Law Council
OF AUSTRALIA

Current and proposed sexual consent laws in Australia

Legal and Constitutional Affairs References Committee

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

The Law Council gratefully acknowledges the contribution of its Constituent Bodies including the Law Society of New South Wales, the Law Institute of Victoria and the Victorian Bar, in addition to the Law Council's National Criminal Law Committee and National Human Rights Committee.

Executive Summary

1. The Law Council is grateful for the opportunity to respond to the review by the Senate Legal and Constitutional Affairs References Committee (the **Committee**) of current and proposed sexual consent laws in Australia.

2. The Law Council has selectively addressed aspects of the Committee's terms of reference, focussing on areas aligned with the specific skills and expertise of its Constituent Bodies and expert advisory committees.

3. The Law Council acknowledges the impetus for a national evaluation of sexual consent laws, which has been driven by some of the following recent developments, including but not limited to:

   - community debate and subsequent law reform consideration prompted by the experience of Saxon Mullins in NSW;[1]
   - the 'Teach us Consent' campaign launched in 2021 by Chanel Contos, and calls for more holistic and earlier consent education in Australia;[2] and
   - the #LetHerSpeak campaign in relation to victim-survivor gag laws in Tasmania, the Northern Territory and Victoria, enabling 17 survivors—such as Grace Tame—to tell their stories without risk of prosecution.[3]

4. The Meeting of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault identified, as a priority area, 'strengthening legal frameworks to ensure victim-survivors have improved justice outcomes and protections, wherever necessary and appropriate, across Australia'.[4]

5. The Law Council recognises that members of the legal profession, like the broader community, are likely to have a range of views on the most appropriate legal definition of sexual consent, noting that the experience of law reform to realise affirmative consent provisions has varied between jurisdictions. For this reason, the Law Council does not advocate for any one substantive definition of consent or particular jury direction or rule of evidence as national 'best practice' in this area. In addition, the Law Council recognises the ongoing work of its Constituent Bodies in carefully scrutinising individual proposals in the context of unique state and territory circumstances.

6. As a general comment, the Law Council cautions against consideration of sexual consent laws in isolation from the sexual assault offence provisions in each state and territory; the distinct approaches to the rules of evidence taken in common law and uniform evidence rules jurisdictions; and the practices of courts and law enforcement officials in each jurisdiction.

[1] 'I am that girl,' *Four Corners* (Australian Broadcasting Corporation, 8 May 2018).
[2] Emma Brancatisano, 'Consent education has reached an 'important milestone' in Australia. Here's what experts want to see next,' *SBS News* (Online, 9 March 2022).
[3] Nina Funnell, #LetHerSpeak, 'Why we advocate,' (undated).
[4] Commonwealth of Australia, Attorney-General's Department, *The Meeting of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022-2027* (12 August 2022).

7. The Law Council notes the following context, which informs its consideration of the serious issues canvassed in this review:

- Sexual violence is a widespread harm.[5] It can have serious and long-term negative impacts. Women and girls are more likely than males to have experienced sexual violence.
- The incidence of sexual harm often overlaps with other patterns of violence, including family and domestic violence and child abuse, and disproportionately affects already marginalised groups in society.[6]
- Sexual violence is widespread but underreported. Most reports of sexual violence do not make it to court.[7]
- Sexual violence matters suffer from higher attrition within the criminal justice system.[8] For example, in Victoria, only about half of the trials in higher courts end with someone being found guilty which is a lower rate than for most other offences.[9]

8. The Law Council supports a national evaluation of sexual consent laws and recognises the impact of inconsistencies in consent laws across various jurisdictions on the experience of victim-survivors. In this regard, there is increasing convergence across jurisdictions reflecting that the definition of sexual consent should seek to achieve a communicative model of consent.[10] Communicative consent has the following three key elements:

- every person has a right to choose whether or not to participate in a sexual activity;
- consent to a sexual activity is not to be presumed; and
- consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.[11]

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[5] The ABS estimate 2.2 million women (23%) and 718 000 men (8%) aged 18 years and over have experienced sexual violence in their lifetime, including childhood sexual abuse and/or sexual assault since the age of 15: Commonwealth of Australia, Australian Bureau of Statistics, *Sexual Violence – Victimisation* (24 August 2021).

