Submission

Attorney-General's Department (SA) – Review of Sexual Consent Law in South Australia
December 2023

Introduction

The Youth Affairs Council of South Australia (YACSA) is the peak body representing young people aged 12 to 25 years as well as the non-government services that support them. YACSA is a member-based organisation, and our policy positions are independent and not aligned with any political party or movement. We aim to achieve meaningful improvements in the quality of young people's lives.

YACSA advocates for the fundamental right of all young people to participate in and contribute to all aspects of community life, including decision-making processes that impact them, and we recognise the barriers young people experience when engaging in government decision-making processes.

YACSA is pleased to provide this contribution to the Attorney-General's Department Review of Sexual Consent Laws in South Australia. Gender equality is an issue of significant concern for young people, which encompasses gendered and sexual violence, including sexual assault. Young people are a significant stakeholder in decision-making on consent law and education, with young people the most likely cohort to experience – and perpetrate - sexual assault. While the current consultation discusses legislative reform, the importance of prevention education must be recognised as an integral part of successful legislative reform and YACSA urges the State Government to invest in evidence-based education as a preventative measure.

Young people in context

Young people are a key cohort for consideration in reform to consent and sexual violence-related legislation as they are the most likely cohort to be victimised and perpetrate sexual assault[i]. Further, an assumption that young people would develop an improved understanding of consent and sexual violence has not been realised, and today in Australia young people continue to hold misinformed views on sexual violence[ii]. Young people are experiencing a stage in life where expressions, values and understandings can be impacted by exposure to violence and attitudes that support it. Responses to sexual violence are impacted significantly by misunderstandings on consent and by commonly believed myths about sexual violence (called 'rape myths'). The purpose of rape myths is to obscure the nature of sexual violence as well as create both hostility and bias towards victim-survivors[iii]. These myths and misunderstandings on consent are employed to distinguish the experiences of victim-survivors from the 'real rape' stereotype which undermines the credibility of victim-survivors[iv].

Past legislative reforms have attempted to address myths and misunderstandings, but they remain persistent at institutional, societal, and individual levels[v]. Police, prosecution and defence, as well as decision-makers like judges and juries, are not immune to rape myths[vi]. Research finds that when rape myths are relied upon within proceedings, the prosecution rarely challenges them, nor do judges counter them[vii]. Prosecution reinforces rape myths by relying on them when an experience fits the 'real rape' stereotype and defence relies on rape myths in cross-examination, while judges use rape myths

as a mental shortcut when practising intervention decisions, linguistic choices and, most concerningly when providing jury direction proposed to counter these myths[viii].

Affirmative consent

An affirmative consent model aims to shift the framing of consent from one person accepting or rejecting an offer of sexual activity, which supports the use of a narrative based on a subjective inference of another person's actions, to understanding consent as ongoing active communication allowing attention to be given to steps taken by all parties to clarify consent[ix]. Adopting an affirmative consent model in South Australia may assist in better framing of consent. In recent years both Victoria and New South Wales have incorporated affirmative consent in legislation but whether reforms of this nature improve the reporting and conviction rates of sexual violence-related offences or better support victim-survivors throughout proceedings is unclear[x]. In the interest of harmonising sexual violence-related legislation across Australian jurisdictions, South Australia would benefit from adopting an affirmative consent model similar to New South Wales and Victoria.

