Full Stop Australia

Australian Institute of Criminology review of child sexual abuse and sexual assault laws.

29 June 2023

Submission by Full Stop Australia

About Full Stop Australia

Full Stop Australia (FSA) thanks the Australian Institute of Criminology (AIC) for the opportunity to provide input on its review of sexual assault and child sexual abuse legislation.

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

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

FSA, as a national service, draws upon the experiences of our trauma-specialist counsellors to support people impacted by sexual, domestic and family violence across jurisdictions, as well as our clients and other survivor advocates who are part of our National Survivor Advocate Program, to advocate for victim focussed laws and consistent approaches to family, domestic and sexual violence nationally.

About this submission

This submission responds to the AIC's questions on:

- how legislation addressing sexual violence and child sexual abuse could be improved;
- examples of best practice regarding sexual assault legislation; and
- what gaps exist in legislation for responding to new and emerging trends in sexual violence and child sexual abuse.

The responses in this submission focus primarily on sexual assault legislation, given FSA's organisational focus on, and expertise in, sexual violence. While this submission contains some input on child sexual abuse legislation, it should not be taken as an exhaustive statement of these laws. We recommend that the AIC engage with organisations who specialise in child sexual abuse, and victim-survivors of child sexual abuse, about how these laws could be improved.

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

Terminology

Throughout this submission, we have used the term *sexual violence* as a broad descriptor for any unwanted acts of a sexual nature perpetrated by one or more persons against another. This term is used to emphasise the violent nature of all sexual offences and is not limited to those offences that involve physical force and/or injury.

Those who are or have experienced sexual violence are referenced as *victim-survivors*, *people with lived experience* or in the case of their involvement with FSA's National Survivor Advocate program, *survivor-advocates*.

Statistics show that the justice system is not supporting victim-survivors

The latest data from the Australian Bureau of Statistics shows that 22% of Australian women have experienced sexual violence since the age of 15.[1] However, according to the 2016 Personal Safety Survey, of the 639,000 women who experienced sexual assault by a male perpetrator in the ten years prior to survey, only 13% (86,000) contacted the police about the most recent incident.[2] In addition, conviction rates for sexual offences are significantly lower than for other offences.[3]

This data shows that the justice system is not working for victim-survivors of sexual violence.

While legislative reform is not the only thing that needs to be done to improve rates of reporting and conviction of sexual offences, it is a step in the right direction. This paper sets out how legislative responses to sexual violence across the country could be improved, to improve access to justice for victim-survivors.

Summary of recommendations

We recommend the following measures to improve legislative responses to sexual violence and child sexual abuse:

- **Recommendation 1:** All Australian jurisdictions should adopt harmonised criminal legislation regarding sexual offences and child sexual offences. In particular, terminology for sexual offences and child sexual offences, the elements of criminal offences, and the age of consent, should be uniform across the country.
- **Recommendation 2:** To align the definition of consent in all jurisdictions, with this definition based on an affirmative model of consent:
    - Tasmania should amend its legislation to clarify that agreement to sexual activity must be "free and voluntary," rather than just "free"; and

[1] Australian Bureau of Statistics. (2021-22). *Personal Safety, Australia*. ABS. https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release.
[2] Australian Bureau of Statistics. (2021, August 24). *Sexual Violence - Victimisation*. ABS. https://www.abs.gov.au/articles/sexual-violence-victimisation.
[3] There was an average conviction rate of 11.5% between 1990 and 2005, which is lower than other criminal offences, according to Sarah Bright et al, *Attrition of Sexual Offence Through the Victorian Criminal Justice System: 2021 Updates* (Crime Statistics Agency Report, 2021) 7, 17.

    - All jurisdictions should amend their legislative definition of consent, to specify that consent must be "communicated by words or actions" (as is already the case in ACT law).
- **Recommendation 3:** The objectives of sexual offence provisions should be aligned across the country, with a view to promoting affirmative consent. To this end, we recommend that QLD, WA, SA, TAS and the NT amend their criminal legislation to introduce an 'objectives' provision for sexual offences that specifies:
    - Every person has a right to choose whether or not to participate in a sexual activity;
    - Consent to a sexual activity is not to be presumed; and
    - Consensual sexual activity involves ongoing and mutual communication and decision-making between participants.
- **Recommendation 4:** All jurisdictions should enact legislative amendments to adopt the guiding principles in s 37B of the *Crimes Act 1958* (VIC), as well as additional guiding principles aimed at explicitly debunking common myths and misconceptions regarding sexual violence. Best practice guiding principles are set out in this submission.
- **Recommendation 5:** To ensure that the possibility of a "freeze" response to sexual violence is appropriately addressed by legislation, in a uniform way across the country, we recommend that:
    - The NT, SA and TAS amend their criminal legislation to specify that a lack of physical or verbal resistance does not, of itself, amount to consent; and
    - WA amend its criminal legislation to specify that "a lack of physical *or verbal* resistance does not, of itself, amount to consent" (currently, WA legislation only refers to physical resistance).
- **Recommendation 6:** To ensure a harmonised approach to withdrawal of consent, we recommend that WA, TAS and the NT introduce provisions explicitly stating that a person may, by words or conduct, withdraw consent to sexual activity – and that sexual activity that continues after consent has been withdrawn occurs without consent.
- **Recommendation 7:** We recommend that QLD, TAS, SA, NT and WA amend their legislation to introduce provisions specifying that consent is specific and limited to the person, occasion and activity for which it was provided. This provision should be modelled off provisions in VIC and ACT law.
- **Recommendation 8:** For clarity and consistency, and to ensure more just outcomes for victim-survivors, we recommend that all jurisdictions adopt a comprehensive, uniform, non-exhaustive list of factors where consent does not exist. This list should be modelled off section 61HJ of the *Crimes Act 1900* (NSW), which we consider contains a comprehensive list of situations in which consent does not exist.
- **Recommendation 9**: To support harmonisation and remove a legislative loophole with the propensity to deny justice to victim-survivors, QLD, TAS and WA should align their legislation to most other jurisdictions by specifying that the mistake of fact defence does not apply to sexual offences. Instead, these jurisdictions should impose a mental state element for sexual offences, modelled off s 61HK of the *Crimes Act 1900* (NSW).
- **Recommendation 10:** Sections 192(3) and (4) of the *Criminal Code Act 1983* (NT) should be amended to clarify that consent is not present where any belief that the accused person had that the other person consented to the sexual activity was not reasonable in the circumstances.
- **Recommendation 11:** NT, WA, QLD and SA should introduce legislative amendments to require the accused to take positive steps to ascertain consent, to align with the law in TAS, NSW, VIC and ACT.

- **Recommendation 12:** All Australian jurisdictions should introduce legislation specifically making 'stealthing' a criminal offence.
- **Recommendation 13:** NT should align its legislation with that of other states and territories, by introducing legislative amendments to specify that sexual reputation evidence is not admissible in any circumstances.
- **Recommendation 14**: The approach to the admissibility of sexual experience and activity evidence should be aligned across the country. To this end, all jurisdictions other than Victoria should introduce legislative amendments that limit the admissibility of this evidence modelled off Part 8.2, Division 2 of the *Criminal Procedure Act 2009* (Vic).
- **Recommendation 15**: All jurisdictions should harmonise the terminology used to refer to 'sexual reputation,' 'sexual experience' and 'sexual activity' evidence – with clear legislative guidance on what relevant terms mean.
- **Recommendation 16:** All jurisdictions should adopt a harmonised approach to the admissibility of tendency and coincidence evidence, based on uniform legislation in NSW, ACT, NT and TAS – with the following changes to increase the admissibility of relevant evidence in both child and adult sexual offence matters:
    - Section 97A should be amended to apply to all sexual offence matters (i.e. matters involving both adult and child complainants) – not only child sexual offence matters.
    - Section 97A should be expanded to refer to both tendency and coincidence evidence.
- **Recommendation 17:** All jurisdictions should introduce legislative amendments to harmonise the jury directions required to be given in sexual offence matters, aimed at combating common misconceptions about sexual violence. Jury directions should largely be required to be given at the outset of proceedings, for the reasons set out in this submission, and should address:
    - The meaning of consent, based on the affirmative model of consent recommended in this submission;
    - The multitude of ways people might respond to sexual violence – including the freeze response. This should be based on jury directions in NSW and VIC law;
    - The possibility that a nonconsensual sexual encounter may occur in the absence of injury, violence or threat. This should be based on jury directions in NSW and VIC law;
    - The fact that, in considering whether a person consented to sexual activity, it is not relevant that they have engaged in other sexual activities in the past. This should be based on jury directions in VIC law;
    - The irrelevance of the complainant's personal appearance and conduct – specifying that a complainant's clothing, appearance, conduct, consumption of alcohol or drugs, or presence in a particular location, are not relevant. This should be based on jury directions in NSW and VIC law;
    - The fact that sexual violence may occur in a range of contexts, including between people in intimate relationships or who know each other, and that a victim-survivor might maintain a relationship with a perpetrator following sexual violence. These provisions should be based on jury directions in VIC law;
    - The fact that differences in a complainant's accounts do not necessarily point to a lack of credibility. These provisions should be based on jury directions in NSW and VIC law; and
    - The fact that trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not – and that this does not affect a complainant's credibility. These provisions should be based on jury directions in NSW law.

