Review of Sexual Consent Laws in South Australia.

Submission by Full Stop Australia
February 2024

Full Stop Australia acknowledges the Traditional Custodians of Country throughout Australia, and their continuing connection to land, sea and community. We pay our respects to them, their cultures and their Elders past and present.

About Full Stop Australia

Full Stop Australia thanks the South Australian Government for inviting us to comment on the Government's discussion paper, *Review of Sexual Consent Laws in South Australia* (**Discussion Paper**).

Full Stop Australia is a 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 to governments and in the media for laws and systems that better respond to, and ultimately prevent, gender-based violence.

Our advocacy draws upon the expertise of our trauma-specialist counsellors, who support people impacted by sexual, domestic and family violence across the country. It also draws on the lived expertise of our clients and over 600 survivor-advocates in our National Survivor Advocate Program—a program that facilitates survivor-advocates sharing their experiences to drive positive change. We are committed to centering the voices of victim-survivors in our work, and advocating for laws and systems that genuinely meet their needs.

About this submission

This submission doesn't respond to every question in the Discussion Paper. Our lack of response to certain questions is due purely to time constraints, and shouldn't be taken to indicate either support for, or opposition to, any particular policy approach.

The recommendations in this submission are underpinned by the following principles:

- Maximising victim-survivor autonomy and choice, by recognising that there is no 'right' way to seek justice following sexual violence, and ensuring access to a range of support options.
- Ensuring victim-survivors are given the right information, in a timely manner, to make informed choices about how to engage with the justice system.
- Understanding trauma and the gendered drivers of sexual violence. This includes recognising that all gender-based violence is rooted in misogyny and patriarchy, and incorporating that knowledge throughout the justice system.

- Increasing practical support, so victim-survivors are supported to engage with the justice system if they choose to do so.

This submission uses 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.

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

Affirmative consent

As noted in the Discussion Paper, there are extremely high rates of under-reporting of sexual violence, as well as significant attrition of sexual violence matters from the justice system. We reiterate the latest data from the Australian Bureau of Statistics (**ABS**), referred to in the Discussion Paper, that the majority (92% or 680,300) of women who experienced sexual assault by a male in the ten years prior to the survey did not report the most recent incident to police.[1] In addition, conviction rates for sexual offences are significantly lower than for other offences.[2]

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

Question 1: Should the definition of consent in South Australia include a positive obligation to obtain consent, consistent with an affirmative model of consent?

Full Stop Australia strongly supports amending the definition of consent in South Australia to include a positive obligation to obtain consent, consistent with an affirmative model of consent.

As set out in the Discussion Paper, adopting an affirmative consent model would involve amending the *Criminal Law Consolidation Act 1935* (SA) (**CLC Act**) to:

> [Place] a responsibility on the parties involved in sexual activity to continually ensure that consent is given throughout the activity [and place] particular responsibility on the initiator of the sexual activity, who must say or do something to determine whether the

[1] Australian Bureau of Statistics. (2021, August 24). *Sexual Violence - Victimisation*. ABS. https://www.abs.gov.au/articles/sexual-violence-victimisation.
[2] 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.

other person consents, in order to support the defence that they had a 'reasonable belief' as to the existence of consent.

Introducing a positive obligation to obtain consent appropriately shifts the fault element of sexual offences towards the accused—requiring them to show the steps they took to ensure a complainant was consenting.[3] This is a reasonable expectation and an extremely 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. Affirmative consent is a reasonable expectation for something as significant and consequential as engaging in sexual activity. The consequences of sexual activity without consent are grave.

There are several reasons why law reform introducing a positive obligation to obtain consent is important. Firstly, it would facilitate greater alignment between SA law, and best-practice legislative and policy approaches favoured across the country. The majority of other States and Territories have already legislated, or are in the process of legislating, an affirmative standard of consent that requires positive steps to be taken to obtain consent.[4] The 2023 Australian Senate inquiry on consent laws explicitly supported a legislative model of affirmative consent—saying that an affirmative consent standard should be used as the basis for any harmonisation of Australia's sexual consent laws.[5]

Legislating an affirmative model of consent would align SA law with Federal Government policy, expressed in the recently released *Consent Policy Framework*. The *Framework* aims to 'promote a clear and consistent community definition of sexual consent across programs that focus on young people,' and articulates an affirmative, positively expressed, ongoing and mutual model of consent.[6] National alignment of legislation and policy on consent promises to reduce confusion for victim-survivors navigating criminal justice systems, and deliver more consistent access to justice for victim-survivors across the country, regardless of where the relevant offence occurred.