According to the *Criminal Law Consolidation Act 1935* (SA), to be considered an offence of 'rape' under the Act, a defendant engages in or continues to engage in sexual intercourse with another person who does not or has withdrawn consent and the offender knows or is recklessly indifferent to the other person not consenting or withdrawing consent. To be considered 'recklessly indifferent' a person may be aware of the possibility another person does not or has withdrawn consent but failed to take reasonable steps to confirm it, or a person does not give any thought whether another person does not or has withdrawn consent. In proceedings on a charge of rape under the Act, the intention to engage in sexual intercourse and the defendant knowing, or being recklessly indifferent to the other person not providing or withdrawing consent are a fault element. South Australia, as a common law jurisdiction, allows for a defence of 'honest belief' and that belief is not required to be considered reasonable. This means a defence need only demonstrate whether the defendant believed the other person was providing consent and not whether that belief could be considered reasonable. An 'honest belief' is a wholly subjective element of fault that allows the influence of rape myths and misunderstandings on consent to thrive during proceedings, especially as relying on 'honest belief' frames consent as one person accepting or rejecting another person's request for sexual activity. Victim-survivors, in the face of heavy scrutiny and significant opposition, must therefore demonstrate that they did not consent or withdrew consent, and the defendant was either aware or recklessly indifferent to that. Outside of adopting affirmative consent, changes to the subjective fault element of 'honest belief' requiring a defendant to demonstrate reasonable steps taken to ascertain consent would be an improvement.

Conversely, affirmative consent is centred on communication and agency, and it allows for understanding that consent is unambiguous, actively given and ongoing. It acknowledges the reality of sexual violence-related offences, and it is a positive starting point for improved education and awareness. Affirmative consent models can also begin to address misunderstandings about consent and rape myths, especially related to the inference of consent. Helping the community accept that it is each individual's responsibility to affirm whether any other people engaging in sexual activity with them are providing consent is a positive step towards acknowledging and shifting the power dynamic often present in sexual violence-related court proceedings[xi]. Improving the understanding of affirmative consent is important for young people as evidence demonstrates that young women in particular struggle to say no including within relationships that do not involve violence[xii]. Young women therefore rely on non-verbal communication to show a lack of consent and recent research showed that consent was considered to be assumed, alluded to and even expected or inevitable, resulting in young women feeling a lack of control and agency[xiii]. While adopting affirmative consent is progression, including an affirmative consent model in legislation will not necessarily improve issues

present in the adversarial trial system and if not well consulted on and drafted, it risks detrimentally impacting marginalised groups such as LGBTIQA+ people as well as refugees and migrants[xiv].

There are several circumstances when a person is not taken to consent included in other jurisdiction's legislation that are not explicitly included in South Australia's current legislation. Primarily, New South Wales and Victoria include the circumstance of 'if the person does not say or do anything to communicate consent'. Jurisdictions with affirmative consent models also include when a person engages in sexual activity because of intimidation either as a single occurrence or as an ongoing pattern of behaviour as well as when a person engages in sexual activity because they are overcome by an abuse of authority, trust or dependence within the relationship.

Legislative reform cannot force social change[xv]. While adopting affirmative consent is positive, legislative reform alone will not address cultural and social limitations on improving a broader understanding of consent[xvi]. Despite reform to remove criteria for physical violence and force from legislation on sexual violence offences in favour of consent that began in the 19th century, without evidence of physical violence present, securing a conviction on sexual violence-related offences remains considerably onerous and rare[xvii]. Within court proceedings, victim-survivors continue to be subjected to a high level of scrutiny over their behaviour, appearance and demeanour. To determine whether consent was present or whether a defendant held an 'honest belief' that consent was present, a victim-survivor can be cross-examined on their sexual history, occupation, clothes, medical history and more[xviii]. This is a common approach to sexual violence-related proceedings employed to frame consent as being given by inference (despite current laws) or to demonstrate that a defendant believed consent was present. A low threshold for defendants to claim a belief of consent and persistent misunderstandings on consent within the community continue to influence responses to sexual violence-related offences[xix].

Jury directions

The effectiveness of jury directions is debatable as evidence indicates jurors can struggle to fully understand and apply directions and that when jurors are unclear on their task, they rely more heavily on assumptions that reinforce misunderstandings and myths[xx]. Jury directions in proceedings for sexual violence-related offences primarily attempt to limit the pursuit of cross-examination designed to undermine a complainant's credibility based on rape myths and misunderstandings of consent commonly present in the community[xxi]. The extent of the effectiveness of jury directions in this respect is limited as directions do not prohibit attempts to undermine a complainant's credibility, but merely allow a judge to address the myth-based narrative being employed[xxii].