Further details on and reasons for each of these recommendations are outlined below.

Harmonisation of consent and sexual violence laws

We recommend harmonising consent and sexual violence laws in all Australian jurisdictions, based on an affirmative model of consent.

Harmonisation

Harmonisation is necessary to simplify legislation on consent and sexual violence, clarify its objectives, and set clear and consistent standards for consensual sexual activity. The current plurality of legislative schemes on consent and sexual violence across the country creates confusion, profoundly impacting victim-survivors' ability to access justice and engage in an informed and empowered way with the justice system. This, in turn, impacts reporting and conviction rates.[4]

As noted by the Grace Tame Foundation, "currently, there are eight definitions for sexual intercourse, the age of consent to sex, consent, and grooming between the eight state and territory jurisdictions, as well as eight different sets of punishments for these inconsistently worded offences."[5] We agree with the Foundation's assertion that "if the nation achieves consistent sexual assault legislation, we will be better equipped to prevent and respond to this complex issue; to protect survivors and deter perpetrators."

In this regard, we would support fully harmonised criminal legislation regarding sexual offences and child sexual offences in all states and territories across Australia. In particular:

- Terminology for sexual offences and child sexual offences should be uniform across the country. This would minimise confusion for survivors who already find criminal justice processes opaque, difficult to understand and disempowering to engage with. For example, Tasmanian, Queensland, Victorian and South Australian legislation contain the offence of 'rape,' while ACT and NT legislation contain the offence of 'sexual intercourse without consent,' WA legislation contains the offence of 'sexual penetration without consent,' and NSW legislation contains the offence of 'sexual assault' – with all offences prohibiting the same conduct. Referring to all relevant offences as 'rape' – which appropriately recognises the seriousness of the offence – would be a step in the right direction towards harmonisation of terminology.
- The elements of criminal offences, and defences available for those offences, should be uniform across jurisdictions. Currently, the elements of the offence of rape differ across jurisdictions – with ACT, NSW, NT, SA and Vic requiring evidence of the defendant's mental state as an element of the offence, and QLD, WA and TAS not requiring this, but making the 'mistake of fact' defence available to defendants. These differences affect the way this offence is prosecuted, and the defences available, across jurisdictions – which is leading to vastly different justice outcomes for victim-survivors.
- The age of consent should be uniform across the country, as recommended by the Grace Tame Foundation.

[4] New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Report No 148, September 2020) [1.23].
[5] The Grace Tame Foundation, 'The Harmony Campaign,' available at: https://www.thegracetamefoundation.org.au/the-harmony-campaign.

Recommendation 1: All Australian jurisdictions should adopt harmonised criminal legislation regarding sexual offences and child sexual offences. In particular, terminology for sexual offences and child sexual offences, the elements and defences available for criminal offences, and the age of consent, should be uniform across the country.

We consider that harmonised legislation should be based on the affirmative model of consent detailed below.

Affirmative consent laws

Uniform adoption of an affirmative consent model would enshrine respectful, mutual and communicative sexual relationships in law. This has the potential to have significant impact, by sending a powerful message to the general community about respectful sex and relationship standards, supporting community understandings of sexual violence and consensual sex, undoing harmful myths about consent (for example, that consent can be assumed unless it is expressly negated), and promoting ongoing and mutual communication between parties to a sexual encounter. It would also combat public perceptions that the legal system is biased against victims, thereby promoting increased complaints to the police and increased convictions as a result.[6]

While the core principles of consent are currently similar across jurisdictions – with sexual offence legislation in all states and territories specifying that consent must be "freely and voluntarily given"[7] – the key objectives of sexual assault laws – being the reduction of offences, improved reporting and conviction rates, and increased public confidence in the legal system – are still not being achieved.[8] FSA considers that adoption of a uniform consent model across the country is a necessary step to address these shortfalls.

An affirmative consent model would shift the fault element of sexual offences towards an 'objective' standard of reasonableness, focused on the actions of the accused and the steps they took to ensure a complainant was consenting.[9] It provides explicit legislative acknowledgement that a person is not consenting unless they say or do something to communicate consent.[10] Under an affirmative consent model, consent can be communicated through both words and reciprocating body language, and as long as there is consent that is continued to be reciprocated by all parties involved, there is no requirement for a person to ask for verbal consent.[11]

A best practice affirmative consent legislative model should specify that:

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[6] Wendy Larcombe et al, ''I Think It's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (Un)reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social and Legal Studies* 611, 614.

[7] Other than Tasmania, which defines consent simply as "free agreement." However, while the Tasmanian Criminal Code does not expressly refer to voluntariness, the operation of Schedule 1 s 2A(2) impliedly incorporates this requirement. This provision clarifies that consent is not given freely when a person agrees to sexual activity because of threats, coercion, fraud, mistaken identity or they are asleep, unconscious or significantly impaired.

[8] New South Wales Law Reform Commission, above n 4, [3.38].

[9] Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases' (2019) 31 Current Issues in Criminal Justice 24, 28.

[10] James Duffy and Kelley Burton, 'A Review of the New Legislative Definition of Consent in Queensland: An Opportunity for Western Australia' (2022) 41(2) *The University of Queensland Law Journal* 189, 201.

[11] New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2021, 6633 (Natalie Ward).

- You can't assume someone is consenting because they don't say no. Silence or a lack or resistance is not consent.
- Consent is an ongoing process of mutual communication and decision-making. A person can change their mind and withdraw their consent at any time.
- A person can't consent if they're so intoxicated that they can't choose or refuse to participate.
- Consent can only be given freely and voluntarily. If you force or coerce your partner into sex, it's not consensual.
- Consent must be present for every sexual act. If someone consents to one sexual act, it doesn't mean they've consented to others.
- A person can't consent if they're asleep or unconscious.
- A person can only have a reasonable belief in another person's consent where they've taken positive steps to seek that other person's consent.[12]

We have also outlined below key aspects of an affirmative consent model – identifying where particular jurisdictions fall short of best practice and linking these to individual recommendations for change. We note that this model is largely based on Part 3, Division 10, Subdivision 1A of the *Crimes Act 1900* (NSW), with some adjustments to strengthen protections for victim-survivors.

Issue	Jurisdictional analysis	Recommendations
Definition of consent	As set out above, all jurisdictions define consent as either "free agreement" or "free and voluntary agreement" to engage in sexual activity. Additionally, ACT legislation specifies that consent to a sexual act must be "communicated by saying or doing something."[13]	We recommend that: • Tasmania amend its legislation to clarify that agreement to sexual activity must be "free and voluntary," rather than just "free"; and • All jurisdictions amend their legislative definition of consent, to specify that consent must be "communicated by words or actions" (as is already the case in ACT law). In relation to the requirement for positive communication of consent, we note that the proposal below in relation to "lack of resistance by a victim-survivor" operates to preclude the defence from arguing that there *was* consent simply because a complainant did not resist. The proposed change to the definition of consent would, in addition, give the prosecution explicit legislative grounds on which to argue that there *wasn't* consent where the complainant did not say or do anything to express agreement to sexual activity. Noting the disproportionately low conviction rates in sexual offence matters, and that the starting principle of the law of consent is the protection of sexual autonomy, we consider this change essential.

[12] See Department of Communities and Justice, *Affirmative consent becomes law in NSW* (Media Release), 1 June 2022, available at: https://dcj.nsw.gov.au/news-and-media/media-releases-archive/2022/affirmative-consent-becomes-law-in-nsw.html.

[13] *Crimes Act 1900* (ACT) s 50B(b).

