



Submission

Inquiry into Current and Proposed Sexual Consent Laws in Australia

Senate Standing Committee on Legal and Constitutional Affairs 2023

Introduction

The Youth Affairs Council of South Australia (YACSA) is the peak body in South Australia representing the interests of young people and youth workers, as well as organisations and networks throughout the non-government youth sector. YACSA policy positions are independent and not aligned with any political party or movement. YACSA advocates for meaningful improvements in the quality of young peoples' lives and supports young peoples' fundamental right to participate in and contribute to all aspects of community life particularly decision-making processes that impact them.

YACSA welcomes the opportunity to contribute to the Standing Committee on Legal and Constitutional Affairs' Inquiry into Current and Proposed Sexual Consent Laws in Australia and has chosen to focus this submission on the impact of current and proposed sexual consent law on young people including access to consent education.

Gender equality and sexual violence are significant issues of concern for young people in Australia, sexual assault being one way they can and do commonly experience sexual violence. Young people are a significant stakeholder in decision-making on consent law and education, with young women the most likely cohort to experience sexual assault and young men the most likely cohort to perpetrate sexual assaultⁱ.

The importance of prevention through awareness and education must be recognised and YACSA urges the Federal Government to significantly invest in evidence-based consent education as a preventative measure against sexual assault in Australia. YACSA contends that governments, both state and federal, play an important role in violence prevention and funding vital services needed.

Key Points

- Young people are the most likely cohort to perpetrate and be victimised by sexual assault.
- Young people continue to believe misinformation about consent and sexual assault that is grounded in gender inequality.
- Consent law reform is an opportunity to develop evidence-based co-designed peer consent education nationally.

Young People in Context

The assumption that young people would develop better understandings of consent and sexual violence has not been realised, and today in Australia young people lack an understanding of consent and can continue to hold misinformed views on sexual assault. Young people are experiencing a stage in life where expressions, values and understandings can be impacted by exposure to violence against women and attitudes that support itⁱⁱ. Consent education must be improved by co-design with young people to better address issues identified in understanding of and attitudes towards sexual violence.

Findings from the 2017 National Community Attitudes Towards Violence Against Women Survey (NCAS) were compared to previous NCAS findings in 2009 and 2013 finding there was no significant improvement in understandings regarding consent among young people. The 2017 NCAS results indicated almost two in five young people believe it is common for sexual assault accusations to be used as a way of 'getting back at men' and over 30 per cent of young men believe that a lot of times women who say they were raped had 'led a man on and then had regrets'. Other concerning results that show an urgent need to improve consent education include one in eight young people believing women often say 'no' when they mean 'yes' and one in four young Australians believe when a man is sexually aroused, he may not even realise that the woman doesn't want to have sex.

R4Respect youth ambassadors commented that there is no discussion with young people about consent and that support, education and resources should be improvedⁱⁱⁱ. Evidence shows that efforts to address sexual assault must include prevention education that is co-designed, action-based, peer delivered and given in various settings like school, recreation settings (e.g., sports or community clubs), through media and in a family setting to be successful^{iv}.

Rape Myths

Responses to sexual assault and sexual violence more broadly are impacted significantly by false beliefs and attitudes about the perpetration and experiences of sexual assault that continue to be broadly held^v. These beliefs and attitudes are known generally as 'rape myths', and while previous reforms globally have attempted to address these myths, they remain persistent at an institutional, societal, and individual level^{vi}. The purpose of rape myths is to obscure the nature of sexual assault as well as create both hostility and bias towards survivors therefore reinforcing stereotypical gender roles^{vii}. These myths are employed to separate an experience from the 'real rape' stereotype, undermine the credibility of a survivor and highlight any factors that can reinforce existing rape myths^{viii}. Police, prosecution and defence, as well as decision makers in court proceedings like judges and juries are not immune to being influenced by rape myths^{ix}. Reviews found that when rape myths are relied upon within proceedings, prosecution rarely challenge them, nor do judges counter them^x. Prosecution reinforces rape myths by relying on them when an experience fits the stereotype. Defence often relies on rape myths in cross-examination, and judges use their belief in rape myths as a mental shortcut when practising intervention decisions, linguistic choices and, most concerning, when providing direction proposed to counter these myths^{xi}.