A requirement for a judge to provide jury direction on matters relating to rape myths and misunderstandings of consent features in both Victorian and South Australian legislation, with Victoria's Act stating direction must be given as soon as possible mid-trial. One rape myth-based narrative that has persisted despite reform attempting to modernise sexual violence-related laws and that remains frequently relied on by defence is the notion that any delay in making a complaint or divergence away from seeking immediate emergency support suggests a complainant lacks credibility and may have fabricated their report[xxiii]. South Australian legislation allows for evidence of why the complainant made their initial complaint to a certain person at a particular time and why a complainant did not make a complaint sooner to be admissible. When this evidence is admitted, a judge must provide a jury direction that there may be various reasons a complaint was made at a particular time to a particular person, however, legislation does not indicate when this direction must be given, and the jury otherwise determines the significance of this evidence[xxiv].

The current Victorian *Jury Directions Act 2015* (Vic) goes slightly further on jury direction (see Part 5, Div 2, s. 52), requiring a trial judge to direct the jury that a delay in reporting on sexual violence-related offences is common and that there is no typical, proper or 'normal' response to experiencing sexual violence-related offences. Despite this, defence counsel continues to rely on this narrative even in cases where a complainant reported to someone immediately[xxv]. Regardless of the legislative requirement, Quilter *et al* 2023[xxvi] found jury direction given as soon as possible mid-trial was not provided by the judge in all reviewed cases. Additionally, when a delay narrative focused on how initial complaints were made, the judge failed to give the required jury direction before evidence was adduced. This research also highlighted the range of delay narratives used to suggest a complainant is not genuine and that the application of required jury direction is inconsistent. Defence counsel has been found to frequently utilise evidence on whether a complainant 'complained' to the defendant immediately following the alleged offence as well as a complainant not telling the right person, not immediately calling emergency services, or expressing reluctance to report to police straight away to suggest a complainant lacks credibility[xxvii].

For South Australia, reform that allows jury direction to be provided early in proceedings would give jurors a more informed position and is likely more effective as jurors tend to consider the evidence as it is presented and so if jury direction is only provided at the end, it requires jurors to re-consider the evidence provided which is unworkable, especially in attempts to address entrenched myths on sexual violence-related offences and consent[xxviii]. Recent research also suggests a pre-trial to take place on whether evidence may include matters subject to jury direction would allow a judge to address jury directions in opening remarks and this better supports the utilisation of jury directions in proceedings on sexual violence-related offences[xxix].

Conclusion

It is broadly accepted that legislative reform alone is insufficient to address the issue of sexual violence-related offences and associated matters. Nationally and internationally, significant legislative reform on the matter of consent and sexual violence-related offences has had little effect on rates of offending, rates of reporting and attrition rates[xxx]. Without considering matters like prevention, community education, reporting processes and police discretion, the effectiveness of any legislative reform seeking to improve reporting, attrition and conviction rates for sexual violence-related offences cannot be fully realised. Primarily, without investment in prevention education for young people, problematic misunderstandings of consent and commonly held rape myths in the community will continue to detrimentally affect the prevalence of sexual violence, the criminal justice system and responses to sexual violence-related offences.