Objectives of affirmative consent legislation	Legislation in NSW and the ACT specifies that their sexual offences provisions have the objective of recognising that: • every person has a right to choose whether or not to participate in a sexual activity; • consent to a sexual activity is not to be presumed; and • consensual sexual activity involves ongoing and mutual communication and decision-making between participants.[14]	FSA recommends that sexual offence legislation in QLD, WA, SA, TAS and the NT be amended to explicitly adopt the objectives set out in ACT, VIC and NSW law. As elucidated above, this would help to shape community expectations and understandings of consent, which is important for driving forward positive cultural changes.
Guiding principles	The *Crimes Act 1958* (VIC) contains a set of guiding principles at s 37B for applying sexual offence and child sexual offence provisions of the Act. Among other things, these guiding principles recognise the high incidence and under-reporting of sexual violence in society, and that women, children and other vulnerable people are disproportionately at risk of sexual offences. We have recommended that all jurisdictions adopt the Victorian guiding principles. We think these principles are important, insofar as they require the Courts to consider the gender-based nature of sexual violence, as well as the reality of disproportionately low reporting and conviction rates. We have also recommended the adoption of additional guiding principles, which specifically debunk common rape myths (e.g. that most rapists are strangers to their victims, or that	We recommend that all jurisdictions enact legislative amendments to adopt the guiding principles in s 37B of the *Crimes Act 1958* (VIC), as well as additional guiding principles aimed at explicitly debunking common myths and misconceptions regarding sexual violence. Best practice guiding principles should be drafted as follows: *"It is the intention of Parliament that in interpreting and applying this chapter, courts are to have regard to the following matters—* • *there is a high incidence of sexual violence within society;* • *sexual offences are significantly under-reported;* • *a significant number of sexual offences are committed against women, children and other vulnerable persons, including persons with a cognitive impairment or mental illness;* • *sexual offenders are commonly known to their victims;* • *sexual offences occur most frequently in residential locations;* • *there are legitimate reasons why victims of sexual violence may not physically resist an assault, including, but not limited to, physiological responses to aggression and fear of escalating or prolonging the attack;* • *sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred; and*

[14] See *Crimes Act 1900* (ACT) s 50A, *Crimes Act 1900* (NSW) s 61HF; *Crimes Act 1958* (Vic) ss 37A.

	rape that occurs without physical violence isn't "real"). These are based on recommendations by Professor Jonathan Crowe, Dr Asher Flynn & Bri Lee (who is herself a victim-survivor).	• *there are legitimate reasons why victims of sexual violence may not immediately report an assault to police or another person and a failure to make an immediate report, without more, does not discredit an allegation."*[15]
Lack of resistance by a victim-survivor	Legislation in the ACT, NSW, QLD and VIC specifies that a lack of physical or verbal resistance does not, of itself, amount to consent.[16] Legislation in WA specifies that lack of physical resistance does not, of itself, constitute consent.[17] WA legislation does not refer to verbal resistance. Legislation in the NT, SA and TAS does not address a lack of physical and/or verbal resistance, and the implications this will have for consent.	A "freeze" response is a common reaction to dangerous or threatening circumstances, including sexual violence. Victim-survivors may exhibit a "freeze" response to sexual violence, whereby they are not consenting to sexual contact, despite a lack of active resistance. Provisions in ACT, NSW, QLD and VIC recognise the commonness of the freeze response – which is a positive step to ensuring that consent is affirmative and based on mutual communication. These express legislative provisions also help combat community misconceptions about women consenting unless they say no or physically resist. We recommend that the NT, SA and TAS amend the legislation to adopt a similar provision, given the commonness of the freeze response. We also recommend an amendment to WA legislation to refer to both physical *and verbal* resistance – this would bring this provision in line with other jurisdictions that address the freeze response.
Approach to withdrawal of consent	ACT, NSW, QLD, SA and VIC law specify that a person may, by words or conduct, withdraw consent to sexual activity.[18] In these jurisdictions, sexual activity that continues after consent has been withdrawn occurs without consent. Meanwhile, legislative schemes in WA, TAS and the NT don't	We recommend that WA, TAS and the NT introduce provisions explicitly stating that a person may, by words or conduct, withdraw consent to sexual activity – and that sexual activity that continues after consent has been withdrawn occurs without consent. Although there is common law to this effect, we consider that explicitly addressing this in remaining jurisdictions would clarify the operation of the law across the country, thereby increasing its

[15] This wording was drafted by Professor Jonathan Crowe, Dr Asher Flynn & Bri Lee, an unpublished manuscript as part of the Australian Feminist Legislation Project. The wording was provided to us by our colleagues at Domestic Violence NSW during FSA's consultation with the NSW Government on the Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021.
[16] See *Crimes Act 1900* (ACT) s 67(2); *Crimes Act 1900* (NSW) ss 61HI(4); *Criminal Code Act 1899* (Qld) s 348(3); *Crimes Act 1958* (Vic) s 36(2).
[17] See *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(b).
[18] See *Crimes Act 1900* (ACT) s 67(1)(a); *Crimes Act 1900* (NSW) ss 61HI(2)-(3); *Criminal Code Act 1899* (Qld) s 348(4); *Criminal Law Consolidation Act 1935* (SA) s 48(1)(b); *Crimes Act 1958* (Vic) ss 36(2)(m) and 36AA(1)(p).

	contain a provision explicitly dealing with the withdrawal of consent.	accessibility to victim-survivors who wish to engage with the criminal justice system. As it is common for sexual contact to begin as consensual, then turn nonconsensual, clarifying the law in this regard might result in more victim-survivors coming forward to report sexual violence.
Consent to other sexual activities, activities with different persons or on different occasions	NSW, ACT and VIC legislation specifies that:[19] • Consent to one sexual activity does not amount to consent to other activities; • Consent to sexual activity with one person does not amount to consent to sexual activity with different persons; and • Consent to sexual activity with a person on one occasion does not amount to consent to sexual activity with that person on a different occasion. VIC and ACT legislation also specifies that consent to one sexual activity with one person does not amount to consent to a different sexual activity with a different person.[20] QLD, TAS, SA, NT and WA law do not contain these provisions.	We recommend that QLD, TAS, SA, NT and WA amend their legislation to introduce provisions specifying that consent is specific and limited to the person, occasion and activity for which it was provided. This provision should be modelled off provisions in VIC and ACT law, which are slightly more comprehensive than NSW law. These changes are important to address rape myths that weaponise victim-survivors' interest in engaging in some sexual activity against them – by incorrectly assuming that willingness to engage in some activity, or activity with one person, necessarily imports willingness to engage in other activities with other people. These myths remain disturbingly prevalent, including among those responsible for determining sexual violence matters. This month, in an article in *The Australian*, a judge was quoted questioning the credibility of a victim-survivor because she alleged that some sexual activity with two men was nonconsensual, whereas other activity on the same night with one of the men was consensual.[21] This is a bizarre view, which shows a profound misunderstanding of affirmative consent laws. It is especially disturbing given that the judge in question is based in NSW, and was commenting on a NSW case (with NSW being one of the jurisdictions that has adopted explicit legislative guidance on this point). The fact that rape myths are still being perpetuated by members of the judiciary, in a leading national publication, shows how much work remains to undo them. The proposed legislative change is important, both to set standards for Courts deciding sexual violence matters, and to influence community understandings of consent.

[19] *Crimes Act 1900* (NSW) s 61HI(5) and (6); *Crimes Act 1958* (VIC) s 36(3); *Crimes Act 1900* (ACT) s 67(2)(b).
[20] *Crimes Act 1958* (VIC) s 36(3); *Crimes Act 1900* (ACT) s 67(2)(b).
[21] See Rice, Stephen, 'Credibility brushed over when mentally ill claim rape: judges', *The Australian*, 18 June 2023.

Circumstances where consent does not exist	Legislative schemes in each jurisdiction set out specific circumstances where consent does not exist – for example, where someone was so affected by alcohol or another drug as to be incapable of consenting.[22] Some legislative schemes are less comprehensive than others. For example, NT legislation does not specify that a person does not consent in circumstances where they "participate[d] in sexual activity because of coercion, blackmail or intimidation,"[23] or where they were "overborne by the abuse of a relationship of authority, trust or dependence"[24] – unlike legislation in NSW, for example.	For clarity and consistency, and to ensure more just outcomes for victim-survivors, FSA recommends that all jurisdictions adopt a comprehensive, uniform, non-exhaustive list of factors where consent does not exist. This list should be modelled off section 61HJ of the *Crimes Act 1900* (NSW), which we consider contains a comprehensive list of situations in which consent does not exist. This change would enhance consistency of decision-making across jurisdictions. It would also, by explicitly drawing attention to the range of situations and power imbalances that might vitiate consent, create a more victim-centric legislative landscape. We note that the limited list of circumstances in Queensland legislation is particularly concerning – with circumstances where the complainant was asleep, unconscious, or so intoxicated as to have been incapable of consent not listed as situations where consent does not exist.
Mistake of fact defence	Australian jurisdictions can be divided into two categories: • Jurisdictions in which sexual offences contain a mental state element (ACT, NSW, NT, SA, Vic) – i.e. in most of these jurisdictions, it must be established that the accused either *knew* that the complainant was not consenting, or was *reckless* as to consent, or belief in consent was *not reasonable* in the circumstances; and • Jurisdictions in which sexual offences do not contain a mental state element (QLD, TAS, WA) – i.e. there is no	The mistake of fact defence has the potential to perpetuate rape myths – for example, that "the complainant's tone of voice or flirtatious behaviour" indicated consent.[28] This is particularly problematic given "prevailing community attitudes… that minimise or dismiss [certain forms of] sexual violence"[29] – such as intimate partner violence. This defence can also place undue focus on a complainant's behaviour. For example, "where the accused argues that the complainant's words, actions or level of intoxication reasonably led them to believe they were consenting, the jury will need to closely consider the complainant's conduct."[30] The research of Jonathan Crowe and Bri Lee (herself a survivor of sexual violence) identifies several undesirable and socially regressive consequences with the mistake of fact defence.[31] Their main

