

Preliminary notes in response to the Law Council of Australia's recommended principles regarding sexual consent laws and definition

Prepared by Sexual Assault services Victoria (SASVic) for the consideration by the Legal and Constitutional Affairs References Committee, 25 July 2023.

Summary: Several of the principles recommended by the Law Council provide a useful starting place- but must be tested and refined through further consultation with specialist sexual assault services as well as victim-survivor focused legal services (such as Women's Legal Services Victoria and Australia).

Please note that this is SASVic's preliminary response, and we would welcome the opportunity to comment in more detail.

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

Agree.

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

Moving towards an affirmative consent model does not, and has not, required a weakening of the presumption of innocence or the right to silence. Instead, it aims to help address the disproportionate and overwhelming burden placed on victim-survivors of sexual violence under the current model (noting that affirmative consent laws will not address this imbalance on their own).

See examples in Tasmania and Canada.

SASVic is not aware of any evidence that shows any increase in wrongful convictions as a result of shifting to an affirmative consent model.

Victim-survivors and the general community already have low levels of faith in the outcomes of criminal trials for sexual offences. A better, fairer process would build confidence in the justice system and its outcomes, which benefits victim-survivors as well as defendants.

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.

SASVic is broadly supportive of consideration of proportionality. Under the current system victim-survivors face an almost impossible up-hill battle to secure a conviction despite the prevalence and impacts of sexual violence. SASVic believes that this burden should be more evenly and proportionately shared through better, fairer court processes.

Victim-survivors have rights as well as defendants, not just 'interests'. The current justice system is generally recognised to be profoundly broken – this undermines community confidence in outcomes for defendants and victim-survivors.

As we have seen many times in relation to child sexual abuse in institutional settings, failure to hold perpetrators of sexual violence to account enables further sexual violence and harm to continue, exposing community members to further harm.

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

We agree. Many laws, including the previous consent laws in Victoria, already include provisions related to communicative consent. There is no single definition of ‘communicative consent’ or ‘affirmative consent’, so the one approach does not exclude the other. However, SASVic strongly prefers and recommends an ‘affirmative consent’ model.

At a minimum, legal reform related to consent must provide:

- *Updated definition of consent*
- *Introduction of affirmative sexual consent model*
- *Additions to circumstances where there is no consent (eg. family violence and coercive control)*
- *Inclusion of non-consensual condom tampering or removal*
- *Changes to image-based sexual abuse laws*
- *Provision to improve the justice system to better protect victim survivors, including increased education and direction for members of a jury to understand sexual violence*

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.

Agree. However it is important to note that marginalised community members who are victim survivors of sexual violence have also been disproportionately negatively affected by the existing criminal legal frameworks. At a minimum, legal reform related to consent must include safeguards for people with cognitive impairment or mental illness.

Identifying and mitigating against any unintended consequences should be a key consideration in measurement and evaluation frameworks. Such frameworks should focus on assessing whether and to what extent:

- *new consent laws have been utilised, including reasonable belief in consent*
- *they have been used against victim survivors by perpetrators as a form of systems abuse, particularly for victim survivors who are over-represented in the CJS, such as Aboriginal and Torres Strait Islander women and girls, and women and girls with a disability*
- *any other unintended consequences have arisen which should be addressed.*

Principle 6: consideration should be given to a broader range of policies to substantially reduce the incidence of sexual violence, for example: - increasing investment in restorative justice for suitable sexual offence matters; - improving financial assistance and truth telling for victim-survivors of sexual violence; and - improving civil litigation options for victim-survivors.

We support further investment in primary prevention of sexual violence and harm (and believe that specialist sexual assault services have a key role to play in driving this agenda). We also support a range of different justice options being provided to victim-survivors, including criminal, civil and restorative justice options.

We would strongly caution against focussing on restorative justice as an alternative to the criminal justice systems for sexual offences. We believe that this reinforces the message that sexual violence survivors deserve a lower standard to justice than other victims of serious crime.

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. In this regard, consideration should be given to: - appropriate resourcing of the legal assistance sector; - appropriate resourcing for judicial officers; and - avoidance of over-complex rules prescribing jury directions, which increase the scope for appeals.

While we support some of the intention behind this principle, we are concerned by the emphasis on 'avoidance of over-complex rules prescribing jury directions.' For too long the burden of pursuing a criminal case has fallen too much on victim-survivors. Instructions for juries can be a key mechanism to shift this burden so that is shared more fairly. SASVic supports strengthened instructions for juries, provided early and consistently in sexual offence proceedings in line with evidence-based best practice. We note that changes to jury directions in Victoria were recommended by the VLRC and adopted by government. These changes have been introduced without creating greater complexity.

Principle 8: the aims of any legislative change towards better realising the communicative model of consent should be supported by community education; there should be ample lead-in time to allow for targeted education of young people and vulnerable people who may be disproportionately impacted by changes.

We agree. However, as communicative and/or affirmative consent models are underway in several Australian jurisdictions, we do not see any need for further delay in relation to the development and delivery of high quality, sustained community education.

While we support a focus on young people, who we know experience some of the highest rates of sexual violence across our community, affirmative consent, sexual violence and respectful sexual relationships impact everyone in our community. Community education must reflect this through a whole of community, multi-setting approach.