Question on Notice: Senate Legal and Constitutional Affairs References Committee Inquiry into current and proposed sexual consent laws in Australia.

Thank you again for giving Full Stop Australia the opportunity to be heard in the above Inquiry on 25 July 2023.

We are writing in response to the question we took on notice about the eight guiding principles set out in the Law Council of Australia's submission to the Inquiry. We apologise that we are providing our comments after the Law Council's appearance before the Inquiry, but hope the Committee will still find them useful in its deliberations.

Principle 1: Sexual consent laws and sexual assault offences should be expressed clearly

Full Stop Australia supports this principle. It is clearly in the public interest that laws are expressed and operate clearly.

As the Committee is aware, Full Stop Australia's submission to the Inquiry calls for national harmonisation of sexual offence and consent laws, based on an affirmative model of consent. In addition to being an important part of ensuring the justice system meets the needs of victim-survivors, and reflects contemporary social values, a nationally consistent affirmative consent model would improve clarity about what is expected of parties to sexual encounters.

NSW, Victoria and the ACT have recently passed legislative reforms instituting an affirmative standard of consent. At a high level, these laws require sexual partners to take positive steps to ascertain consent, recognise that consent must be positively expressed, recognise that consent involves ongoing and mutual communication and decision-making, and that it must be free and voluntary. In our view, these laws are very clear on what is required of all parties to a sexual encounter.

By contrast, there is far less clarity in legislation that doesn't impose an affirmative consent standard. For example, the Law Reform Commission of WA, which is currently reviewing WA's sexual offence legislation, noted that the *Criminal Code Act Compilation Act 1913* (WA) does not currently specify the way in which consent must be given. This is left to case law, which provides that this will usually be done by words or actions, but "in some circumstances, a representation might also be

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made by remaining silent and doing nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluated against a pattern of past behaviour."[1] This offers far less clarity than the legislative principles underpinning affirmative consent in jurisdictions where this standard has been adopted.

Principle 2: The fundamental principles that underpin the criminal justice process, such as the presumption of innocence and right to silence, must be maintained

In suggesting that a "communicative model of consent" could undermine fundamental principles of the criminal justice process, the Law Council's submission conflates multiple distinct features of that process – being the burden and standard of proof, the presumption of innocence, and the accused's right to silence. We disagree that any of these principles would be undermined by either a communicative or affirmative model of consent.

Firstly, we set out our understanding of the difference between communicative and affirmative models of consent. We understand from the Law Council's submission that the former requires participants to sexual activity to actively communicate their willingness to engage in sexual activity by words or conduct. Meanwhile, the latter goes further, by additionally requiring each participant to sexual activity to take measures to ascertain the other participant is consenting. As Full Stop is advocating for an affirmative model of consent, our comments below address why this standard would not undermine any fundamental principles of the criminal justice system, as the Law Council claims.

It is not at all clear to us how the presumption of innocence, or the burden or standard of proof, would be undermined by an affirmative standard of consent. As in all criminal cases, the prosecution would still be required to prove its case beyond reasonable doubt to secure a conviction. This is not shifted by affirmative consent laws. Rather, those laws make it clearer what is expected of all parties to a sexual encounter. In addition to reflecting contemporary social values, this makes the operation of the criminal law clearer.

It is also unclear how the accused's right to silence would be undermined by an affirmative standard of consent. Affirmative consent laws (for example, those that have been enacted in Victoria and NSW) provide that an accused cannot rely on a "reasonable belief" in consent if they failed to take positive steps to seek consent. This doesn't require the accused to testify or provide evidence in support of the prosecution's case, as the Law Council claims. Rather, it removes the defence's ability to claim the accused reasonably believed the complainant was consenting, if they took no steps to establish this. This is a commonsense position, which supports modern understandings of consent.

Finally, we note that the Law Council's submission refers to the rule of law, of which the presumption of innocence is a fundamental component. We wish to add that another foundational principle of the rule of law is that everyone in society must be accountable to the law. With

[1] Law Reform Commission of WA, 'Issues paper 4.2 - Should a participant's consent to sexual activity have to be communicated?', *Project 113: Sexual Offences,* available at: https://www.wa.gov.au/system/files/2023-01/LRC-Project-113-Issues-Paper-04.2.pdf.

reporting and conviction rates for sexual violence significantly lower than for other crimes, it is the protection of this principle that causes far greater concern. To ensure everyone is accountable to the law, we need a justice system that delivers fair outcomes and holds offenders accountable, and in which victims of crime feel safe and supported to come forward. Affirmative consent laws are one important step towards achieving this.

