



Submission to the Review of Sexual Consent Laws in South Australia

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Review of Consent Laws in South Australia

As Commissioner for Children and Young People, I welcome the opportunity to provide a submission to the review of sexual consent laws in South Australia. My mandate under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* is to promote and advocate for the rights, interests and wellbeing of all children and young people living in South Australia. Since 2017, I have been actively engaging with children and young people across the state in order to advocate on their behalf.

Sexual consent laws should reflect contemporary understandings of healthy sexuality and consent. It is hoped that these amendments play their part in driving progress against the outcomes set out in the National Plan to End Violence against Women and Children 2022-2032, including 'to ensure community attitudes and beliefs embrace gender equality and condemn all forms of gendered violence without exception.'

It is recognised that the discussion paper does not ask for commentary on addressing matters such as primary prevention or matters related to the operation of the criminal justice system. Yet it would be naïve to believe that amendments will result in changes in practices without cultural and systemic change and investment in policies and services that encourage changes in attitudes in our society and across the justice system.

We must look closely at the environments that enable and reinforce sexist attitudes and rape myths, including within education and justice settings that are designed to keep people safe from harm. A failure to challenge these gender stereotypes and minimise their impact on children and young people's lives is detrimental to everyone, regardless of age, sex, and gender.

To make recommendations in relation to this discussion paper, we need to understand what children and young people know and what they want to know about navigating intimate relationships and consent. This submission is informed by the views of young people in South Australia. In particular, it draws on my [Sex Education in South Australia Report](#), which is based on a survey of more than 1,200 young South Australians aged 12 to 22 years old about their views and experiences of relationships and sexual health (RASH) education.

The interplay of sex, relationships and technology, and the changing social attitudes toward pornography and sharing of sexual images online, are some of the most pressing issues young people face. Children and young people are calling out for adult support in these areas. They are concerned about how their relationships and sexual health education is falling behind what is happening in their day to day lives.

This is why it is imperative that any amendments are supported through national and statewide strategies to prevent and reduce sexual violence. This includes significant investment in prevention and education efforts to ensure the legal community is supported to implement the changes and to ensure young people are empowered to understand and experience respectful and healthy relationships.

We must move toward a more contemporary discourse around sexuality and consent that is grounded in child rights, evidence-based, and extends beyond legal definitions to include an understanding of the social and practical complexity of consent. For this to happen, we need a healthy consent culture to be reflected in education and justice systems, but also validated across society, including in media reporting, policing, popular culture, by political and educational leaders and in social interactions across schools, communities and workplaces.

In respect to the discussion paper I have provided recommendations in relation to the some of the topics discussed, including consent and the law, affirmative consent, directions about sexual offences, image-based sexual offences and protection of victims in sexual offence trials. If you have any further queries, do not hesitate to contact this office.

Yours sincerely,



Helen Connolly

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Adelaide, South Australia

Consent and the law in South Australia

I recommend reducing the age of consent to 16 years in line with the majority of other Australian jurisdictions and establish a 'similar age defence' with an age difference of two years, similar to New South Wales.

In considering offences involving children and young people there is a need to strike a balance between protecting young people from sexual abuse and exploitation, and supporting young people's independence and allowing for healthy development and sexual autonomy.

Criminalising consensual sexual relations between young people under 17 can be a significant risk to sexual safety. If young people are punished for engaging in ordinary adolescent exploration throughout their psychosexual development, this can undermine their ability and willingness to access healthcare and engage with other support or social networks.

In Australia, the average age which young people first experience of sex is approximately 15 years, but ages range for different sexual practices:

- 13.6 years for viewing pornography,
- 14.6 years for deep kissing,
- 15.2 years for oral sex,
- 15.3 years for vaginal sex, and
- 15.6 years for anal sex.ⁱ

The proportion of Year 10 students who reported being sexually active has increased over time from 19.8% in 1997 to 34.3% in 2018 and 43% of year 10 students in 2021. In 2021, 36% of students under the age of 16 had experienced vaginal or anal sex compared to 31.1% in 2018. In 2021, 68.9% of Year 12 students had had vaginal or anal sex compared to 47.8% in 1997 and 55.8% in 2018.ⁱⁱ

Young people's relationships are increasingly online and can often take place between different jurisdictions, making it essential that the age of consent is consistent throughout the country. Inconsistent legal definitions and applications of consent across jurisdictions can contribute to confusion and, in the case of sexual assault, can compound distress.

To resolve confusion, it is recommended that the age of consent be set at 16 years of age making it uniform with the majority of Australian jurisdictions. This is consistent with the

recommendation made by the Model Criminal Law Officers Committee to ensure consistency across jurisdictions, and the Australian Law Reform Commission's recommendation to provide that the age of consent is 16 years.ⁱⁱⁱ

Care should be taken to improve the ability of systems to avoid punishing young people for having sexual relationships with their peers, while also identifying and responding to coercive, predatory or abusive behaviours.