Requiring positive steps to ascertain consent would also deliver greater clarity regarding the operation of the criminal law and expectations of parties to sexual

[3] 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.
[4] NSW, Victoria, the ACT and Tasmania have already amended their legislation to adopt legislative provisions reflecting an affirmative model of consent, including a requirement for the accused to take positive steps to obtain consent, in order to allege they had a 'reasonable belief' in consent. QLD is in the process of introducing equivalent provisions—via the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023*, which has been introduced but not yet passed.
[5] Senate Legal and Constitutional Affairs Reference Committee, 'Current and Proposed Sexual Consent Laws in Australia,' (September 2023), Recommendation 4, [5.29].
[6] Department of Social Services, 'The Commonwealth Consent Policy Framework: Promoting healthy sexual relationships and consent among young people,' (20 January 2024).

encounters. This would reduce confusion about what 'consent' means among those participating in sexual activity. It is therefore likely to lead to safer sexual interactions.

Legislation imposing a positive obligation to obtain consent makes a positive contribution towards addressing the victim-blaming, and intense scrutiny, that victim-survivors so commonly face in criminal proceedings—by appropriately shifting focus to the actions of the accused.[7] Requiring positive steps to ascertain consent could help address misconceptions relating to women's sexual behaviour and sexual relations, including commonly held myths about rape and sexual assault that women say 'no' when they really mean 'yes', that women who are raped are 'asking for it', and that rape can be the result of men not being able to control their need for sex so their responsibility is removed.[8] By not requiring the accused to take positive steps to ascertain consent, the current position in the CLC Act has the potential to reinforce harmful and dangerous rape myths, and promote the public perception that consent may be assumed unless expressly negated.[9]

Question 2: What are the benefits of adopting an affirmative model of consent?

Benefits of adopting an affirmative model of consent include:

- Entrenching standards of respect, safety, and mutual and ongoing communication as cornerstones of all sexual interactions.
- Increased alignment between SA law and best-practice models of consent set out in legislation and policy across the country. This would reduce confusion among, and increase access to justice for, victim-survivors of sexual violence.
- Improved clarity regarding the operation of the criminal law, and the obligations of parties to sexual encounters. This promises to increase safety for those participating in sexual activity.
- The potential to address harmful rape myths that continue abound in both legal proceedings and society at large. In addition to improving victim-survivors' experiences of the justice system, this has the potential to improve community understandings of consent[10]—for example, 'problematic heterosexual scripts that privilege men's entitlement to sex and position women as the "gatekeepers" who must resist men's advances, including attitudes that disregard consent

[7] Although, studies by Professors Julia Quilter and Luke McNamara show that more work is required to address this cultural problem. This is addressed further below.
[8] New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Report No 148, September 2020) [1.23] citing New South Wales, *Parliamentary Debates*, Legislative Council, Legislative Council, 7 November 2007, 3584-5 (John Hatzistergos); Mason and Monaghan (n 6) 25.
[9] 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.
[10] New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2021, 7508 (Mark Speakman).

because an aroused man "may not realise" the woman does not want to have sex.'[11]

- Increasing protection to victim-survivors who experience the common 'freeze' response to sexual violence. This involves a person becoming unable to communicate lack of consent during a sexual offence, due to fear.[12] This response, alongside surrendering, is the most reported response by victims of sexual assault.[13] By requiring consent to be affirmative and based on mutual communication, lack of physical or verbal resistance cannot, by itself, amount to consent.

Full Stop Australia believes that a best-practice legislative model of affirmative consent should specify that:

- You can't assume someone is consenting because they don't say no. Silence or 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.[14]

We also support the model of affirmative consent articulated in the Federal Government's *Consent Policy Framework,*[15] and the guiding principles for affirmative consent set out in s 37B of the *Crimes Act 1958* (Vic). Among other things, these principles recognise the high incidence and under-reporting of sexual violence, and that women, children and other vulnerable people are disproportionately at risk of sexual offences.

We would support SA adopting an affirmative legislative consent model based on the above principles.

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[11] Australia's National Research Organisation for Women's Safety (ANROWS), 'National Community Attitudes Towards Violence Against Women Survey,' (2021), p 25.
[12] See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2021, 7507 (Mark Speakman)
[13] Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022 (ACT) 11.
[14] 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-innsw.html.
[15] Department of Social Services, above n 6.

Question 3: What are the risks of adopting an affirmative model of consent?

We don't see any risks associated with adopting an affirmative model of consent.

We reiterate that 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—set a low bar. This represents bare minimum standards for respectful interaction.

We are aware that some others—for example, the Law Council of Australia, in its submission to the Senate inquiry on consent laws[16]—have raised concerns about an affirmative legislative model of consent impacting legal principles like 'the presumption of innocence', the 'burden and standard of proof' and the 'accused's right to silence.' For completeness, we have addressed these concerns below.

Neither the presumption of innocence, nor the burden or standard of proof, would be altered or 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.