Principle 3: Any change should be justified on the basis of proportionality analysis, having regard to the interests of victim-survivors and the rights of the accused to a fair trial

We acknowledge the importance of protecting each of the rights of victim-survivors set out in this section.

We have commented above on the rights of the accused set out in relation to this principle – specifically, the presumption of innocence, right to silence, and burden and onus of proof. For the reasons set out above, we do not consider that affirmative consent reform would jeopardise these rights. We therefore do not consider that the proportionality analysis proposed by the Law Council is necessary – as the objective of better protecting the rights of victim-survivors through harmonised affirmative consent laws can be achieved without undermining the rights of the accused.

Principle 4: Sexual consent laws should reflect the communicative model of consent

As set out above, we understand the "communicative model" proposed by the Law Council's submission to be less comprehensive than an "affirmative consent" model, insofar as it doesn't address sexual partners taking "positive steps" to ascertain consent.

A best practice legislative model should require people to take positive steps to ascertain consent, if they propose to allege that they "reasonably believed" it was present in a sexual encounter. This is a very low bar to meet. It represents a basic foundation of respectful interactions, in a sexual context or otherwise. There are hundreds of exchanges we engage in daily, for which we seek consent. This is part of existing in public spaces and being a member of society. To say this is too high a bar for something as significant as engaging in sexual activity – when the consequences of not doing so can be so grave – is absurd.

Principle 5: Consideration should be given to vulnerable groups disproportionately impacted by implementation of communicative model of consent laws, including persons with disability and young persons

We acknowledge that people with disability can have particular vulnerabilities, which some jurisdictions have determined justify some departure from requirements that would otherwise apply under affirmative consent laws.[2] NSW and Victoria have created a carve-out from the requirement

[2] See, for example, s 61HK(3) of the *Crimes Act 1900* (NSW), which provides that the requirement to take positive steps to ascertain consent does not apply if the accused person shows that at the time of the sexual

to take positive steps to ascertain consent for people with cognitive or mental health impairments, where such impairments were a substantial cause of the accused person not saying or doing anything to ascertain consent. ACT and Tasmanian law do not contain such a carve-out.

As noted by Rachel Burgin, Jonathan Crowe and Holli Edwards in relation to the carve-out in NSW and Victorian law, "it could be argued that this is not the most appropriate way to deal with cognitive differences in relation to a seriously harmful act such as rape."[3] Burgin, Crowe and Edwards suggest that the following alternatives exist to protect the rights of people with cognitive impairment:

> *There are, for example, special provisions in Western Australian law so that perpetrators who do not have the cognitive capacity of an adult are not tried similarly to other adults. Judges also have significant discretion when sentencing someone with a different mental capacity, so they are not punished excessively given their cognitive difference.*[4]

We note the possibility for absurd application of the carve-out under NSW and Victorian law. For example, an accused could allege they were experiencing anxiety – with medical documentation to support this – and that this was the "substantial cause" of them not taking positive steps to ascertain consent. We consider this to be quite a different situation to someone with a substantial cognitive impairment not taking positive steps to ascertain consent. Without expressing a final view on what we consider the correct legal settings, as a general proposition, we think that the right to bodily and sexual autonomy, which the requirement to take positive steps to ascertain consent seeks to protect, are so important as to justify significantly limiting any carve-outs.

The Law Council also suggests, at paragraphs 61-64 of their submission, that "young persons" are particularly vulnerable. It is not clear whether the Law Council is suggesting that young persons should therefore be exempt from affirmative consent standards. For clarity, we do not think this is appropriate. As the Law Council notes in its submission, most victim-survivors of sexual violence are young people – many of whom engage in sexual conduct with other young people. Noting these statistics, to say that this cohort should receive some exemption from affirmative consent standards would seriously undermine the value of those standards. We reiterate that the standards of behaviour required by affirmative consent laws – the recognition that sexual relationships should be founded on mutual and ongoing communication, and that sexual partners should take active steps to check in about whether the other person wants to have sex – are such a low bar. This represents the absolute minimum of respectful interaction.

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activity, the accused person had a cognitive impairment (as defined by s 61HD) or a mental health impairment (defined in s 4C), and the impairment was a substantial cause of the accused person not saying or doing anything to ascertain consent. Victorian law contains an equivalent provision.