[22] See, for example, *Crimes Act 1900* (NSW) s 61HJ(1)(c).
[23] See, for example, *Crimes Act 1900* (NSW) s 61HJ(1)(f).
[24] See, for example, *Crimes Act 1900* (NSW) s 61HJ(1)(h).
[28] Law Reform Commission of Western Australia, *Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact* (Project 113: Sexual Offences, December 2022) [5.17].
[29] Women's Legal Service WA, *Preliminary Submission to Project 113: Sexual Offences*, Submission 11, 2.
[30] Law Reform Commission of Western Australia, above n 32, [5.19].
[31] Jonathan Crowe and Bri Lee, 'The mistake of fact excuse in Queensland Rape Law: Some problems and proposals for reform' (2020) 39 (1) *University of Queensland Law Journal*, 1.

	need for the prosecution to prove anything about the accused's state of mind regarding consent. In jurisdictions without a mental state element, the accused's mental state is relevant to the mistake of fact defence. This defence is available where the accused has an honest and reasonable, but mistaken, belief that the complainant was consenting.[25] Tasmanian law limits the mistake of fact defence by providing that a defendant may not rely on the defence if they were "in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated," or were "reckless as to whether or not the complainant consented," or "did not take reasonable steps, in the circumstances known at the time of the offence, to ascertain that the complainant was consenting."[26] Meanwhile, under Queensland law, it is simply the case that regard may be had to anything the accused said or did to ascertain consent when considering the mistake of fact defence.[27] WA legislation does not contain any additional guidance on the operation of the mistake of fact defence.	concern is that the excuse effectively undermines the way that Queensland law construes the notion of free and voluntary consent. They note that: "Consent cannot be established…by the complainant's social behaviour, relationship to the defendant or lack of overt resistance. However, all these factors have been found by the Court of Appeal to be potentially important in cases where the mistake of fact excuse is enlivened. The efforts of the Queensland courts to appropriately define the notion of consent by excluding prejudicial or irrelevant social or contextual factors, in other words, are undetermined by the defendant's ability to cite those factors as inducing or rationalising his mistaken belief as to consent.[32] Given the above concerns about the mistake of fact defence, and its propensity to deny justice to victim-survivors – as well as the broader objective of harmonisation – we recommend that QLD, WA and TAS should amend their legislation by: • Removing the mistake of fact defence altogether for sexual offences; • Instead imposing a mental state element for those offences, modelled off s 61HK of the *Crimes Act 1900* (NSW); • Specifying that the accused's belief in consent will not be considered reasonable where the accused failed to take positive steps to ascertain consent. Short of this comprehensive overhaul, at the very least, it is important to ensure the mistake of fact defence is properly contained – with a view to protecting the safety of victim-survivors. In this regard, if our above recommendation is not accepted, we suggest that instead, WA and QLD should amend their legislation to bring it in line with Tasmanian legislation by limiting the defence. We suggest that a best practice provision for limiting the defence is the following one developed by Jonathan Crowe and Bri Lee:

[25] *Criminal Code Act Compilation Act 1913* (WA) s 24; *Criminal Code Act 1899* (Qld) ss 24 and 348A; *Criminal Code Act 1924* (Tas) ss 14-14A.
[26] *Criminal Code Act 1924* (Tas) s 14A.
[27] *Criminal Code Act 1899* (Qld) s 348A(2).
[32] Ibid.

		A mistaken belief by the accused as to the existence of consent is not honest or reasonable if– • *the accused was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or* • *the accused did not, within a reasonable time before or at the time of each sexual act, say or do anything to ascertain that the complainant was consenting; or* • *the complainant was in a state of intoxication and did not clearly and positively express his or her consent to each act; or* • *the complainant was unconscious or asleep when any part of the act or sequence of acts occurred.*[33]
Positive steps by the accused to seek consent	The law in ACT, NSW, VIC and TAS addresses the taking of 'positive steps' by the accused to ascertain consent. The law in ACT, NSW and VIC specifies that the accused will not be taken to have had a reasonable belief in consent where they failed to seek consent from the complainant by saying or doing something.[34] Meanwhile, in TAS, the defendant may not rely on the 'mistake of fact' defence (described below) if they "did not take reasonable steps, in the circumstances known at the time of the offence, to ascertain that the complainant was consenting."[35] However, NSW and VIC provide carve-outs to the rule about taking positive steps to ascertain consent. In these jurisdictions, the rule in relation to taking positive steps does not apply to a defendant with a cognitive or	We recommend that: • Sections 192(3) and (4) of the *Criminal Code Act 1983* (NT) should be amended to clarify that consent is not present where any belief that the accused person had that the other person consented to the sexual activity was not reasonable in the circumstances; and • NT, WA, QLD and SA should introduce legislative amendments to require the accused to take positive steps to ascertain consent, to align with the law in TAS, NSW, VIC and ACT. FSA considers that these changes are necessary to move the onus away from victims to prove that they were not consenting. The proposed change to NT law is a bare minimum towards the application of an objective standard of consent. Meanwhile, legislation that does not require an accused person to take positive steps to ascertain consent will not lead to widespread changes to the legal system or better outcomes for victim-survivors, as patriarchal benchmarks will continue to define appropriate behaviours.[38] Without a requirement on defendants to take positive steps, the focus of criminal trials will

[33] Lee, Bri and Crowe, Jonathan, 'Reform,' *Consent Law in Queensland*, available at: https://www.consentlawqld.com/reform.
[34] See *Crimes Act 1900* (ACT) s 67(5); *Crimes Act 1900* (NSW) s 61HK(2); *Crimes Act 1958* (VIC) s 36A(2).
[35] *Criminal Code Act 1924* (Tas) s 14A.
[38] Rachel Burgin and Asher Flynn, 'Women's Behaviour as Implied Consent: Male 'Reasonableness' in Australian Rape Law' (2021) 21(3) *Criminology and Criminal Justice* 334, 336.

	mental health impairment, which was a substantial cause of the defendant not taking positive steps.[36] TAS and ACT law do not have these carve-outs. Finally, NT, WA, QLD and SA legislation does not require an accused person to take positive steps to ascertain consent from a sexual partner. Relatedly, NT legislation only provides that conduct is unlawful where the accused knew the victim did not consent, or was reckless as to consent[37] – it does not refer to a case where the accused's belief in consent was not reasonable in the circumstances.	continue to inappropriately sit with victims to demonstrate non-consent.[39]

Recommendation 2: To align the definition of consent in all jurisdictions, with this definition based on an affirmative model of consent:

- Tasmania should amend its legislation to clarify that agreement to sexual activity must be "free and voluntary," rather than just "free"; and
- All jurisdictions should amend their legislative definition of consent, to specify that consent must be "communicated by words or actions" (as is already the case in ACT law).

Recommendation 3: The objectives of sexual offence provisions should be aligned across the country, with a view to promoting affirmative consent. To this end, we recommend that QLD, WA, SA, TAS and the NT amend their criminal legislation to introduce an 'objectives' provision for sexual offences that specifies:

- Every person has a right to choose whether or not to participate in a sexual activity;
- Consent to a sexual activity is not to be presumed; and
- Consensual sexual activity involves ongoing and mutual communication and decision-making between participants.

Recommendation 4: All jurisdictions should enact legislative amendments to adopt the guiding principles in s 37B of the *Crimes Act 1958* (VIC), as well as additional guiding principles aimed at explicitly debunking common myths and misconceptions regarding sexual violence. Best practice guiding principles are set out in this submission.

Recommendation 5: To ensure that the possibility of a "freeze" response to sexual violence is appropriately addressed by legislation, in a uniform way across the country, we recommend that:

[36] See *Crimes Act 1900* (NSW) s 61HK(3); *Crimes Act 1958* (VIC) s 36A(3).
[37] See ss 192(3) and (4) of the *Criminal Code Act 1983* (NT).
[39] Julia Quilter and Luke McNamara, Qualitative Analysis of County Court of Victoria Rape Trial Transcripts (Report to the Victorian Law Reform Commission, 2021); Anthony North, 'Legislating Consent in Sexual Relations: How Significant is the Move to Affirmative Consent?' (2022) 0(0) *Alternative Law Journal* 1, 3-4.

- The NT, SA and TAS amend their criminal legislation to specify that a lack of physical or verbal resistance does not, of itself, amount to consent; and
- WA amend its criminal legislation to specify that "a lack of physical *or verbal* resistance does not, of itself, amount to consent" (currently, WA legislation only refers to physical resistance).

Recommendation 6: To ensure a harmonised approach to withdrawal of consent, we recommend that WA, TAS and the NT introduce provisions explicitly stating that a person may, by words or conduct, withdraw consent to sexual activity – and that sexual activity that continues after consent has been withdrawn occurs without consent.

Recommendation 7: We recommend that QLD, TAS, SA, NT and WA amend their legislation to introduce provisions specifying that consent is specific and limited to the person, occasion and activity for which it was provided. This provision should be modelled off provisions in VIC and ACT law.

Recommendation 8: For clarity and consistency, and to ensure more just outcomes for victim-survivors, FSA recommends that all jurisdictions adopt a comprehensive, uniform, non-exhaustive list of factors where consent does not exist. This list should be modelled off section 61HJ of the *Crimes Act 1900* (NSW), which we consider contains a comprehensive list of situations in which consent does not exist.