Youth Affairs Council of South Australia Inc
GPO Box 2117
Adelaide SA 5001

Level 4, 182 Victoria Square, Tarntanyangga
Adelaide SA 5000

(08) 8211 7546
yacsa@yacsa.com.au
www.yacsa.com.au

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

[ii] Coumarelos, C, Roberts, N, Weeks, N, and Rasmussen, V 2023, *Attitudes Matter: The 2021 National Community Attitudes Towards Violence Against Women Survey (NCAS): Findings for Young Australians Report*, ANROWS, Sydney.
[iii] Brownmiller, S 1975, *Against Our Will: Men, Women and Rape*, Random House Publishing Group, Manhattan.
[iv] 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.
[v] Simpson, B 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.
[vi] 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.
[vii] Temkin et al, *Different Functions of Rape Myth Use in Court*.
[viii] 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.
[ix] Schaffer, J 2023, 'Narrative of Force, Resistance and Mistaken Belief in Consent in South Australian Rape', *The Adelaide Law Review*, vol. 44, no.2, pp. 608-637, doi: 10.3316/informit.514799009138991.
[x] Featherstone, L, Byrnes, C, Maturi, J, Minto, K, Mickelburgh, R and Donaghy, P 2024, *The Limits of Consent: Sexual Assault and Affirmative Consent*, Palgrave Macmillan Cham, Camden, doi: 10.1007/978-3-031-46622-9, available: https://library.oapen.org/viewer/web/viewer.html?file=/bitstream/handle/20.500.12657/85079/978-3-031-46622-9.pdf?sequence=1&isAllowed=y.
[xi] Burgin, R and Flynn, A 2021, 'Women's Behaviour as Implied Consent: Male "Reasonableness" in Australian Rape Law', *Criminology and Criminal Justice*, vol. 21, no. 3, pp. 334-352, doi: 10.1177/1748895819880953.
[xii] Featherstone, et al, *The Limits of Consent*.
[xiii] Righi, M, Bogen, K, Kuo, C and Orchowski, L 2021, 'A Qualitative Analysis of Beliefs about Sexual Consent Among High School Students', *Journal of Interpersonal Violence*, vol. 36, no. 15-15, doi: 10.1177/0886260519842855.
[xiv] Love, G, Michele, C, Giakoumidaki, E, Sanchez, M, and Cartei, V 2017, 'Improving Access to Sexual Violence Support for Marginalised Individuals: From the Lesbian, Gay, Bisexual and Trans and the Black and Minority Ethnic Communities', *Critical and Radical Social Work*, vol. 5, vol. 2, pp. 163-179, doi: 10.1332/204986017X14933954425266.
[xv] Serisier, T 2018, *Speaking Out: Feminism, Rape and Narrative Politics*, Palgrave Macmillan Cham, Camden, Springer Link.
[xvi] Burgin & Flynn, *Women's Behaviour as Implied Consent*.
[xvii] Featherstone et al, *The Limits of Consent*.
[xviii] Schaffer, *Narrative of Force, Resistance and Mistaken Belief*.
[xix] Henderson, E and Duncanson, K 2016, 'A Little Judicial Direction: Can the Use of Jury Direction Challenge Traditional Consent Narratives in Rape Trials?', *University of New South Wales Law Journal*, vol. 39, no. 2, pp. 718-746.
[xx] 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.
[xxi] Dinos, S 2015, 'A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?', *International Journal of Law, Crime and Justice*, vol. 43, no.1, pp. 36–49, doi: 10.1016/j.ijlcj.2014.07.001.
[xxii] Quilter, J, McNamara, L and Porter, M 2023, 'The Most Persistent Rape Myth? A Qualitative Study of 'Delay' in Complaint in Victorian Rape Trials', *Current Issues in Criminal Justice*, vol. 35, no.1, pp. 4-26, doi: 0.1080/10345329.2022.2090089.
[xxiii] Byrne, G 2022, 'Helping Jurors to Understand: Misconceptions About Delay in Making a Complaint', *Alternative Law Journal*, vol. 47, no.1, pp. 16–22, doi: 10.1177/1037969X211052707.
[xxiv] *Evidence Act 1929* (SA), Part 3, Div. 2, 34M.
[xxv] Quilter, et al, *The Most Persistent Rape Myth?*.
[xxvi] ibid.
[xxvii] Victorian Law Reform Commission (VLRC) 2021, *Improving the Justice System Response to Sexual Offences Report*, VLRC, Melbourne.
[xxviii] Leverick, F 2020, 'What Do We Know About Rape Myths and Juror Decision Making?', *International Journal of Evidence & Proof*, vol. 24, no. 3, pp. 255–279, doi: 10.1177/1365712720923157.
[xxix] Henderson & Duncanson, *A Little Judicial Direction*.
[xxx] Featherstoneet al, *The Limits of Consent*.