The accused's right to silence would also not be undermined by an affirmative standard of consent. Affirmative consent laws simply 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. This is addressed in the Second Reading Speech to the *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021* (NSW)—the legislation introducing affirmative consent reform in NSW:

> The onus remains on the Crown to prove each element of the sexual offence beyond reasonable doubt. In this bill, affirmative consent does not reverse this onus or abrogate an accused's right to silence. When a belief in consent is raised as a fact in issue, the reasonable belief test will be engaged, and the Crown must prove beyond reasonable doubt that the accused had no reasonable belief in consent. This may include evidence that the accused did not say or do anything to find out if the other person was consenting. It may also require the jury to assess whether any actions taken by the accused were sufficient so as to constitute a reasonable belief in consent in all of the circumstances.

[16] Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs References Committee Inquiry on Current and proposed sexual consent laws in Australia, 2023, (Submission 73).

Finally, we note that a foundational principle of the rule of law is that everyone in society must be accountable to the law. With a bare minority of sexual violence matters clearing even the first hurdle for entry into the justice system—reporting to Police—the fulfilment of this principle causes far greater concern than abrogation of the rights of the accused. 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.

Question 4: Alternatively, should the trier of fact be required to have regard to what the accused said or did to ascertain consent? Should the trier of fact be required to have regard to any other matter?

Full Stop Australia does not consider requiring the trier of fact to have regard to the accused's actions a suitable alternative to adopting an affirmative consent model.

The affirmative model of consent operates with greater clarity, and consistency than the proposed alternative. The benefits of this are outlined above. The proposed alternative, by contrast, introduces significant subjectivity and the potential for lack of consistency about the standards of behaviour required when engaging in sexual activity. This is problematic both legally—it risks delivering inconsistent outcomes to victim-survivors, and introducing significant ambiguity to criminal proceedings—and for community understandings of consent.

The proposed alternative also may allow for the patently unjust and absurd possibility of a Court deciding that, even in circumstances where an accused took no steps to obtain consent, he nonetheless 'reasonably believed' consent was present. There should be no circumstances where an accused, who took no steps to obtain consent, is able to argue that he reasonably believed in consent.

Finally, we note that the justice system already imposes significant barriers and challenges to victim-survivors—for example, the retraumatisation of reporting to police and being cross-examined, and the fact that rape myths continue to abound in Court proceedings, even in jurisdictions that have adopted affirmative consent provisions.[17] In these circumstances, allowing discretion in the question of whether there was consent, even though the accused took no positive steps to obtain consent, is patently inappropriate. This would be another way of negating victims' experiences, and a failure to recognise that consent is based on mutual communication, rather than one party's actions.

[17] Dr Luke McNamara and Dr Julia Quilter, Submission to the Senate Legal and Constitutional Affairs References Committee Inquiry on Current and proposed sexual consent laws in Australia, 2023, (Submission 17).

Question 5: Should the list of circumstances in which a person is taken not to consent be changed?

Full Stop Australia supports increased alignment between state and territory jurisdictions on the circumstances where consent cannot be established. This has the potential to promote a unified understanding of consent across the country, and promises to deliver greater clarity, and more consistent outcomes, to victim-survivors navigating various justice systems.

To this end, we recommend amending section 46(3) of the CLC Act to add the following additional circumstances in which consent does not exist (which apply in other jurisdictions):

- When a person does not say or do anything to communicate consent.[18]
- When a person takes part in sexual activity because of a "fraudulent inducement."[19] Or alternatively, as is the case under Victorian law, where the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid".[20]
- When a person participates in the sexual activity because of coercion, blackmail or intimidation.[21]
- When a person participates in sexual activity because they are overborne by the abuse of a relationship of authority, trust or dependence.[22] This is particularly important in addressing sexual abuse facilitated by power imbalance. This is a significant risk in institutional contexts. For example, abuse by a carer of a person with disability, or abuse by a teacher of a young person, of the age of consent, but nonetheless significantly at risk.
- Section 46(3)(a) should be amended to include harm to animals and property, as well as other persons— such threats are common ways perpetrators of domestic and family violence intimidate their victims, to facilitate the commission of sexual violence.[23]
- Section 46(3)(b) should be amended to include the unlawful detainment of other persons or animals, for the reasons set out above in relation to section 46(3)(a).[24]
- Section 46(3)(g) should be amended to incorporate mistaken belief about being married to a person, in addition to mistaken belief about the identity of the person, as is the case under NSW law.