Recommendation 9: To support harmonisation and remove a legislative loophole with the propensity to deny justice to victim-survivors, QLD, TAS and WA should align their legislation to most other jurisdictions by specifying that the mistake of fact defence does not apply to sexual offences. Instead, these jurisdictions should impose a mental state element for sexual offences, modelled off s 61HK of the *Crimes Act 1900* (NSW).

Recommendation 10: Sections 192(3) and (4) of the *Criminal Code Act 1983* (NT) should be amended to clarify that consent is not present where any belief that the accused person had that the other person consented to the sexual activity was not reasonable in the circumstances

Recommendation 11: NT, WA, QLD and SA should introduce legislative amendments to require the accused to take positive steps to ascertain consent, to align with the law in TAS, NSW, VIC and ACT.

Explicit legislative prohibition of 'stealthing'

Legislative protection for victim-survivors would be strengthened if all Australian jurisdictions introduced provisions to expressly prohibit 'stealthing.'

'Stealthing' refers to the non-consensual tampering with or removal of a condom during sexual intercourse. It is an increasing practice that leads to adverse consequences for victims, including the risk of STI transmission and unwanted pregnancy.[40]

Stealthing has been introduced as a standalone factor negating consent in the ACT, Tasmania and Victoria.[41] Meanwhile, in NSW, the act of stealthing is captured by a broader provision specifying that a person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to

[40] Women's Safety and Justice Taskforce, above n 37, 218; Sienna Parrott and Brianna Chesser, *Stealthing: Legislating for Change* (Report, October 2022) 2.
[41] See *Criminal Code Act 1924* (Tas) Schedule 1, s 2A(2A); *Crimes Act 1900* (ACT) s 67(1); *Crimes Act 1958* (VIC) s 36AA(1).

consent to any other sexual activity.[42] That provision in NSW law contains an example that "a person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom."

However, legislation in NT, QLD, SA and WA does not expressly criminalise stealthing. In these jurisdictions, ambiguity in the law may lead to negative outcomes for victim-survivors navigating the legal system. While there is some consensus amongst academics that stealthing vitiates consent,[43] whether this practice constitutes sexual assault depends on the court's interpretation of current consent provisions – which leads to inconsistencies in decision-making.[44] For example, in one Queensland case, the District Court at Southport rejected the argument that stealthing could not reasonably support a rape prosecution; while in a similar case (also involving stealthing), the Queensland ODPP refused to proceed with an indictment for rape due to difficulties establishing the defendant's intention.[45]

The introduction of express provisions prohibiting stealthing in the NT, QLD, SA and WA would strengthen legislative protection available to victim-survivors. A clear legislative prohibition is important, as research shows that only approximately 15% of Australians are familiar with the practice of stealthing, and 56% are unclear as to its legal status.[46]

We note that this was one of the recommendations of the Queensland Women's Safety and Justice Taskforce in July 2022.[47]

Recommendation 12: All Australian jurisdictions should introduce legislation specifically making 'stealthing' a criminal offence.

Limiting admissibility of sexual reputation and experience evidence

FSA strongly supports banning the admission of sexual reputation evidence in all cases, and limiting the admissibility of sexual experience and activity evidence, in sexual violence matters. Not only is this kind of evidence re-traumatising to victim-survivors but, in our view, it is also of limited evidentiary value and can reinforce harmful stereotypes about sexual violence. As noted by the Australian Law Reform Commission, "this issue is an important one for all complainants in sexual assault cases for whom the admission of sexual experience evidence can have the effect of re-traumatisation through humiliation and 'victim-blaming.'"[48]

To this end, we recommend that:

- NT introduce legislative amendments to specify that sexual reputation evidence is not admissible in any circumstances;

[42] *Crimes Act 1900* (NSW) s 61HI(5).
[43] Women's Safety and Justice Taskforce, above n 37, 218.
[44] Ibid.
[45] Ibid, 137.
[46] Parrott and Chesser, above n 38, 1.
[47] Women's Safety and Justice Taskforce, above n 37, 17. See recommendation 44(b).
[48] Australian Law Reform Commission, 'Sexual Reputation and Experience', *Family Violence: A National Legal Response* (ALRC Report 114) [27.37].

- All jurisdictions introduce legislative amendments to take a harmonised approach to sexual experience and activity evidence, based on Part 8.2, Division 2 of the *Criminal Procedure Act 2009* (Vic); and
- All jurisdictions harmonise the terminology used to refer to 'sexual reputation,' 'sexual experience' and 'sexual activity' evidence – with clear legislative guidance on what relevant terms mean.

The reasons for these recommendations are outlined below.

Issue	Jurisdictional analysis	Recommendations
Admissibility of sexual reputation evidence	Legislation in VIC and QLD prohibits questions or evidence concerning the reputation of the complainant with respect to chastity.[49] Similarly, NSW, ACT, WA, SA and TAS legislation prohibit evidence relating to the sexual reputation of the complainant.[50] In WA, evidence of the 'sexual disposition' of the complainant is also prohibited from being adduced.[51] Meanwhile, NT legislation enables evidence of a complainant's "general reputation as to chastity" to be admitted with the leave of the court, if the court is satisfied that the evidence has substantial relevance to the facts in issue.[52]	We recommend that NT legislation be amended to specify that sexual reputation evidence is not admissible in any circumstances. This would bring NT legislation in line with all other states and territories, which serves the purpose of harmonisation (the benefits of which are outlined above). It would also ensure that decisions cannot be made based on evidence with limited evidentiary value, and which reinforces harmful rape myths.
Admissibility of evidence of the sexual experience or sexual activities of the complainant	Rules about the admissibility of evidence about a complainant's sexual experience and sexual activities differ across jurisdictions. Terminology used across jurisdictions also varies – with some jurisdictions referring only to 'sexual experience' or 'sexual activity' evidence, others referring to both 'sexual experience' and 'sexual activity' evidence, and others using different terminology altogether (e.g. 'sexual history' in Victoria). VIC law provides that evidence of a complainant's sexual activities is only admissible with the leave of the Court, which will only be granted where: • the evidence has substantial relevance to a fact in issue; and	We recommend that, to support harmonisation, all jurisdictions adopt a single rule regarding the admissibility of evidence of the sexual experience and sexual activities of a complainant. We recommend that this rule be modelled off Victorian legislation, which provides the most comprehensive restrictions on

[49] *Criminal Procedure Act 2009* (Vic) s 341; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4.
[50] *Criminal Procedure Act 1986* (NSW) s 294CB (2); *Evidence (Miscellaneous Provisions) Act* (ACT) s 75; *Evidence Act* (WA) s 36B; *Evidence ACT 1929* (SA) s 34L (1)(a); *Evidence Act 2001* (Tas) s 194M.
[51] *Evidence Act* (WA) s 36BA.
[52] *Sexual Offences (Evidence and Procedure) Act* (NT) s 4.

	• it is in the interests of justice to admit the evidence, with regard to whether its probative value outweighs the distress, humiliation and embarrassment of the complainant; the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility; the need to respect the complainant's personal dignity and privacy; and the right of the accused to fully answer and defend the charge.[53] Additionally, VIC legislation provides that sexual history evidence is not admissible to support an inference that the complainant is the type of person who to have consented to the sexual activity to which the charge relates.[54] WA and TAS legislation provide that leave may only be granted to admit sexual experience evidence where: • the evidence has substantial[55] relevance to the facts in issue; and • the probative value of the evidence outweighs any distress, humiliation or embarrassment which the complainant might suffer.[56] NSW legislation provides that evidence of a complainant's sexual activities or sexual experience is not admissible unless: • it fits into one of the categories listed in s 294CB(4) of the *Criminal Procedure Act 1986* (e.g., that the evidence relates to a relationship with the defendant, that was existing or recent at the time of the offence); and • the probative value of the evidence outweighs the potential to cause distress, humiliation, or embarrassment to the complainant.[57] SA legislation provides that no question may be asked, or evidence admitted, about a complainant's sexual activities (other than recent sexual activities with the accused), unless the Court: • gives effect to the principle that alleged victims of sexual offences should not be subjected to unnecessary distress, humiliation or embarrassment; • is satisfied that the evidence is of substantial probative value, or would likely materially impair confidence in the reliability of the complainant; and	admissibility of sexual experience and activity evidence, and appropriately links admissibility to substantial relevance to facts in issue and the interests of justice. In particular, we urge ACT, QLD and the NT to adopt an approach which places emphasis on the emotional distress, humiliation and potential embarrassment for the complainant, which the use of this evidence may cause, rather than just considering the evidence's relevance to facts in issue. Harmonisation of terminology is also important – to increase accessibility of the justice system and reduce confusion for victim-survivors who wish to engage with the justice system. As noted by the Australian Law Reform Commission, "statutory and judicial guidance about the meaning and boundaries of each of these terms and the kinds of evidence covered are limited. In practice, this uncertainty may inhibit the ability of judicial officers and practitioners

[53] *Criminal Procedure Act 2009* (Vic) s 342, 349.
[54] *Criminal Procedure Act 2009* (Vic) ss 343, 350.
[55] Tasmanian law provides 'direct and substantial,' rather than just 'substantial.'
[56] *Evidence Act 1906* (WA) s 36BC (2); *Evidence Act 2001* (Tas) s 194M.
[57] *Criminal Procedure Act 1986* (NSW) s 294CB (4).