Improving understandings of consent and the diverse experiences of survivors broadly is an important step in addressing myths including the belief that women say 'no' but mean 'yes', that 'real' survivors will have physical injuries and that falsified reports of sexual assault are common^{xii}.

National and South Australian Consent Laws

In Australia there are currently eight different definitions used for sexual activity and consent. Across each jurisdiction there are inconsistencies in how offences against a person relating to sexual assault are worded and conditions relating to consent, 'honestly held belief' and the application of judicial direction vary immensely.

In South Australia the *Criminal Law Consolidation Act 1935* (SA) defines consent as a 'free and voluntary agreement'^{xiii}. It outlines a non-exhaustive list of circumstances that determine when consent is not a 'free and voluntary agreement', and it outlines how a person is committing an offence when 'recklessly indifferent' to whether a person has given consent, knowledge a person does not consent or has withdrawn consent, or whether a person does not consent^{xiv}. 'Recklessly indifferent' attempts to outline a matter where an accused failed to consider another person's wishes and has disregarded whether a person has consented or withdrawn consent for sexual activity. This

extended definition of consent is contained within the *Criminal Law Consolidation Act 1935 (SA)* but it is not included in the *Summary Offences Act 1953 (SA)*.

In 2022, New South Wales (NSW) and Victoria adopted affirmative consent laws. The affirmative consent model recognises common complexities in experiences of sexual assault and attempts to shift the framing of consent to engage in sexual activity from 'no means no' to 'yes means yes'^{xv}. Similar to provisions within the *Criminal Law Consolidation Act 1935 (SA)*, the presence of consent or, more specifically, the belief that consent is present is not considered to be reasonable unless active steps are taken to confirm consent. Concerns about reform to affirmative consent model law primarily relate to whether a defendant's right to silence could be undermined as they may need to provide evidence they took steps to affirm consent^{xvi}.

Adoption of affirmative consent laws are a positive step to addressing some of the barriers to justice and the re-traumatisation experienced by survivors within the criminal justice system, however reform to consent laws alone is not adequate. Reports of sexual assault continue to increase each year across Australia and the criminal justice system fails to appropriately handle the majority of alleged offences reported. Additionally, empirical research shows that only a small minority of offences are ever reported. While consent law reform addresses issues with determining consent within court proceedings, it does not affect how police consistently fail to investigate reports of sexual assault with studies finding police believe up to a quarter of reported offences are false^{xvii}. Reform may somewhat affect the rate that prosecution decline taking alleged sexual assault offences to trial given that when a trial does take place the conviction rate is considerably lower compared to other offences^{xviii}. Consent law reform alone will also not address the role of the media in supporting misunderstandings of consent, nor would reform likely alter community attitudes about sexual assault and consent.

A lack of understanding within the community about consent continues to affect responses to sexual assault, including criminal justice system responses from police and magistrates to juries and perpetrators^{xix}. An affirmative consent model as adopted in NSW and Victoria could better define consent, as well as parameters relating to a defendant's belief consent was present, and therefore better prosecute sexual assault. Whether improvement to the prosecution and conviction of sexual assault offences would better support survivors is unclear as survivors typically endure significant trauma during court proceedings regardless of result^{xx}.

