear link to the issue of harmonised sexual consent laws, we note the links between experiences of sexual violence and imprisonment.<sup>57</sup> We are concerned that the rising number of women in prison is driven by an increase in the proportion of women on remand, not a rise in crime.<sup>58</sup> The Centre for Innovative Justice points out that 90 percent of women entering prison in 2019–20 were on remand, with around 40 per cent of these women spending more time on remand than they eventually receive as a sentence.<sup>59</sup> The Victorian Inquiry into the criminal justice system finds that the bailing system disproportionately affects women, particularly

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<sup>53</sup> Sentencing Advisory Council, "Indigenous young people in detention", accessed February 9, 2023, <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/indigenous-young-people-in-detention>.

<sup>54</sup> NASASV, *Standards of practice manual for services against sexual violence* (3<sup>rd</sup> edition) (Mildura: NASASV, 2021), <https://www.nasasv.org.au/resources>, p.91.

<sup>55</sup> Quadara et al., *Good practice in responding to young people with harmful sexual behaviours*. Also, Gemma McKibbin et al., *Power to kids: respecting sexual safety evaluation report* (Melbourne: Mackillop Family Services, 2020), [https://www.mackillop.org.au/uploads/Service-documents/Institute/Power-to-Kids\\_Respecting-Sexual-Safety\\_Evaluation-Report.pdf](https://www.mackillop.org.au/uploads/Service-documents/Institute/Power-to-Kids_Respecting-Sexual-Safety_Evaluation-Report.pdf).

<sup>56</sup> Emma D'Agostino, "Centre against Sexual Assault 'struggling to respond' to growing demand in Victoria as wait times climb", *ABC Central Victoria*, May 25, 2022, <https://www.abc.net.au/news/2022-05-25/sexual-assault-service-wait-times-rise-as-demand-climbs/101093576> and Neve Brissenden, "Family and sexual violence services call for funding as waitlists exceed 6 months", *Bendigo Advertiser*, May 27, 2022, <https://www.bendigoadvertiser.com.au/story/7754675/family-and-sexual-violence-services-call-for-funding-as-waitlists-exceed-six-months/>.

<sup>57</sup> Parliament of Victoria, *Inquiry into Victoria's criminal justice system* (Melbourne: Victorian Government, 2022), <https://new.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-victorias-criminal-justice-system/reports>.

<sup>58</sup> Lucy Phelan et al., *Profile of women in prison in NSW: Part A and snapshot* (Sydney: Keeping women out of prison (KWOOP) Coalition, 2019), [https://www.sydneycommunityfoundation.org.au/find\\_a\\_fund/kwoop-keeping-women-out-of-prison/](https://www.sydneycommunityfoundation.org.au/find_a_fund/kwoop-keeping-women-out-of-prison/).

<sup>59</sup> Centre for Innovative Justice RMIT University, *Submission to legal and social issues committee Inquiry into Victoria's Criminal Justice System* (Melbourne: Centre for Innovative Justice RMIT University, 2022), <https://cij.org.au/research-projects/download-publications-here/>, p.5.

Aboriginal women, children and young people, and people with a disability.<sup>60</sup> SASVic is concerned that the increased unsentenced remand population is seeing victim survivors imprisoned.<sup>61</sup>

Bail practices are designed as an exercise in risk management, with the risk being that of failure to appear at court or reoffend.<sup>62</sup> It is concerning that bail legislation across Australia see a shift in practices that prioritise harm risk mitigation and decrease access to bail, leading to an increase in remand population.<sup>63</sup> In addition, there is no strong evidence to suggest that those who are released on bail commit further offending. In a 10-year study (2009-2018) of New South Wales, Victoria and Queensland, there are four cases where the bail accused go on to commit highly consequential further offending.<sup>64</sup> We draw attention to the fact that Australia has ratified the International Covenant on Civil and Political Rights, which states it should not be a general rule that persons awaiting trial shall be detained in custody.<sup>65</sup>

## Recommendation

That the Committee recommend:

- 19) reviewing existing bail legislation in each state or territory with a view of providing presumption in favour of bail unless there is an immediate and specific risk to a person's safety or the community.

## Conclusion

SASVic strongly supports the introduction of harmonised affirmative consent laws across Australia, noting that to have the most impact, a whole-of-community approach should be taken to legislative reform. Community education is a crucial component to such an approach. Specialist sexual assault and harmful sexual behaviour services offer a unique expertise that can be harnessed in community education, particularly in schools.

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<sup>60</sup> Parliament of Victoria, *Inquiry into Victoria's criminal justice system: Volume 1* (Melbourne: Victorian Government, 2022), <https://parliament.vic.gov.au/lsc-lc/article/4534>. Also see Australian Law Reform Commission, "Drivers of incarceration for Aboriginal and Torres Strait Islander women", accessed March 2, 2023, <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/11-aboriginal-and-torres-strait-islander-women/drivers-of-incarceration-for-aboriginal-and-torres-strait-islander-women/>.

<sup>61</sup> The Victorian Inquiry into the criminal justice system finds that women who commit criminal offences are often victim survivors and typically enter the criminal justice system as a victim or a perpetrator of a non-violent crime that is often related to poverty or drug dependence. Parliament of Victoria, *Inquiry into Victoria's criminal justice system*, p.xx.

<sup>62</sup> Lorana Bartels et al., "Bail, risk and law reform: a review of bail legislation across Australia", *Criminal Law Journal* 42, no. 2 (May 2018) 91-107, [https://www.researchgate.net/publication/325335450\\_Bail\\_Risk\\_and\\_Law\\_Reform\\_A\\_Review\\_of\\_Bail\\_Legislation\\_across\\_Australia](https://www.researchgate.net/publication/325335450_Bail_Risk_and_Law_Reform_A_Review_of_Bail_Legislation_across_Australia).

<sup>63</sup> Lorana Bartels, "The growth in remand and its impact on Indigenous over-representation in the criminal justice system", accessed March 2, 2023, <https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/the-growth-in-remand-13-08-2.pdf>.

<sup>64</sup> Lachlan Auld and Julia Quilter, "Changing the rules on bail: an analysis of recent legislative reforms in three Australian jurisdictions", *UNSW Law Journal* 43, no.2 (June 2020) 642-673, <https://www.unswlawjournal.unsw.edu.au/article/changing-the-rules-on-bail-an-analysis-of-recent-legislative-reforms-in-three-australian-jurisdictions>.

<sup>65</sup> Australian Human Rights Commission, "International Covenant on Civil and Political Rights", accessed March 2, 2023, <https://humanrights.gov.au/our-work/commission-general/international-covenant-civil-and-political-rights-human-rights-your>.