[18] See, for example, *Crimes Act 1900* (NSW) s 61HJ(1)(a).
[19] See, for example, *Crimes Act 1900* (NSW) s 61HJ(1)(k).
[20] See *Crimes Act 1958* (VIC) s 36AA(1)(m).
[21] See, for example, *Crimes Act 1900* (NSW) s 61HJ(1)(f).
[22] See, for example, *Crimes Act 1900* (NSW) s 61HJ(1)(h).
[23] An equivalent provision in NSW law captures these circumstances—see *Crimes Act 1900* (NSW) s 61HJ(1)(e).
[24] See, for example, *Crimes Act 1900* (NSW) s 61HJ(g).

Directions about sexual offences

Question 6: Should the list of jury directions in section 34N of the *Evidence Act* be expanded?

As noted in the Discussion Paper, misconceptions about, and violence-enabling attitudes towards, consent and sexual violence persist across Australian society. This impacts how Court proceedings are conducted. A 2021 study by Professors Julia Quilter and Luke McNamara 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.[25]

This form of cross-examination contributes to enabling violence, and denying justice to victim-survivors. Mandatory, comprehensive jury directions are one way of addressing these problems. We commend the SA Government for its recent amendment to section 34N of the *Evidence Act* to expand jury directions applicable to sexual violence matters. In addition to the matters already addressed in section 34N, we recommend introducing new jury directions:

- Addressing lack of complaint and delay in making a complaint. There is a significant evidence base around all the reasons a person may not choose to come forward with an allegation of sexual violence, and about the rarity of false allegations. Yet, myths about false allegations, and incorrect assumptions that delay in reporting indicates falsehood, remain prevalent. We recommend the following wording, modelled off NSW law:[26]

  (2) In circumstances to which this section applies, the Judge—
  (a) must direct the jury that absence of complaint or delay in complaining does not indicate that the allegation that the offence was committed is false, and
  (b) must direct the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault.

- Covering the possibility of a 'freeze' response. While section 34N(1)(a) already contains a direction that there is no typical response to nonconsensual sexual activity, equivalent NSW and Victorian directions go further by additionally specifying that "people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything," and "the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity."[27] Including directions on

[25] Quilter and McNamara (2023), above n 17.
[26]
[27] See *Criminal Procedure Act 1986* (NSW) s 292B; *Jury Directions Act 2015* (Vic) s 47E.

these matters would explicitly address the very common freeze response, thereby providing additional support to the large cohort of victim-survivors who experience this reaction to threat.

- Identifying a broader range of diverse relationships in which sexual violence may occur. Section 34N(1)(c) lists some relationships in which nonconsensual activity can occur—but we think this could be expanded to specifically refer to sexual violence perpetrated against sex workers, and the LGBTQ+ community. Both groups are disproportionately at risk of sexual violence and other forms of exploitation and abuse—which is why we think it's important to specifically include directions aimed at their protection. Relevant directions could be modelled off the *Jury Directions Act 2015* (Vic) s 47H:

  (c) that non-consensual sexual activity can occur between different kinds of people including—
  …
  (iv) people who provide commercial sexual services and people for whose arousal or gratification such services are provided, or
  (v) people of the same or different sexual orientations, or
  (vi) people of any gender identity, including people whose gender identity does not correspond to their designated sex at birth.

- Specifying that it's common for victim-survivors of sexual violence to continue relationships with perpetrators following sexual violence—and as such, the fact of a continued relationship should not be used to test or undermine a victim-survivor's credibility. This could also be modelled off an equivalent Victorian provision:[28]

  (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.

- Specifying 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 linear accounts of relevant events, remember all details of an offence and be consistent in their descriptions of it.[29] However, research shows that it is common for a complainant to recount their

[28] *Jury Directions Act 2015* (Vic) s 54H.
[29] 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].

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.[30] Victim-survivors may also have clear and specific recall of some events—and very limited or hazy recall of other (often more peripheral) events. Disordered and fragmented memories are common responses to trauma.

- A jury direction 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. We recommend a direction modelled off New South Wales and Victorian law:[31]

  (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.

We also recommend the following changes to existing jury directions in section 34N:

- It should be made clearer that sexual violence commonly occurs in the absence of physical violence or threat. Studies have found very low rates of injury during rape/sexual offences. In a 2014 study of 317 rape reports in Minnesota, 4% of victims experienced a physical injury, and 11% sustained anogenital injuries requiring medical intervention.[32] In a 2016 survey of 400 cases of rape reported to the central UK police force, most victims (79%) sustained no physical injuries during the attack.[33] Currently, section 34N(1)(a)(iii) provides that "a person is not to be regarded as having consented to the sexual activity the subject of the charge merely because… the person was not physically injured in the course of,