Judicial Directions

Typically included in recent reforms is additional judicial directions that address commonly held rape myths. Some of these directions already exist, however, reforms in NSW and Victoria have been made to support their utilisation. Review of judicial directions finds that Australia has long believed directions given to a jury are adequate to counter reliance on rape myths and numerous jurisdictions have made reforms on the basis of this belief, however, evidence on the effectiveness of judicial directions to address particular rape myths is lacking^{xxi}. More broadly, recent evidence on the effectiveness of judicial directions across proceedings for various offences found improvements to be inconsistent^{xxii}. While the evidence is not strong, reforms on directions have still occurred. A 2019 review has shown that jurors struggle to understand and apply directions given which impacts the effectiveness of directions and that timing of directions also has a significant impact^{xxiii}. Reform to consent law made in Victoria in 2022 amended the *Jury Direction Act 2014 (Vic)* to allow direction to be given as early as possible however this change has not been evaluated yet^{xxiv}. Previous reform on judicial directions aimed to address existing myths about consent and sexual assault however, there has been a high number of appeals lodged and convictions overturned on the grounds of judicial directions given during proceedings.

For example, a high-profile Australian case from 2015 highlighted how difficult it can be to determine whether a defendant took steps to establish consent and how judicial directions can cause more confusion. A jury convicted the defendant in *R v Lazarus [2015]* which was then overturned in the NSW Court of Appeal in *R v Lazarus [2016] 52* which was then re-judged in the Court of Appeal in *R v Lazarus [2017] NSWCCA 279* with the appeal judge found to have failed to make a finding about steps taken by the defendant to establish consent. During *R v Lazarus [2015]* the judge directed the jury on obligations to establish that the defendant knew the complainant was not consenting to the incident of penetration. In oral and written direction, the judge outlined the ways knowledge of a lack of consent could be established including actual knowledge the complainant did not consent, absence of reasonable grounds to believe the complainant consented, or a defendant being recklessly indifferent to consent. Ultimately, after two successive appeals on the grounds of two trial judges' direction to the jury and themselves, the NSW Court of Appeal did not order a third trial^{xxv}.

Given rape myths are held subconsciously^{xxvi}, the lack of robust evidence for the effectiveness of judicial direction to counter rape myths^{xxvii} and the potentially extended grounds for appeal created by additional directions^{xxviii}, a much more holistic reform strategy that incorporates law reform as well as prevention through education and awareness is needed to improve response to sexual assault in Australia^{xxix}.

Consent Education

Reform to adopt affirmative consent laws and changes to judicial directions nationally is positive, but without significant investment in prevention the problematic views held by society and individuals regarding consent and sexual assault will continue to affect the criminal justice system and the prevalence of sexual violence in Australia.

As recognised in the *Change the Story* framework, effective prevention requires a national multifaceted approach that involves change at system, institutional, societal and individual levels^{xxx}. Making use of direct programs delivered in a variety of settings with diverse cohorts is as crucial to addressing this issue as law reform. Young people must be recognised as a priority cohort as part of improving prevention. Young people and particularly young men have demonstrated concerning attitudes towards consent that must be addressed.

Prevention is a significant factor in addressing sexual violence and while nationally consistent definitions and laws concerning consent are important, they will not be effective if the national prevention workforce and its capacity to implement, deliver and monitor prevention initiatives is not recognised and supported. Any reform towards nationally consistent consent law is an opportunity to include improved prevention and education on consent for young people that is co-designed, evidence-based and multidisciplinary. Current prevention initiatives through consent education and the workforce that deliver it is small and distinct and does not have a formal professional structure. To better support prevention education across jurisdictions, the government should invest in growing the size of the workforce, grow the diversity of skills within the workforce and provide support to coordinate prevention consistently across states and territories^{xxxi}.

ⁱ Australian Institute of Health and Welfare (AIHW) 2020, *In Focus: Sexual Assault in Australia*, AIHW, Canberra.

ⁱⁱ Chandra-Mouli, V, Plesons, M, Adebayo, E, Amin, A, Avni, M, Kraft, J, Lane, C, Brundage, C, Kreinin, T, Bosworth, E, Garcia-Moreno, C & Malarcher, S 2017, 'Implications of the Global Early Adolescent Study's Formative Research Findings for Action and for Research', *Journal of Adolescent Health*, vol. 61, no. 4, pp. 5-9.