The similar age defence should also be expanded to protect young people younger than 16 from being criminalised for consensual sexual relations with another young person of similar age. . The government should look to the *Crimes Act 1900* (NSW) for guidance, which provides a defence if the alleged victim was of or above the age of 14 years and the age difference between the two parties was less than two years.^{iv}

Affirmative Consent

I give in-principle support for adopting an affirmative model of consent. However, it may be prudent to monitor and evaluate the impact of such models in other jurisdictions to ensure implementation in South Australia results in real cultural and societal change and includes safeguards against the criminalisation of children.

Sexual consent laws play an important role in setting standards that underpin education and behavioural change. There is some evidence that an affirmative consent model in legislation can provide a foundation for comprehensive consent education and improved understanding and attitudes at a societal level.^v A positive and aspirational definition of affirmative consent that goes beyond the minimum legal standard and is grounded in empathy and respect is particularly important in light of young people's experiences and concerns.

Young people are confused about what consent actually looks like, and they are seeking more practical and positive guidance in relation to the social and emotional realities of navigating consent. While the majority of young people who responded to my Sex Education Survey reported learning about consent in school-based RASH education, 1 in 5 young people (22%) reported not learning about consent or were unsure whether they had. While some young people responded that consent 'was never mentioned' or 'only mentioned once in Year 12', others reported understanding it only as a 'broad term'.

“went over consent for the first time in year 12 and the lesson had ended already so it lasted for about 2 minutes ... by the time we “learnt” about it most people had already experience sexual harassment or assault and schools played no role in helping them.”

– 17, non-binary

Young people expressed real concern about their lack of understanding about the social and emotional ‘intricacies’ of consent. While they highlighted a need for young people to fully understand that consent ‘should be enthusiastic and not coerced’, they also raised concerns about a lack of information about what ‘enthusiastic consent’ actually means. They focused on the negative impacts of inadequate consent education on their wellbeing and their ability to maintain healthy relationships and feel empowered.

“we definitely did not learn enough about consent!! Rape & sexual assault don’t just happen when a stranger pulls you into an alleyway or something, it can be from your own partner. The pressure to have sex with someone & the compliance even tho you don’t want to say yes should’ve been talked about. Makes me sick to think about myself & my friends doing things for people just because we felt we owed something to them”

– Female, 20

“I was never taught about sexual assault... I was unsure if what happened to me would even be classed as assault and this was a contributing factor in me not telling anyone or reporting it because I thought it was stupid and no one would believe me”

– Female, 19

“All I was taught was... [sexual assault] was bad but we already knew that. So when it happened to me, I didn’t know what to do”

– Female, 17

Young people note that there is a lot of information about what is *not* consent, but there is less about what is consent and how to practice consent in real situations.

However, expanding the list of circumstances in which a person is taken not to consent is supported insofar as this will provide clarification and guidance for the community, and especially for young people, if it is supported by community-wide education efforts. All of the examples given in the discussion paper should be considered, with particular regard to the following:

- there is a failure to offer physical and verbal resistance (QLD14, NSW, Victoria and ACT),
- the person does not say or do anything to communicate/indicate consent (NSW, Victoria, QLD and Tasmania),
- because the person consented to another act or the same act at a different time or place, or the same act with a different person, or a different act with a different person (ACT), and
- having given consent, the person later withdraws consent to the act taking place or continuing (Victoria, QLD, ACT).

Image-based sexual offences

It is essential that any laws build in safeguards to reduce the criminalisation of image-based sexual acts between young people in particular circumstances.

The discussion paper recognises that the sharing of intimate photographs has become increasingly common in the course of teenagers' sexual development. It also notes that laws prohibiting sexting between juveniles has created a number of issues for young people, including an increase in young people criminalised when sexting to a person they are in a relationship with.

It is recommended that a similar age defence of two years should also be implemented, consistent with the recommendation made above, when the image has not been shared with others.

There is also in-principle support for all offences being placed within the *Criminal Law Consolidation Act 1935* as long as there are safeguards to avoid the criminalisation of young people. This means ensuring the following conditions:

- There is a similar age defence for young people (of 2 years);
- That the Department of Public Prosecutions makes the decision to prosecute children; and
- That there be an review on the use of current diversion practices and procedures by South Australian police in relation to young people to assess whether diversion is being used.

Protection of victims in sexual offence trials and beyond

It is recommended that any amendments to better protect victim-survivors are supported by appropriate training for the institutions that uphold these laws.

As the data in the discussion paper shows, victim-survivors face significant barriers to reporting sexual violence and many sexual assaults never come to the attention of the criminal justice system. The small proportion of cases that proceed to trial and the low conviction rates reveals more has to be done than just amend laws, policies and guidance.