[6] Research suggests that certain populations are more likely to experience sexual assault including people who are homeless, have a disability, identify as LBTQI+ and have previously been victim-survivors of sexual assault at any point through their life: Commonwealth of Australia, Australian Institute of Health and Welfare, *Sexual assault in Australia* (August 2020).

[7] A 2016 ABS study found that approximately nine out of ten women who experienced sexual assault by a male (87% or 553,900) did not contact the police about the most recent incident. Reasons for not contacting the police included feeling like they could deal with it themselves (34% or 189,400) and not regarding the incident as a serious offence (34% or 187,400): Commonwealth of Australia, Australian Bureau of Statistics, *Personal Safety, Australia, Relationship to perpetrator in more recent incident of sexual assault by a male*, (8 November 2017).

[8] A recent Victorian study found only one in seven incidents of sexual offending reported to police progress through the justice system to be proven in court: Victorian Government, Crime Statistics Agency, *Attrition of sexual offence incidents through the Victorian criminal justice system: 2021 update* (September 2021).

[9] Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, (September 2021) xxii. (‘***Victorian Law Reform Commission, Improving Justice System Response***’)

[10] The Law Council recognises commentators have used the term ‘affirmative consent’ and ‘communicative consent’ in slightly different ways. For the purpose of this Submission the Law Council adopts the usage of the New South Wales Law Reform Commission which used the concept of ‘communicative consent’ as a ‘type’ of affirmative consent.

[11] New South Wales Law Reform Commission, *Consent in relation to sexual Offences*, Structure and Language, (September 2020) Report 148, Recommendation 4.3 47. (‘***New South Wales Law Reform Commission, Consent***’)

9. Views may differ on the degree to which legislative provisions already accommodate the communicative model of consent and the degree of change required. While recognising that there are arguments for national harmonisation, the Law Council also highlights that there are practical impediments, risks and opportunity costs to such an approach, having regard to alternative measures available. Key differences also exist between common law and code-based criminal law jurisdictions. These differences, which are not insignificant, would need to be overcome to produce a common model.

10. There are also conflicting human rights at play, which create tensions for reformers. For this reason, the Law Council's suggested overarching principles contained in this submission emphasise a proportionality framework to evaluate any potential justification for legislative amendment to better realise the communicative model of consent.

11. The Law Council recommends that these overarching principles should be subject to further consultation through the Standing Council of Attorneys-General, to inform the evaluation of sexual consent definitions across jurisdictions. The principles are:

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

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

    - **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.

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

    - **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.

    - **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.

    - **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.

- **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.

Inconsistencies in consent laws across different jurisdictions

12. To assist the Committee in its identification and consideration of inconsistencies in consent laws across different jurisdictions, the Law Council has attached a table of inconsistencies in sexual consent laws (**Appendix**).

Common law and code jurisdictions

13. In considering the differences noted in the Appendix, it is important to understand the distinction between common law and code jurisdictions which identify elements of the offence differently. Proponents of harmonisation have noted that 'deep-seated differences … exist between common law and code-based criminal law jurisdictions' and that 'these differences would need to be overcome to produce a common model'.[12]

14. Australian jurisdictions adopt one of two approaches to criminal law:

- **common law jurisdictions**—some jurisdictions, such as Victoria, New South Wales and South Australia, rely on a combination of the common law and statute law to proscribe criminal conduct.
- **code jurisdictions**—some jurisdictions, such as Queensland,[13] Western Australia,[14] Tasmania,[15] the Australian Capital Territory[16] and the Northern Territory,[17] only rely on statute law to proscribe criminal conduct.