ⁱⁱⁱ Politoff, V, Crabbe, M, Honey, N, Mannix, S, Mickle, J, Morgan, J, Parkes, A, Powell, A, Stubbs, J, Ward, A, & Webster, K 2019, *Young Australians' Attitudes to Violence Against Women and Gender Equality: Findings from the 2017 National Community Attitudes Towards Violence Against Women Survey (NCAS)*, ANROWS, Sydney.

- iv Gleeson, C, Kearney, S, Leung, L & Brislane, J 2015, *Respectful Relationships: Education in Schools*, Our Watch, Melbourne.
- v Cooper, J 2022, 'Judges as Myth-Busters: Re-Examination of Jury Directions in Rape Trials', *Griffith Law Review*, vol. 31, no. 4, pp. 485-512, doi: 10.1080/10383441.2022.2143663.
- vi Simpson 2016, Why Has the Concept of Consent Proven so Difficult to Clarify?, *The Journal of Criminal Law*, vol. 80, no. 2, doi: 10.1177/022018316639104.
- vii Brownmiller, S 1975, *Against Our Will: Men, Women and Rape*, Random House Publishing Group, Manhattan.
- viii Temkin, J, Gray, J & Barrett, J 2018, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study', *Feminist Criminology*, vol. 13, no. 2, pp. 205-226.
- ix Gray, J & Horvath, M 2018, 'Rape Myths in the Criminal Justice System' in E Milne, K Brennan, N South & J Turton (eds), *Women and the Criminal Justice System: Failing Victims and Offenders*, Palgrave MacMillian Cham, Melbourne, pp. 15-41.
- x Temkin et al, Different Functions of Rape Myth Use
- xi Cooper, Judges as Myth-Busters
- xii Politoff et al, Young Australians' Attitudes
- xiii *Criminal Law Consolidation Act 1935 (SA)*, section 46
- xiv *Criminal Law Consolidation Act 1935 (SA)*, section 47
- xv Briggs, J and Scott, R 2020, 'Rape Myths and 'Reasonable Belief' of Consent: R V Lazarus [2017] NSWCCA 279', *Psychiatry, Psychology and Law*, vol. 27, no. 5, pp. 750-777.
- xvi Victorian Law Reform Commission 2016, *Victim's Rights in the Criminal Trial Process: Report*, VLRC, Melbourne.
- xvii Australia Law Reform Commission 2010, *Consent, Family Violence – A National Legal Response: ALRC Report 114*, available: <https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/25-sexual-offences-3/consent-4/>.
- xviii AIHW, Sexual Assault in Australia
- xix Henderson, E and Duncanson, K 2016, 'A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trails?', *UNSW Law Journal*, vol. 39, no. 2, pp. 750-778.
- xx Lonsway, K & Fitzgerald, L 2016, 'Rape Myths in Review', *Psychology of Women Quarterly*, vol. 18, no. 2 pp. 133-164, doi: 10.1111/j.471-6402.1994.tb00448.x.
- xxi Cooper, Judges as Myth-Busters
- xxii Spivak, B, Ogloff, J, Clough, J, Tinsley, Y & Young, W 2019, 'The Impact of Fact-Based Instruction on Juror Application of the Law: Results from a Trans-Tasman Field Study', *Social Science Quarterly*, vol. 101, no. 1, pp. 346-361.
- xxiii *ibid*
- xxiv Cooper, Judges as Myth-Busters
- xxv Briggs and Scott, 'Rape Myths and 'Reasonable Belief'
- xxvi Temkin et al, Different Functions of Rape Myth Use
- xxvii Cooper, Judges as Myth-Busters
- xxviii Briggs & Scott, Rape Myths and 'Reasonable Belief'
- xxix Cooper, Judges as Myth-Busters
- xxx Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth 2015, *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia*, Our Watch, Melbourne.
- xxxi Our Watch 2023, *Growing with Change: Developing an Expert Workforce to Prevent Violence Against Women*, Our Watch, Melbourne.