[3] Burgin, R, Crowe, J and Edwards, H, "Affirmative Consent and the Mistake of Fact Excuse in Western Australian Rape Law," *University of Western Australia Law Review*, Vol 50(1):1, available at: https://www.able.uwa.edu.au/__data/assets/pdf_file/0005/3687926/7.-AFFIRMATIVE-CONSENT-AND-THE-MISTAKE-OF-FACT-EXCUSE-IN-WESTERN-AUSTRALIAN-RAPE-LAW_.pdf.

[4] Ibid.

Principle 6: Consideration should be given to a broader range of policies, including restorative justice, to substantially reduce the incidence of sexual violence

We recognise the potential for restorative justice to offer an alternative path to recovery for some victim-survivors. The following principles should guide the use of this option:

- Victim-survivors' recovery, agency, choice and safety should be the primary considerations in whether this option is appropriate.
- This option should only be considered where the offender shows genuine remorse, a willingness to take responsibility and change their behaviour.
- Restorative justice should part of an 'integrated justice response' – with other criminal and civil justice options available, as well as therapeutic treatment programs.
- We agree with the Law Council that restorative justice should be seen as "a supplement to the criminal justice system and careful consideration should be given to the criteria for selecting appropriate matters for resolution on restorative justice principles."

The Victorian Law Reform Commission has proposed that this option should be available, among other cases, where harm is reported but there are insufficient grounds to file charges, or charges were filed but prosecution is discontinued. We are concerned that, if this becomes a guiding principle for the availability of restorative justice, it could encourage Police to funnel victim-survivors who would prefer for their cases to be heard in Court into restorative justice programs. We note that many victim-survivors find the process of reporting to Police disempowering and retraumatising. We are concerned about alternative justice mechanisms reducing victim-survivor agency. In considering restorative justice, this should be top of mind.

Principle 7: Consideration of broader limitations of the criminal justice system, including delays and the scope for appeals, that impact on the experience of victim-survivors

We support any measures that would reduce delays in the final determination of sexual violence matters and improve the experience of victim-survivors in the justice system. We note that delays in the Court process can prolong trauma experienced by victim-survivors, requiring them to relive painful events over many years, which can seriously impact their recovery journeys.

We support the Law Council's proposal to appropriately resource the legal assistance sector and judicial officers. We think this should include:

- Appropriate training on trauma and gendered drivers of sexual violence for all actors in the justice system; and
- Providing victim-survivors of sexual violence with universal access to specialised trauma-informed legal services, including independent victim-survivor advocates. This is critical for ensuring that victim-survivors feel empowered and informed to engage with the justice system.

The Law Council's submission also refers to jury directions. In our view, all jurisdictions should introduce mandatory jury directions, required to be given at the outset of proceedings and to correct improper assertions in real time, to support affirmative consent laws. Among other things, jury directions should address:

- The multitude of ways people might respond to sexual violence – including freeze and fawn responses;
- The impact of trauma on memory – that imperfect recall of facts (especially facts of no or marginal relevance) does not point to lack of credibility;
- That trauma may manifest in different ways, and may not appear as visible distress; and
- The irrelevance of a complainant's past sexual activities, appearance and conduct.

A 2021 study by Professors Julia Quilter and Luka McNamara, referenced in their submission to this Inquiry, found that, even in jurisdictions that have introduced affirmative consent laws, cross-examination still often runs contrary to legislation – questioning why victim-survivors "didn't just say no," and questioning victim-survivors' credibility over their imperfect recall of (often trivial) events.[5] Mandatory jury directions would limit cross-examination that reinforces victim-blaming and rape myths, or weaponises victim-survivors' experience of trauma against them.

Principle 8: The aims of any legislative change towards better realising the communicative model of consent should be supported by community education

We strongly support this principle, and each of the measures proposed by the Law Council, being:

- Integration of content on gender equality into curricula at all levels of education. We would add that education should address the gendered nature of sexual violence and its foundation in patriarchal structures. We would also support NASASV's proposal that all schools should have dedicated consent educators, who have specialist knowledge of gender-based violence, to deliver this training.
- Programs that seek to educate the community at large about gender-based violence, to encourage awareness, and improve reporting and intervention.
- Education for members of the judiciary and legal profession on consent, the gendered drivers of sexual violence, the impacts of trauma, and the rights of victim-survivors. We would add that this training should be available to all actors in the justice system (not only the judiciary and legal profession), especially police.

Thank you in advance for considering our above comments. We are more than happy to discuss any aspect of the above if that would assist the Committee with the Inquiry.

Yours faithfully,

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[5] See Dr Luke McNamara and Dr Julia Quilter's submission to this Inquiry (Submission 17).