



26 July 2023

Rape and Sexual Assault Research and Advocacy (RASARA)

Response to the Law Council of Australia's submission to the Legal and Constitutional Affairs References Committee Inquiry into Current and proposed sexual consent laws in Australia.

RASARA thank the Committee for the opportunity to respond to questions on notice. We note that our responses in relation to some questions taken on notice, and further comments on the below are forthcoming. In brief, however, we wish to draw the Committee's attention to the following comments in relation to the submission made by the Law Council of Australia (herein 'Law Council').

'Communicative Consent'

The Law Council express support in their submission for a standard of communicative consent. This standard of consent draws on some of the features of affirmative consent but removes others from the scope of the criminal law.

The Law Council assert that three elements are central to communicative consent:

1. That every person has the right to choose whether they engage in a sexual act
2. Consent cannot be presumed
3. Consent involves ongoing, free and voluntary agreement and conversation between participants

We agree that these are important principles to be legislated, and indeed, these principles are key to a standard of affirmative consent.

However, affirmative consent goes further by ensuring that a person who is wanting to have sex with another person(s) must take active and reasonable steps to ensure that the other person is also consenting. These steps must also be ongoing, i.e. be taken before and during a sexual act. A failure to take steps (or 'do something') to make sure that the other person(s) is consenting is unreasonable. Thus, the defence of 'reasonable belief in consent' or the mistake of fact excuse would not be open on the facts, since the accused did not act reasonably in proceeding with the sexual act (rape).

This aligns with the principles of communicative consent, since it ensures that consent is not presumed (silence or passivity isn't consent) and it places an obligation on all sexual actors to engage in 'ongoing, free and voluntary agreement and conversation'.

However, communicative consent does not redirect attention to the actions of the accused person, where it belongs. Communicative consent falls far short of the community's expectations of the criminal justice system, and of responsible sexual citizenship.

Law Councils 'Principles'

Based on the premise that jurisdictions should adopt a communicative standard of consent, and not affirmative consent (a premise we strongly reject), the Law Council propose a set of principles to 'inform the evaluation of sexual consent definitions across jurisdictions.'

We respond to some of these principles below.

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

There is no evidence that affirmative consent laws such as proposed by experts and advocates present any conflict with these criminal justice principles. In circumstances where an accused person relies on a defence of 'reasonable belief in consent' or the excuse of 'mistake of fact' (the mistaken fact being that consent was given), affirmative consent may place an **evidential or legal burden** on the defence.

Briefly, a legal burden requires the bearer to *prove* a fact or matter in issue. An evidential burden requires the bearer to adduce evidence to support the premise they are advancing. If the evidence raises the issue, the fact must be determined. In these circumstances, the premise would likely be that they took active and reasonable steps to ascertain consent.

An evidential burden of proof is not generally considered to encroach upon the presumption of innocence. Both evidential and legal burdens exist in the criminal law in Australia, including in relation to child sexual offences and drug offences.

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 agree with the Law Council. Proportionality is a recognised principle in support of reversal of a legal or evidential burden, which may follow the introduction of affirmative consent laws. In 2014 the Parliamentary Joint Committee on Human Rights asserted that a reverse burden is 'compatible with the presumption of innocence where [it is] ... reasonable, necessary and proportionate in pursuit of a legitimate objective'.

We assert however, that a proportionality analysis further supports the need for an affirmative consent standard that places a positive obligation on sexual actors to take steps to ascertain consent.

Sexual violence is endemic in this country. The rates of sexual violence in the community are often cited, but seemingly just as often forgotten. **Twenty percent of Australian women and over five percent of Australian men have experienced sexual assault since the age of 15.**

This is an underestimation of sexual violence in our community. It doesn't capture lived experiences of sexual violence in childhood, and it was limited to data collected from persons 18 years old and above. These are some of the most vulnerable cohorts. We also know that rates of violence within minority or otherwise vulnerable groups compounds. Trans and non-binary, gay, lesbian, queer or other identifying persons (LGBTIQ+), people with disabilities, culturally and linguistically diverse groups are, for example, among some of the groups highly represented in these statistics.

Yet, despite the widespread use of sexual violence within our community, most victim-survivors will never report the crime to the police. If they do, most cases never proceed to charge. If they do, most

cases will never be prosecuted. If they are, most cases will not end in conviction. If they do, sentencing practices are out of step with community expectations.

This disjuncture demonstrates a lack of proportionality in the criminal justice system's response to sexual violence. The deck is stacked against victim-survivors. A proportionality analysis supports reforms that respond to the significant gap between rates of perpetration of sexual violence and rates of conviction.

Principle 4: sexual consent laws should reflect the communicative model of consent.

We ask the Committee to consider this document our robust rejection of this assertion.

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.

People with disabilities

The Law Council raise persons with a disability as a group disproportionately impacted by potential law reform. In multiple states, mental impairment can make a 'reasonable belief in consent' or mistake as to consent, more likely to be deemed honest and reasonable. Under an affirmative standard, reasonableness is determined through the active taking of steps to ensure consent. An honest and reasonable belief in consent is exculpatory.

The requirement to take active steps considers the mental capacity of an accused person. In our view, this is an appropriate mechanism. New South Wales (NSW) has recently legislated to remove the requirement for steps to be taken where the accused has a cognitive impairment that 'was a substantial cause of the accused person not saying or doing anything' (i.e. not taking steps) (s61HK(3)(a)(i)(b) *Crimes ACT 1900* (NSW)).

This provision places a legal burden on the accused to prove the relevance of the cognitive impairment on the balance of probabilities.

NSW extend this provision to persons with a 'mental health impairment'. In our submission, this is should be removed, as there is no evidence to support the need for such a broad provision that could be weaponised by perpetrators of violence.

There are other mechanisms through which the court can ensure appropriate safeguards are in place for accused persons with a cognitive impairment, including broad discretionary powers in sentencing and in some states, provisions allowing persons who do not have the mental capacity are not tried in the same way as other adults. We encourage exploration of these other options, so as not to limit legal reforms that will contribute significantly to the safety of vulnerable groups, including those with a cognitive impairment, who are over-represented as victims of sexual violence.

Young people

There is no evidence that young people will be disproportionately impacted by these laws. Nonetheless, we refer to the Committee terms which include reference to the need for consent education, more accurately referred to as 'comprehensive relationships and sexuality education', and the ongoing work to support age-appropriate education in early childhood (noting RASARA's strong support for a 'cradle to grave' approach).

Sexual violence knows no age. Sexual violence occurs in the home, on the streets, in the school yard, on university campuses, churches and places of worship, workplaces and in hospital or care settings, including aged care homes. The law will apply equally across the community, in line with the expectation of what responsible and appropriate sexual citizenship is. We look forward to the Law Council's vocal support of comprehensive relationships and sexuality education across Australia, in light of their concerns for young people.

Principle 6: consideration should be given to a broader range of policies to substantially reduce the incidence of sexual violence, for example [in brief]: restorative justice, financial assistance and truth-telling, civil litigation options.

We agree that the reform agenda must also focus on reducing the incidence of sexual violence. However, the provisions mentioned in this principle are not such that would achieve this goal.

We do support increased pathways to civil litigation and financial assistance, in recognition of the significant impact on the lives of victim-survivors, including financial burden.

However, we must recognise that calls for alternative legal options that divert away from the criminal justice system distract from the clear message from survivors in our community for criminal justice reform.

The criminal justice system cannot shut out survivors of sexual violence. It is the responsibility of law and policy makers and agencies of the criminal justice system to ensure equal access to justice. This means a system that is trauma-informed.