	• is satisfied that admission of the evidence is required in the interests of justice.[58] ACT legislation provides that evidence of a complainant's sexual activities with person(s) other than the defendant is only admissible with the leave of the Court – and that leave may only be granted where the evidence has substantial relevance to the facts in issue, or is a proper matter for cross-examination about credit.[59] This restriction only applies to evidence about sexual activity with persons other than the accused (i.e. evidence of sexual activities with the accused is still admissible). QLD legislation provides that no question may be asked, or evidence admitted, about a complainant's sexual activities, unless the Court is satisfied the evidence has substantial relevance to the facts in issue or is proper matter for cross-examination as to credit.[60] NT legislation enables evidence of a complainant's "sexual activities with any other person" to be admitted with the leave of the court, if the court is satisfied that the evidence has substantial relevance to the facts in issue.[61] NT legislation specifies that evidence of an act or event that is "substantially contemporaneous" with the offence, or is part of a sequence of acts or events that explain the circumstances in which the offence was committed, shall be regarded as having substantial relevance.[62]	to apply and observe the current legislative provisions."[63]

Recommendation 13: NT should align its legislation with that of other states and territories, by introducing legislative amendments to specify that sexual reputation evidence is not admissible in any circumstances.

Recommendation 14: The approach to the admissibility of sexual experience and activity evidence should be aligned across the country. To this end, all jurisdictions other than Victoria should introduce legislative amendments that limit the admissibility of this evidence modelled off Part 8.2, Division 2 of the *Criminal Procedure Act 2009* (Vic).

Recommendation 15: All jurisdictions should harmonise the terminology used to refer to 'sexual reputation,' 'sexual experience' and 'sexual activity' evidence – with clear legislative guidance on what relevant terms mean.

[58] *Evidence Act 1929* (SA) s 34L.
[59] *Evidence (Miscellaneous Provisions) Act* (ACT) ss 76, 78.
[60] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(3).
[61] *Sexual Offences (Evidence and Procedure) Act* (NT) s 4.
62 Ibid.
[63] Australian Law Reform Commission, above n 46, [27.23].

Allowing greater admissibility of tendency and coincidence evidence

We recommend legislative reforms to harmonise the position regarding the admissibility of tendency and coincidence evidence across the country, and increase the admissibility of this evidence. These reforms should be based on the position in NSW, TAS, ACT and NT legislation,[64] with slight amendments to incorporate the recommendations of Professor David Hamer (set out below).

In NSW, TAS, ACT and NT – all of which have adopted Uniform Evidence Acts – legislation on the admissibility of tendency and coincidence evidence specifies that:

- Tendency and coincidence evidence is admissible where it has significant probative value, which outweighs the danger of unfair prejudice to the defendant.[65]
- Issues of concoction, collusion or contamination should not affect the admissibility of tendency or coincidence evidence;[66] and
- Tendency evidence about the defendant's sexual interest in children, or about the defendant acting on such interest, is presumed to have significant probative value.[67]

Meanwhile, Victorian legislation is less permissive about the admissibility of tendency and coincidence evidence than legislation in NSW, TAS, ACT and the NT.[68] And QLD, WA and SA have their own provisions regarding the admissibility of tendency and coincidence evidence (which uses different terms for these forms of evidence).

The fact that rules about the admissibility of tendency and coincidence evidence differ across the country, and different jurisdictions apply different terminology to this evidence, can cause confusion for victim-survivors navigating the criminal justice system, and mean that justice outcomes differ depending on where proceedings are brought. This is clearly not in the interests of justice. We therefore consider it important that a harmonised approach be taken to the admissibility of this evidence.

We think the harmonised approach should be based on the position in NSW, TAS, ACT and NT evidence legislation, with the following changes to s 97A of those jurisdictions' legislation to expand the admissibility of tendency and coincidence evidence:

- Section 97A should be amended to apply to all sexual offence matters (i.e. matters involving both adult and child complainants) – not only child sexual offence matters. This change could be achieved with wording to the effect of "evidence about the defendant's propensity to commit sexual violence is presumed to have significant probative value."

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[64] *Evidence Act 1995* (NSW); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (TAS).
[65] See, for example, *Evidence Act 1995* (NSW) ss 97, 98, 101.
[66] See, for example, *Evidence Act 1995* (NSW) s 94(5).
[67] See, for example, *Evidence Act 1995* (NSW) s 97A.
[68] While Victoria, like NSW, TAS, ACT and the NT, has introduced a Uniform Evidence Act, Victoria has not yet followed NSW, TAS, ACT and the NT in amending its evidence law to give effect to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. As such, Victorian legislation is less permissive regarding the admissibility of tendency and coincidence evidence than other jurisdictions with Uniform Evidence Acts.

- Section 97A should be expanded to refer to both tendency and coincidence evidence. Professor Hamer notes that "The distinction between tendency and coincidence evidence is artificial and unnecessary."[69]

As noted by Professor Hamer, "the s 97A presumption has a restricted sphere of operation. It is limited to [child sexual offence] proceedings; and tendency evidence – not coincidence evidence – of a defendant's sexual interest in children."[70] Hamer argues that "there are no sound policy reasons for these restrictions, and that resulting tensions may impact the way the presumption is applied in practice."[71]

Adopting a more permissive approach to the admissibility of both tendency and coincidence evidence, in both adult and child sexual offence matters, is important, as this evidence is highly relevant to all sexual violence matters. Noting that sexual violence often occurs without witnesses, which is a strong contributing factor to the ongoing low conviction rates for these crimes (relative to other types of crime), tendency and coincidence evidence can greatly impact the prosecution of these matters. As noted by Professor Hamer, "these are serious offences that occur on a very large scale, and they are difficult to prosecute… [T]he same applies to adult sexual assault, and there are many other crimes where this evidence could also play a greater role and assist in enforcement."[72]

Recommendation 16: All jurisdictions should adopt a harmonised approach to the admissibility of tendency and coincidence evidence, based on uniform legislation in NSW, ACT, NT and TAS – with the following changes to increase the admissibility of relevant evidence in both child and adult sexual offence matters:

- Section 97A should be amended to apply to all sexual offence matters (i.e. matters involving both adult and child complainants) – not only child sexual offence matters.
- Section 97A should be expanded to refer to both tendency and coincidence evidence.

Jury directions to address harmful rape myths

FSA recommends legislating harmonised jury directions for sexual offence trials in all jurisdictions.

Currently, legislated jury directions for sexual offences vary between jurisdictions – with comprehensive legislated directions in some jurisdictions, and less comprehensive legislation in others, where instead, directing juries in sexual offence trials based on a combination of legislation, common law, experience, and in some cases, Bench Book directions.

We consider that jury directions in NSW and VIC are most comprehensive, so harmonised jury directions should be based on the directions required to be given in these jurisdictions.

Reasons why harmonised legislation on jury directions is important

[69] David Hamer, 'Myths, Misconceptions and Mixed Messages: An Early Look at the New Tendency and Coincidence Evidence Provisions' 45 Crim LJ 232.
70 Ibid.
71 Ibid.
[72] Professor David Hamer, quoted in Silva, Francisco, 'Tendency for Trouble,' Law Society Journal, 14 April 2022, available at: https://lsj.com.au/articles/a-tendency-for-trouble/.

Jury directions play an essential role in guiding juries through complex legal concepts and ensuring that they make informed and fair decisions in criminal trials. In rape trials, these directions are particularly critical due to widespread misconceptions about sexual offences and enduring negative attitudes towards victims. For example:

- A lack of understanding of the range of trauma responses – for example, the commonness of "freeze" and "fawn" responses, which do not involve active resistance by a victim-survivor, the fact that trauma can affect recall, and the fact that some victim-survivors may not appear distressed while giving evidence about a traumatic event. A 2009 study found that jurors often drew negative inferences from a complainant's failure to appear obviously distressed while testifying, to report the offence immediately or to fight back physically during the assault – even though these are common responses among genuine victims of sexual violence.[73]
- A lack of understanding of complex power imbalances underlying a person's ability (or lack thereof) to consent and withdraw consent.[74] Research shows that misconceptions about consent can influence juror decision-making in sexual offence trials "to the detriment of a proper application of the law of consent;"[75]
- "Real rape" myths, which do not accord with sexual violence perpetrated in intimate partner relationships or by a person known to the survivor. Research shows that individual complainants whose experience departs from the archetype of "real rape" (where the perpetrator is a stranger, physical violence is used and the victim fights back) are less likely to be accepted by jurors as genuine;[76]
- The persistence of victim blaming; and
- Lack of sympathy for victims who don't match "perfect victim" archetypes.