[30] Victorian Department of Justice and Regulation, above n 88, vii; New South Wales Law Reform Commission, above n 4, [8.18].
[31] *Criminal Procedure Act 1986* (NSW) s 293A; *Jury Directions Act 2015* (Vic) s 54D.
[32] Carr, M., Thomas, A. J., Atwood, D., Muhar, A., Jarvis, K., & Wewerka, S. S. (2014). Debunking three rape myths. *Journal of Forensic Nursing*, 10(4), 217–225.
[33] Waterhouse, G. F., Reynolds, A., & Egan, V. (2016). Myths and legends: The reality of rape offences reported to a UK police force. *The European Journal of Psychology Applied to Legal Context*, 8(1), 1–10.

or in connection with, the sexual activity." This direction does not adequately reflect the evidence base. This direction would be strengthened by acknowledging that sexual violence *often occurs* without physical injury (reflecting the above evidence base), and dealing with threats of violence as well as actual violence. We recommend the following wording:

"Non-consensual sex frequently occurs in the absence of violence, physical injury, or threats of injury or violence. The absence of injury or violence, or threats of injury or violence, does not mean that a person is not telling the truth about an alleged sexual offence."

- Section 34N(e) should deal with "acting flirtatiously," in addition to existing subsections (i)-(iii). This would replicate an existing direction in Victorian law.[34]
- Rather than referring to a victim-survivor "not telling the truth," section 34N(d)(ii) should be reframed to reflect extensive research on trauma. We recommend wording along the lines of: "Many victims respond to trauma in a calm and controlled manner as a coping mechanism." This reframing would recognise a strong evidence base showing the commonness of a "controlled response" as a coping mechanism to trauma, with many victims recounting evidence of sexual violence appearing "numbed" and like their emotions are under control.[35]

Question 7: Are there any other common misconceptions about sexual violence that could be addressed through jury directions?

See our response to Question 6 above.

Question 9: Should the *Evidence Act* specify the timing or frequency of directions?

Full Stop Australia recommends that SA law should specify that jury directions must be given at the following times:

- Firstly, all jury directions on sexual violence and consent should be required to be given at the outset of every sexual violence trial. It is critical that jury directions are given early in all cases, to address misconceptions about sexual violence that might otherwise take root during a trial. For consistency, giving such directions at the outset of proceedings should be mandatory—rather than being left up to the discretion of individual judges.
- Secondly, jury directions should be required to be repeated during the sexual offence trial if there is a good reason to do so, or if a party to proceedings

[34] See *Jury Directions Act 2015* (Vic) s 47G.
[35] Petrak, J., & Hedge, B. (Eds.). (2003). *The trauma of sexual assault: Treatment, prevention and practice*. West Sussex: John Wiley & Sons. See also Klippenstine, M. A., & Schuller, R. (2012). Perceptions of sexual assault: Expectancies regarding the emotional response of a rape victim over time. *Psychology, Crime & Law*, 18(1), 79–94.

> requests the direction be repeated and there is no good reason not to do so—as is the case under NSW law. This would enable misconceptions about consent and sexual violence to be addressed in real time, and reflects evidence that "repetition of jury directions helps jury comprehension."[36]

This approach is a mix between the timing for jury directions under NSW and Victorian law—where they are required to be given as a corrective, and where they are required to be given at the earliest opportunity the Judge deems appropriate, respectively. We have recommended this mixed approach in response to ample evidence that jury directions are most effective when given early in proceedings and used proactively to address assumptions introduced by improper questioning.

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.[37] Research by Professors Quilter and McNamara found that "for maximum effect, it is preferable if judges give 'corrective' directions (e.g. that delay in complaint does not necessarily mean fabrication) at the time this suggestion is raised—most commonly during the complainant's cross-examination."[38] Quilter and McNamara also found that "more needs to be done to ensure that relevant directions are given in every trial where they are warranted [and that in many cases] a direction on delay or differences in account was warranted, but was not given."[39]

Finally, we note that there is value in legislation explicitly requiring judges to give applicable directions at particular points in the trial. The current position in SA law—silence as to *when* during a trial jury directions must be given—isn't sufficiently clear, and has the potential to result in inconsistent outcomes, and contribute to injustice, for victim-survivors.

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[36] Criminal Law Review, Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, 2015) 9.
[37] Victorian Law Reform Commission (VLRC), Sex Offences: Interim Report, Report No 78 (2004) Ch 7.
[38] Quilter, J, McNamara, L & Porter, M (2022b) 'New Jury Directions for Sexual Offence Trials in NSW: The Importance of Timing', *Criminal Law Journal*, 46(3), 138-150.
[39] Quilter & McNamara (2023), above n 17.

Question 10: Should a trial judge be required to give themselves the same directions that must be given to jurors in a jury trial?

Trial judges should be required to give themselves the same directions as must be given to jurors. Rape myths and misconceptions are saturated across the community and all actors in the justice system—including the judges overseeing sexual violence proceedings—should be subject to consistent directions intended to combat pervasive and insidious beliefs about sexual violence. We hope this will increase access to justice for victim-survivors, and contribute to cultural change in the justice system.