There is in-principle support for amendments to better protect victim-survivors in court proceedings. Particular consideration could be given to providing for protections similar to those for children or adults who have experienced child sexual abuse. Such protections include:

- Ground rules hearings if consideration is given to provide Witness Intermediaries. The Commonwealth government has excluded ground hearings in the [Crimes Amendment \(Strengthening the Criminal Justice Response to Sexual Violence\) Bill 2024](#) tabled on 7 February due to a lack of representation for witnesses. Representation for witnesses ensures they are able to properly exercise their rights and protects their interests. It is strongly recommended that South Australia reconsider its position and fully fund Witness Intermediaries similar to other states and in line with recommendations from the Communication Assistance Study [Report](#) produced by the South Australian Law Reform Institute.
- Protection for the right to privacy, especially in relation to the protection of sensitive health related information except in exceptional circumstances. Victims also should have a right to be notified if the defence wants to procure this information.

Any amendments to better protect victim-survivors must be supported by appropriate training for the institutions that must uphold these laws. This includes courts, police prosecutors, lawyers, educational institutions, as well as ensuring education across the community reinforces legal standards in a way that is understandable and developmentally appropriate.

Although it is appreciated that the discussion paper is only about legislative change, it is naïve to think that legislative change will lead to improvements in victim-survivor experiences of the justice system unless there are actions to ensure proper

implementation. Therefore, there needs to be continued resourcing and training to ensure cultural changes, not only within the justice system, but in the wider society.

According to the Women's Legal Services Australia 'statutory reforms and [jury directions] addressing rape myths and misconceptions are not self-executing. Unconscious biases towards victim-survivors will not change, nor will sexual consent literacy increase, until there is social and cultural change in regard to attitudes towards women and sexual violence.'^{vi} Current evidence suggests that:

- Some lines of cross-examination of victim-survivors are contrary to express legislation or rules and is not addressed at the time.^{vii}
- Rape myth beliefs are still extensively held by barristers and used either deliberately or subconsciously at trial. Many of the barristers interviewed by researchers from La Trobe University struggled to accurately define 'rape myth' or explain what might constitute a rape myth.^{viii}
- The amount of teaching time dedicated to sexual offences has declined over the past 20 years. A survey of criminal law teaching staff at all 32 accredited law schools across Australia found that 'knowledge about sexual offences held by most graduates of Australian law schools is reliant on self-directed learning'.^{ix}

As such, any amendments made will not necessarily improve the experience of victim-survivors unless there is support and training for legal practitioners and judicial officers to comply with laws. Over and above the amendments there should be a review to determine the extent to which trials in South Australia are currently being run consistent with legislation, evidentiary rules and guidance, and to monitor conviction rates.

ⁱ La Trobe University, ARCSHS. *Results of the 7th National Survey of Australian Secondary Students and Sexual Health 2021*. Accessed on 7 February 2024 https://s3-ap-southeast-2.amazonaws.com/figshare-production-eu-latrobe-storage9079-ap-southeast-2/38618210/ARCSHS_7th_National_Survey_of_Australian_Secondary_Students_and_Sexual_Health_2021_Print_version.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIARRFKZQ25KW2DIYRU/20240212/ap-southeast-2/s3/aws4_request&X-Amz-Date=20240212T033310Z&X-Amz-Expires=10&X-Amz-SignedHeaders=host&X-Amz-Signature=a989783a1621ff7094b074d2a8bdd33054afae89a2819e51f718441e2ac653c5

ⁱⁱ Ibid.

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- ⁱⁱⁱ Attorney-General's Department. Model Criminal Law Officers Committee Reports: Chapter 5. Accessed on 31 January 2024, <https://www.ag.gov.au/crime/publications/model-criminal-law-officers-committee-reports>. Australian Law Reform Commission, Overview of Sexual Offences, Family Violence – Improving Legal Frameworks (ALRC CPS 1), 2010, accessed 5 February 2024, <https://www.alrc.gov.au/publication/family-violence-improving-legal-frameworks-alrc-cps-1/16-sexual-offences/overview-of-sexual-offences/>.
- ^{iv} Crimes Act 1900, s80AG.
- ^v BodySafety Australia, Submission to the Inquiry into current and proposed sexual consent laws in Australia, 2023, <https://www.aph.gov.au/DocumentStore.ashx?id=770b1427-5e10-42cf-bd0b-ed7473315afc&subId=735366>.
- ^{vi} Australian Commonwealth. The Senate Legal and Constitutional Affairs References Committee. September 2023. *Current and proposed sexual consent laws in Australia*. Accessed on 6 February 2024, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000074/toc_pdf/Currentandpropose sexualconsentlawsinAustralia.pdf at p 34
- ^{vii} Dr Duncanson and Dr Henderson, Submission to the Senate Inquiry, <https://www.aph.gov.au/DocumentStore.ashx?id=103ee3fe-c637-4e28-a652-70cab3e3a748&subId=734189>; Submission to the ; Senate inquiry into current and proposed sexual consent laws in Australia report, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000074/toc_pdf/Currentandpropose sexualconsentlawsinAustralia.pdf, p 57.
- ^{viii} Ibid at p 57.
- ^{ix} i.b.i.d. at p 57.