As the New Zealand Law Commission noted in its 2015 report, 'The Justice Response to Victims of Sexual Violence,' the prevalence of these misconceptions in sexual violence trials often inhibits the jury's ability to perform its function, which is to apply combined common sense and life experience to ascertain the facts in a criminal case.[77] Research has found that jurors commonly rely on ignorant or biased assumptions when determining guilt in sexual violence matters. For example, a 2007 study conducted by the Australian Institute of Criminology revealed that:

> *Pre-existing juror attitudes about sexual assault not only influence their judgements about the credibility of the complainant and guilt of the accused, but also influence judgements more than the facts of the case presented and the manner in which the testimony is given.*[78]

Dealing with jury directions comprehensively in legislation – rather than leaving directions up to common law, Bench Book guidance and individual judges' discretion – and harmonising them across the country, is important because:

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[73] L. Ellison and V. Munro, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) *The British Journal of Criminology* 363, 363.
[74] Enhance Research, *Community Attitudes to Sexual Consent* (Women's Safety and Justice Taskforce (Qld), 2022).
[75] New South Wales Law Reform Commission, above n 4, [8.35].
[76] H. Gerger, H. Kley, G. Bohner, F. Siebler, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33(5) Aggressive Behavior 422, 423.
[77] New Zealand Law Commission, 'The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes', NZLC R136 (December 2015), 12
[78] N. Taylor and J. Joudo, 'The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: An experimental study', *Research and Public Policy Series* No 68 (Canberra: Australian Institute of Criminology, 2005).

- It is likely to lead to fairer trials, by specifying the steps judicial officers must take to address common myths and misconceptions about sexual offences and consent;
- It will create greater consistency in judicial officers' handling of sexual violence trials across the country, which would likely have the positive effect of increasing certainty of both process and outcomes; and
- It would increase the confidence of victim-survivors and the general public regarding the way sexual violence trials are handled.

Below, we have addressed several jury directions which we believe should be harmonised across the country. These are based on directions required to be given under NSW and VIC law.

Direction about consent

FSA supports the implementation of a legislated jury direction about the meaning of consent in all jurisdictions, which explains the affirmative consent model, including that:

- consent must be free and voluntary;
- consent requires a positive act of communication; and
- consent may be withdrawn at any time by words or conduct, and sexual activity that occurs after consent has been withdrawn occurs without consent.

We consider that this would support the amendments recommended above to legislate harmonised affirmative consent legislation.

Direction about responses to sexual violence

FSA recommends that all jurisdictions introduce a harmonised legislated jury direction about the multitude of ways that people may respond to sexual violence.

We would support a harmonised legislated direction modelled off the following provision in New South Wales and Victorian law:[79]

(a) there is no typical or normal response to non-consensual sexual activity, and
(b) people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and
(c) the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.

FSA considers that legislating such a provision in all jurisdictions would help ensure that the ongoing dearth of understanding regarding normal trauma responses is addressed in a consistent way across the country.

[79] See *Criminal Procedure Act 1986* (NSW) s 292B; *Jury Directions Act 2015* (Vic) s 47E.

Research shows that misconceptions about how a "real victim" would react to a sexual offence (for example, physical struggle or clearly expressing rejection) continue to adversely affect the assessment of complainants' credibility in sexual assault trials.[80] In addition, despite significant evidence that "freeze" and "fawn" responses are normal reactions to sexual violence, cross-examination continues to raise a failure to resist to suggest that a complainant was consenting to sexual activity.[81] In light of these ongoing issues, having consistent legislative guidelines for jury directions, which apply across the country, is essential.

Directions About the Absence of Injury, Violence or Threat

FSA recommends that all jurisdictions introduce a harmonised legislated jury direction which specifies that non-consensual sexual activity may have occurred even if the victim did not experience injury, physical violence or threat.

We would support a harmonised legislated direction modelled off the following provision in New South Wales and Victorian law:[82]

> *(a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and*
> *(b) the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence.*

Despite overwhelming evidence that non-consensual sexual activity may occur in a range of contexts and relationships, and regardless of whether there is injury or violence present, many persist in understanding rape as a stranger forcibly assaulting a woman in a deserted area, where, despite her physical and verbal resistance, she cannot stop the assault. As a result, juries are often influenced by the misconception that a "genuine victim" of sexual assault would experience physical injury.[83] Legislating a jury direction to correct that misconception, which applies consistently across the country, will allow the law to better support victims who have not sustained injury but have nevertheless experienced non-consensual sexual violence, which accounts for a large proportion of cases.

Directions About Other Sexual Activity

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[80] See Isla Callander, 'Jury Directions in Rape Trials in Scotland' (2016) 20 *Edinburgh Law Review* 76, 77; Kimberly Peterson, 'Victim of villain?: The effects of rape culture and rape myths on justice for rape victims' (2019) 53 *Valparaiso University Law Review* 467, 485-486; Louise Ellison and Vanessa E Munro, 'Reacting to Rape: exploring jurors' assessments of complainant credibility' (2009) 49(2) *British Journal of Criminology* 202; 62 Louise Ellison and Vanessa E Munro, 'Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials' (2009) 49(3) *British Journal of Criminology* 363; NSW Law Reform Commission, *Consent in relation to sexual offences: Draft proposals*, October 2019, [8.2].

[81] E McDonald and others, Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot (Canterbury University Press, 2020) 277. See also J Horan and J Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43 *UNSW Law Journal* 707, 716; New South Wales Law Reform Commission, above n 4, [8.99]-[8.101].

[82] See *Criminal Procedure Act 1986* (NSW) s 292C; *Jury Directions Act 2015* (Vic) s 47D(b).

[83] Louise Ellison and Vanessa E Munro, 'Turning Mirrors Into Windows? Assessing the Impact of Mock Juror Education in Rape Trials' (2009) 49 *British Journal of Criminology* 363, 371–372; Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 *British Journal of Criminology* 202, 206–207; Louise Ellison and Vanessa E Munro, 'Better the Devil you Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17 *International Journal of Evidence and Proof* 299, 314–315.

FSA recommends that all jurisdictions introduce a harmonised legislated jury direction to clarify that, in considering whether a person consented to sexual activity, it is not relevant that they have engaged in other sexual activities in the past.

We would support a harmonised legislated direction modelled off the following provision in Victorian law:[84]

> *People who do not consent to a sexual activity with a particular person on one occasion, may have, on one or more other occasions, engaged in or been involved in consensual sexual activity–*
>
> *(a) with that person or another person, or*
>
> *(b) of the same kind or a different kind.*

It is common for a victim to have consented to some sexual activity with the accused prior to sexual assault, or to have consented to participating in a different sexual activity with the accused at the time of the alleged assault.[85] This direction would make it clear that prior sexual activity is not relevant to whether a person consented to the sexual activity being considered in proceedings.

It would also address the persistence of victim blaming and negative stereotyping of victims who do not meet the "perfect victim" archetype, and remind jurors to consider only the facts of the case before them.

Directions About Personal Appearance and Irrelevant Conduct

FSA recommends that all jurisdictions introduce a harmonised legislated jury direction with the following elements, modelled off Victorian and NSW law:[86]

> *It should not be assumed that a person consented to a sexual activity because the person–*
>
> *(a) wore particular clothing or had a particular appearance, or*
>
> *(b) consumed alcohol or another drug, or*
>
> *(c) was present in a particular location, or*
>
> *(d) acted flirtatiously.*

Legislating such a direction in all jurisdictions would help to address dated and false narratives, which drive victim blaming and deny survivors justice, in a consistent way across the country.

Directions About the Relationship Between Perpetrators and Victim-Survivors

[84] See *Jury Directions Act 2015* (Vic) s 47F.
[85] Harrison Lee et al, 'The Effects of Victim Testimony Order and Judicial Education on Juror Decision-Making in Trials for Rape' (2022) *Psychology, Crime and Law* 1, 4.
[86] See *Criminal Procedure Act 1986* (NSW) s 292; *Jury Directions Act 2015* (Vic) s 47G.

FSA recommends that all jurisdictions introduce a harmonised legislated jury direction regarding existing relationships between perpetrators and victim-survivors. Such a direction could be modelled off the following provision in Victorian law:[87]

> *Non-consensual sexual activity can occur between different kinds of people including –*
> *(a) people who know one another, or*
> *(b) people who are married to one another, or*
> *(c) people who are in an established relationship with one another, or*
> *(d) people who provide commercial sexual services and people for whose arousal or gratification such services are provided, or*
> *(e) people of the same or different sexual orientations, or*
> *(f) people of any gender identity, including people whose gender identity does not correspond to their designated sex at birth.*

Despite being the fact that 35% of women have experienced physical or sexual violence, or both, perpetrated by a man they know,[88] the myth that sexual offences are usually committed by strangers persists. If all jurisdictions adopted the above jury direction in their legislation, this would provide better protection to survivors of intimate partner sexual violence, and survivors who have otherwise experienced sexual violence perpetrated by someone known to them.