Image-based sexual offences

Question 12: Should there be any increase in the current penalties?

The Discussion Paper identifies the possibility of moving image-based offences into the CLC Act and increasing the penalties where aggravating circumstances exist. We support penalties for image-based abuse being increased in circumstances of aggravation. This approach enables sentencing for image-based abuse to take into account broader patterns of control, intimidation, abuse of power and exploitation of vulnerability—with circumstances of aggravation under section 5AA of the CLC Act including offending against older victims, offending against child victims, abuse of authority, and offending against people with disability or cognitive impairment.

Protection of victims in sexual offence trials

Question 15: Should the categories of witnesses that may give evidence at pre-trial special hearings be expanded to expressly include witnesses of sexual abuse generally?

As set out in the Discussion Paper, the provisions of the *Evidence Act* that deal with who may give evidence at a pre-trial special hearing "do not expressly include witnesses of sexual abuse generally." We support adding victim-survivors of sexual violence to the category of witnesses with access to pre-trial special hearings. Enabling victim-survivors of sexual violence to give their evidence in this way would eliminate a significant source of trauma for them—the possibility of encountering their abuser in Court. There is significant evidence of the link between an experience of sexual violence and long-term trauma impacts, and an overwhelming number of victim-survivors have reported that engaging with the justice system—and especially the Court process—exacerbated the effects of trauma for them. Measures like this—that reduce retraumatisation—are therefore urgent.

We note that this change seems aligned with existing provisions in the *Evidence Act.* Section 5AA already recognises victim-survivors of sexual violence as vulnerable witnesses. Meanwhile, section 12AB(14)(d) recognises victim-survivors of domestic

abuse as a category of person who may give evidence at a pre-trial special hearing—an existing acknowledgment of the dynamics of gender-based violence giving rise to vulnerability, and the need for additional protection in Court proceedings.

Question 16: Should 'ground rules' hearings be available in trials for victims of sexual abuse who have been offended against as adults?

We support 'ground rules' hearings being made available to all adult victims of sexual violence. This has significant potential to reduce retraumatisation for victim-survivors who appear as witnesses in Court. As set out above, research suggests that even in jurisdictions that have introduced affirmative consent reform, cross-examination still commonly involves victim-blaming, rape myths and stigmatisation of victim-survivors. Ground rules hearings have the potential to address this, by establishing clear rules on:

- the style and parameters of questioning, so that questioning is not improper or irrelevant;
- the scope of questioning, including questioning on sensitive topics and evidence to reduce re-traumatisation; and
- the preferences and needs of complainants.

Ground rules hearings also have the potential to support victim-survivors to give better evidence, thereby going some way towards countering disproportionately low conviction rates for sexual violence. The research of Quilter and McNamara referred to above also found that the style of cross-examination can impact victim-survivors' capacity to recount events at trial—resulting in a higher chance of providing inaccurate responses or making mistakes when cross-examined with questions that are closed, leading, repeated or complex. Ground rules hearings can address, and seek to eliminate, this style of questioning.

Question 17: Should police be required to record interviews with all sexual abuse victims regardless of their age?

We support police being required to record interviews with adult victims of sexual violence—and those police interviews being admitted at trial, subject to an application under section 13BA of the *Evidence Act*—as an alternative to the witness giving evidence in Court. We agree with the points in the Discussion Paper—that this would lead to "a reduction in the amount of time that a witness needs to spend giving evidence in court (and having to interact with the perpetrator) and the fact that their account is given at a point in time when events are more fresh in their memory." We reiterate the prevalence of retraumatisation from the Court process—and emphasise the importance of taking all measures available to mitigate this.

Victims' right to privacy

Question 18: Do you consider there to be a gap in the way that the South Australian laws operate?

It is critical that victim-survivors' communications with health practitioners are adequately protected, so they can report and disclose their experiences of sexual violence confidentially, and receive necessary care. Legislative provisions protecting counselling communications were introduced in response to defence counsel issuing subpoenas seeking access to complainants' counselling or treatment records, with the aim of searching for inconsistencies in the victim's reporting.[40] Historically, this material was frequently adduced in court to highlight discrepancies in victims' accounts, with the goal of undermining their credibility.[41]

While SA law goes some way towards protecting victim-survivors' right to privacy, we think broader protections are warranted. We recommend the following changes to SA law—to achieve policy objectives of prioritising the privacy and agency of victim-survivors, recognising the confidentiality of all health information, and ensuring victim-survivors feel safe to seek critical medical care:

- We recommend that a victim-survivor's consent should be required to disclose any information recorded in the course of receiving healthcare. This could be modelled off the following provisions in Tasmanian law:[42]

  (3) A counselling communication must not be disclosed in any criminal proceedings unless the victim has consented to the disclosure.
  (4) A person must not be required, in or in connection with any criminal proceedings, to produce a document that records a counselling communication unless the victim has consented to the production of the document.
  (5) Evidence of a counselling communication must not be adduced or admitted in any criminal proceedings unless the victim has consented to the adducing or admission of the evidence.

- Privilege should apply to all medical communications and records—as well as communications and records held by social workers, drug and alcohol rehabilitation services, and specialist domestic, family or sexual violence services—not only psychological or psychiatric records. See our response to Question 19 below.

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[40] Danuta Mendelson, 'Judicial Responses to the Protected Confidential Communications Legislation in Australia' (2002) 10 (1) *Journal of Law and Medicine* 49, 53; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (2016, Report), 221.

[41] Ibid.
[42] *Evidence Act 2001* (TAS) s 127B.

- Privilege should be applicable to civil proceedings, where the relevant evidence was found to be privileged in a criminal matter, as is the case in NSW:[43]

  (2) If evidence was found to be privileged in a criminal proceeding under …[relevant section]… the evidence may not be adduced in a civil proceeding to which this section applies.

Question 19: Should protected communications be expanded to include health information, such as personal information that is collected in providing a health service?

Full Stop Australia strongly supports protected communications being expanded to include all health information collected by health practitioners. Currently, the protection in South Australia is limited to communication made in a therapeutic context—specifically, communications made for, or in the course of, psychiatric or psychological therapy.[44] In our view, a broader range of health records should be encompassed as 'protected communications'—including:

- All records taken in the course of receiving medical treatment or advice, not only psychological or psychiatric records;
- Records made by social workers;
- Records held by specialist domestic, family or sexual violence services; and
- Records held by drug and alcohol rehabilitation services.

Full Stop Australia supports the broader definition of 'health information' under Victorian law:[45]

(1) … health information is protected health information for the purposes of a proceeding if –

a. The proceeding is a criminal proceeding; and
b. The proceeding relates (wholly or partly) to a charge for a sexual offence; and
c. The health information is about a person against whom –
i. That sexual offence is alleged to have been committed; or
ii. Any other sexual offence has been committed or is alleged to have been committed; and
d. The person who recorded or collected the information (or, if the information is an opinion, formed that opinion) did so in a professional capacity.

(2) It does not matter whether the information was recorded or collected (or, if the information is an opinion, was formed) before or after the conduct constituting the sexual offence occurred or is alleged to have occurred.

[43] *Evidence Act 1995* (NSW) s 126H.
[44] *Evidence Act 1929* (SA) s 67D.
[45] *Evidence (Miscellaneous Provisions) Act 1958* (VIC) s 32BA.

We also support Victoria's more complete approach to defining 'health information', which includes personal information—whether true or not—that discloses:

- any information or opinion about the physical, mental or psychological health of an individual;
- an individual's disability;
- any expressed wishes for future provision of health services by an individual; and
- any health service provided.[46]

Finally, we strongly support this privilege encompassing any contact victim-survivors have with alcohol and drug rehabilitation services. Records created for such purposes are intended for a specific context and should not be adduced in court or treated as relevant to a complainant's credibility in a criminal trial.[47]

We hope protecting complainants' privacy by expanding the approach to protected communications will encourage more victim-survivors to seek counselling and support services, and in turn ensure that their long-term recovery is prioritised. We also hope this approach will lead to more victim-survivors feeling safe to report crimes, without fear of their private information being made public through the Court process.

Question 20: Should a victim be made aware of applications for disclosure of their protected communications?

Victim-survivors should be informed of any application to disclose their protected communications. The Victorian Law Reform Commission has recognised that involving victim-survivors in decision-making regarding disclosure of their medical records is not only integral for psychological safety, but also empowering.[48]

The requirement to notify victim-survivors of applications to disclose their protected communications could be modelled off NSW law:[49]

> *(1) An applicant for leave under this Division must, as soon as is reasonably practicable, give notice in writing of the application to each other party and each relevant protected confider (or the protected confider's nominee) that—*
> *(a) specifies the document that is sought to be produced or the evidence that is sought to be adduced, and*
> *(b) in the case of a notice to a protected confider who is not a party to the proceedings—advises the protected confider that the protected confider may appear in the proceedings concerned, and*

[46] *Health Records Act 2001* (Vic).
[47] VLRC n 42, 222.
[48] Ibid 142.
[49] *Criminal Procedure Act 1986* (NSW) s 299C.