Additionally, FSA supports a harmonised legislated jury direction in relation to the continuation of a relationship after a sexual offence occurs, which could be modelled off the following Victorian provisions:[89]

> *(a) some people who are subjected to a sexual act without their consent will never again contact the person who subjected them to the act, while others –*
> *(i) may continue a relationship with that person, or*
> *(ii) may otherwise continue to communicate with them, and*
> *(b) there may be good reasons why a person who is subjected to a sexual act without their consent—*
> *(i) may continue a relationship with the person who subjected them to the act, or*
> *(ii) may otherwise continue to communicate with that person.*

Directions About Differences in the Complainant's Accounts

FSA recommends that all jurisdictions introduce a harmonised legislated jury direction to make it clear that differences in a complainant's accounts do not necessarily point to a lack of credibility.

A common misconception in sexual offence cases is that complainants will always give full and consistent accounts of relevant events, remember all details of an offence and be consistent in their

[87] *Jury Directions Act 2015* (Vic) s 47H; see also *Criminal Procedure Act 1986* (NSW) s 292A.
[88] Australian Bureau of Statistics, above n 1.
[89] *Jury Directions Act 2015* (Vic) s 54H.

descriptions of it.[90] However, research shows that it is common for a complainant to recount their experience of a sexual offence differently at different times, because of the way they retain and recall memories, the context of the disclosure, or feelings of stress or embarrassment.[91] Disordered and fragmented memories are also common responses to trauma.

Including a jury direction in all jurisdictions that specifically addresses differences in a complainant's accounts, reflecting the fact that inconsistencies in accounts in trials for sexual offences are common but do not necessarily mean that a complainant is fabricating their story, will help address this reality.

FSA supports the implementation of a harmonised legislated jury direction modelled off those given in New South Wales and Victoria:[92]

(1) In circumstances to which this section applies, the Judge may direct the jury—
(a) that experience shows—
(i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time, and
(ii) trauma may affect people differently, including affecting how they recall events, and
(iii) it is common for there to be differences in accounts of a sexual offence, and
(iv) both truthful and untruthful accounts of a sexual offence may contain differences, and
(b) that it is up to the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability.
(2) In this section—difference in an account includes—
(a) a gap in the account, and
(b) an inconsistency in the account, and
(c) a difference between the account and another account.

FSA recommends such a direction should be able to be given as the judge sees fit, at any time during a trial, and on more than one occasion during a trial if required. This is the position in NSW law.[93]

Complainant responses to giving evidence

FSA recommends that all jurisdictions introduce a harmonised legislated jury direction that addresses bias against complainants who do not appear distressed when giving evidence.

There is ample evidence of complainants who appear calm or controlled in court being assessed as less credible than complainants who appear emotional, despite research that emotional demeanour is not a reliable indicator of honesty.

[90] Victorian Department of Justice and Regulation, Criminal Law Review, *Jury Directions: A JuryCentric Approach Part 2* (2017) 20; New South Wales Law Reform Commission, above n 4, [8.15].
[91] Victorian Department of Justice and Regulation, above n 88, vii; New South Wales Law Reform Commission, above n 4, [8.18].
[92] *Criminal Procedure Act 1986* (NSW) s 293A; *Jury Directions Act 2015* (Vic) s 54D.
[93] *Criminal Procedure Act 1986* (NSW) s 293A.

FSA recommends modelling a harmonised legislated jury direction off the following provision in NSW law:[94]

> *(a) Trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and*
> *(b) The presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.*

Timing of Directions

Other than directions about differences in the complainant's accounts, which we have set out proposed timing requirements for above, FSA considers that the required timing for each of the legislated jury directions recommended above should be:

- Directions must be given at the outset of every sexual offence trial; and
- Directions must be repeated during the sexual offence trial if there is a good reason to do so, or if a party to proceedings requests the direction be repeated and there is no good reason not to do so.

We consider that it is important that jury directions be given at the outset of proceedings in all sexual offence trials, as evidence shows that the potential for such directions to influence the outcome of a trial is dependent on their being given early. In a comparative study of 10 rape trials, which used the timing of jury direction as the key variable, early introduction of jury directions showed a higher conviction rate compared to when they were introduced later.[95] In 2004, the Victorian Law Reform Commission found that the timing of jury directions significantly impacts the jury's deliberation process, with directions delivered early being much more effective in combating misconceptions and myths about sexual assault.[96] Research has also found that in sexual violence trials, jury directions presented as part of a "lengthy judicial monologue, at the end of a days or weeks-long trial," are ineffective at enabling the jury to consider evidence through an alternative narrative framework that is not based on existing misconceptions.[97] This shows that, once a jury has built a narrative based on misconceptions at the start of a trial, it is more difficult to dislodge this later in proceedings.

In addition to giving directions at the beginning of a trial, it may be necessary to remind jurors of relevant directions later in proceedings – for example, if the defence's cross-examination inappropriately reinforces rape myths in a way that undermines jury directions given at the outset of proceedings. It has been found that "repetition of jury directions helps jury comprehension."[98] We have

[94] *Criminal Procedure Act 1986* (NSW) s 292D.
[95] Emma Henderson and Kirsty Duncanson, 'A little judicial direction: Can the use of jury directions challenge traditional consent narratives in rape trials?' (2016) 39(2) *UNSW Law Journal* 750, 759.
[96] Victorian Law Reform Commission (VLRC), *Sex Offences: Interim Report, Report No 78* (2004) Ch 7.
[97] Kirsty Duncanson and Emma Henderson, 'Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials' (2014) 22 *Feminist Legal Studies* 155, 172.
[98] Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, 2015) 9.

suggested that a harmonised provision governing the timing of such repeated directions be modelled off section 292(2) of the *Criminal Procedure Act 1986* (NSW).[99]

Recommendation 17: All jurisdictions should introduce legislative amendments to harmonise the jury directions required to be given in sexual offence matters, aimed at combating common misconceptions about sexual violence. Jury directions should largely be required to be given at the outset of proceedings, for the reasons set out in this submission, and should address:

- The meaning of consent, based on the affirmative model of consent recommended in this submission;
- The multitude of ways people might respond to sexual violence – including the freeze response. This should be based on jury directions in NSW and VIC law;
- The possibility that a nonconsensual sexual encounter may occur in the absence of injury, violence or threat. This should be based on jury directions in NSW and VIC law;
- The fact that, in considering whether a person consented to sexual activity, it is not relevant that they have engaged in other sexual activities in the past. This should be based on jury directions in VIC law;
- The irrelevance of the complainant's personal appearance and conduct – specifying that a complainant's clothing, appearance, conduct, consumption of alcohol or drugs, or presence in a particular location, are not relevant. This should be based on jury directions in NSW and VIC law;
- The fact that sexual violence may occur in a range of contexts, including between people in intimate relationships or who know each other, and that a victim-survivor might maintain a relationship with a perpetrator following sexual violence. These provisions should be based on jury directions in VIC law;
- The fact that differences in a complainant's accounts do not necessarily point to a lack of credibility. These provisions should be based on jury directions in NSW and VIC law; and
- The fact that trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not – and that this does not affect a complainant's credibility. These provisions should be based on jury directions in NSW law.

Gaps in legislation for responding to emerging trends

The AIC review asks what gaps exist in current legislation for responding to new and emerging trends in sexual violence and child sexual abuse.

A significant legislative gap is the regulation of pornography. This is a key part of primary prevention, in circumstances where many young people learn about sex and relationships by accessing widely available online pornography.

Readily available pornography can create and reinforce harmful stereotypes about gender roles and normalise sexual violence and child abuse. This is all impactful for young people and the views that they for about sex and relationships.

[99] Noting, however, that this provision deals with the giving of jury directions in the first instance. As set out above, FSA recommends that jury directions should be given in the first instance at the outset of proceedings – then repeated as required in the circumstances set out in s 292(2).

At a minimum, legislation in all states and territories should regulate harmful pornographic content. Associate Professor Michael Salter, an Associate Professor of criminology at UNSW, has recommended regulating adult content in the same way as other media content. For example, having certain standards about things that can and can't be depicted – for example, introducing legislation banning the depiction of sexual violence and sexual acts between family members.[100] FSA supports this approach.

This could be addressed via the introduction of legislation banning the display of harmful content (e.g. pornography displaying violence against women or child abuse), and sanctioning publishers who do display harmful content.

While legislative reform is critical, it is only part of the solution

We note that this inquiry specifically asks about legislative responses to sexual violence and child sexual abuses, so have focused our responses on this. However, it's important to note that legislative responses to sexual violence and child sexual abuse are only one piece of the puzzle.

In addition to improving legislation on sexual violence, it is essential to improve service systems delivering support to victim-survivors, by making them:

- More trauma-informed;
- Informed by the lived expertise of victim-survivors, so that services respond to the real issues faced by victim-survivors; and
- Better coordinated – so that victim-survivors feel empowered and supported from the first time they report sexual violence, and don't need to tell their stories again at multiple contact points.

These changes would complement legislative reform, to address low reporting and high attrition rates among victim-survivors of sexual violence.

In addition, primary prevention efforts – including fit-for-purpose consent education, and better regulation of harmful media content, which plays a key role in shaping attitudes towards sexual violence – is a key for reducing this form of gender-based violence in the long term.

[100] Associate Professor Michael Salter, quoted in Baker, Jordan, 'Anna was 10 when a boy first showed her porn on his iPad,' *Sydney Morning Herald,* 15 May 2023.