> *(c) in the case of an application for leave to compel (whether by subpoena or any other procedure) a person to produce a document—specifies the day on which the document is to be produced, and*
> *(d) in the case of an application for leave to adduce evidence—specifies the day (if known) when the proceedings are to be heard, and*
> *(e) includes any other matter that may be prescribed by the regulations.*

In addition, when deciding whether to admit medical records, Courts should be required to consider the healthcare, recovery and safety needs of victim-survivors of sexual violence. We recommend including a requirement to consider the following factors, which apply under NSW law:

> *(a) the need to encourage victims of sexual offences to seek counselling,*
> *(b) that the effectiveness of counselling is likely to be dependent on the maintenance of the confidentiality of the counselling relationship,*
> *(c) the public interest in ensuring that victims of sexual offences receive effective counselling,*
> *(d) that the disclosure of the protected confidence is likely to damage or undermine the relationship between the counsellor and the counselled person,*
> *(e) whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias,*
> *(f) that the adducing of the evidence is likely to infringe a reasonable expectation of privacy.*[50]

Finally, to increase victim-survivors' autonomy and control over medical records, and support them to assert their right to privacy, legislative change should be combined with publicly funded support for people impacted by applications for relevant records. This would support would provide support to the proposed legislative protections. For example, Legal Aid NSW runs a Sexual Assault Communications Privilege Service—which provides legal advice and representation to victim-survivors of sexual assault who want to prevent the disclosure of protected communications or enable their release in an informed way. Enabling victim-survivors to make informed choices about the release of their medical records would increase their sense of agency and control over legal proceedings, reducing disempowerment and retraumatisation.

Question 21: Should a victim be made aware of applications by the defence to ask questions or admit evidence about the prior sexual history of the victim?

Full Stop Australia supports introducing a requirement to make victims aware of applications by the defence to ask questions or admit evidence about the prior sexual activities of the victim. This notice requirement could form part of the ground rules hearing process.

[50] *Criminal Procedure Act 1986* (NSW) s 299D (2).

This would promote victims having greater agency and awareness of matters that affect them in sexual violence proceedings. Being less 'passive' and having more visibility of Court processes that affect them, could help reduce the sense of disempowerment and retraumatisation so many victims report experiencing in Court proceedings.

More generally, we make the following points about the admissibility of evidence of a victim's past sexual activities under SA law:

- Evidence of a victim's 'sexual reputation' is inadmissible under section 34L of the *Evidence Act.* We strongly support this position.
- Evidence of a victim's past sexual activities continues to be admissible in some cases. Allowing this kind of evidence to be adduced is retraumatising and can reinforce harmful stereotypes about sexual violence. This kind of evidence is also often of limited evidentiary value. 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.[51] This has nothing to do with whether the victim consented to the sexual activity in question.

To recognise the limited value of this evidence, we recommend some amendments to the way it's dealt with in section 34L:

- Section 34L(2) should explicitly require the judge to weigh probative value against the victim's distress. Rather than simply requiring the Court to "give effect to the principle that alleged victims of sexual offences should not be subjected to unnecessary distress, humiliation or embarrassment through the asking of questions or admission of evidence," it should be necessary for the probative value of evidence of a complainant's past sexual activities to "*outweigh* any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission."[52] This is the position under NSW law.
- Evidence of a victim's past sexual activities should only be admissible where it is "part of a connected set of circumstances in which the alleged sexual offence was committed"[53]—i.e. there needs to be some connection to the offence.
- There should be restrictions placed on the admissibility of evidence of "recent sexual activities with the accused," which does not appear to be the case under section 34L(1)(b). Such evidence should only be admissible in the circumstances outlined in alignment with the amendments we've proposed above to 34L(2), and with the permission of a judge.

[51] 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.
[52] See, for example, *Criminal Procedure Act 1986* (NSW) s 294CB.
[53] *Criminal Procedure Act 1986* (NSW) s 294CB(4)(a)(ii).

Question 22: Should a victim be entitled to be heard in relation to such applications?

Full Stop Australia supports victim-survivors being given standing to make submissions in relation to applications by the defence to ask questions or admit evidence about their past sexual activity.

This would enable victims—through dedicated legal representatives—to challenge improper and irrelevant lines of questioning, which reinforce dangerous and outdated rape myths and victim-blaming narratives. As set out above, this continues to retraumatise victims and deny them justice.

Currently, victims of sexual violence don't have their own legal representatives in criminal proceedings—whereas the accused has defence counsel and the prosecution's interests may not align with a victim-survivor's. In addition to causing feelings of disempowerment among victim-survivors who appear as witnesses in Court, this also means there isn't a reliable mechanism for addressing inappropriate questioning (as Quilter and McNamara's study above demonstrates).

To support legislative reform, Full Stop Australia recommends making this form of legal support freely available to victim-survivors through legal services such as Legal Aid or community legal centres. We think there are strong public interest grounds for doing this.