15. The structure and elements of sexual offences differ considerably across common law and code jurisdictions. In common law jurisdictions, the prosecution is required to show that the accused demonstrated a specific mental state to establish the offence. In Victoria, a common law jurisdiction, establishing the offence of rape requires proof that:

- the accused sexually penetrated the complainant;
- the complainant did not consent to the sexual penetration; and
- the accused did not reasonably believe that the complainant consented.[18]

16. In most cases,[19] sexual offences in code jurisdictions do not usually contain a mental state requirement as an element of the offence.[20] The Law Reform Commission of Western Australia noted that, in code jurisdictions, establishing rape would only require proof that the accused committed the relevant conduct (for

[12] Jonathan Crowe and Guzyal Hill, 'It's time we aligned sexual consent laws across Australia – but this faces formidable challenges,' *The Conversation* (online, 15 December 2022).
[13] *Criminal Code Act 1899* (Qld).
[14] *Criminal Code Act Compilation Act 1913* (WA).
[15] *Criminal Code Act 1924* (Tas).
[16] *Criminal Code 2002* (ACT).
[17] *Criminal Code Act 1983* (NT).
[18] *Crimes Act 1958* (Vic) s 38.
[19] With the exception of the NT, which includes a mental state requirement as part of its sexual offences: see *Criminal Code Act 1983* (NT) ss 192(3)-(4A).
[20] For example, in relation to the definition of the offence of rape in code jurisdictions, *Criminal Code Act 1899* (QLD), s 349.

example, sexual penetration) and (if relevant) that the complainant did not consent to that conduct. Critically, the accused's mental state would only be relevant to defences contained in the code such as mistake of fact.[21]

17. The distinction between common law and code jurisdictions should be kept in mind in the Committee's assessment of evidence in relation to sexual consent laws in any particular jurisdiction. In this context, the Law Reform Commission of Western Australia noted:

> *This distinction between common law and code jurisdictions should be kept in mind when addressing the questions raised in the Discussion Papers. This is because many of the issues that have been raised in the literature and in other jurisdictions relate to the common law approach to sexual offences. They may have less relevance to a code jurisdiction such as Western Australia.*[22]

18. The Law Council notes that there is some convergence in code jurisdictions to clarify the scope of mistake of fact defences in their application to sexual offence cases, to better realise communicative consent principles. For example, the Queensland Law Reform Commission recommended amendments to the mistake of fact defence. The proposed amendments would provide that, for sexual assault offences in deciding whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may be had to anything the defendant said or did to ascertain whether the other person was giving consent to the act.[23]

19. This recommendation was subsequently implemented in Queensland by the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021*.

20. Scholars have called for similar reforms to the ambit of the mistake of fact defence to be made in Western Australia, and these are currently under consideration by the Law Reform Commission of Western Australia.[24] That Commission is also considering other measures to modify the mistake of fact defence including:[25]

- excluding the operation of the mistake of fact defence in sexual offence cases;
- making the mistake of fact defence more objective;
- providing legislative guidance on assessing the reasonableness of a mistaken belief;
- addressing the measures that the accused took to ascertain the complainant's consent; and
- reversing the onus of proving the mistake of fact defence.

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[21] For example, see mistake of fact defence in Western Australia: *Criminal Code Act Compilation Act 1913* (WA) s 24.
[22] Law Reform Commission of Western Australia, *Sexual Offences Discussion Paper*, Volume 1 Project 113, (December 2022) 22 [2.21]. ('***Law Reform Commission of Western Australia, Sexual Offences***')
[23] Queensland Law Reform Commission, Review of Consent Laws, Recommendation 7-1 143.
[24] The authors suggest that the Western Australian mistake of fact defence in allowing defendants to rely on passive acquiescence or unrelated past conduct by the complainant to establish a mistaken belief in consent is contrary to an affirmative consent model: Jonathan Crowe, Rachael Burgin and Holli Edwards, 'Affirmative Consent and the Mistake of Fact Excuse in Western Australian Rape Law,' *University of Western Australia Law Review* (2022) Vol 50(1):1 284-315; Law Reform Commission of Western Australia, Sexual Offences, 118-152.
[25] Law Reform Commission of Western Australia, Sexual Offences, 123.

Inconsistencies in defining sexual consent

21. Notwithstanding the differences noted in this section and in the Appendix, the Law Council notes that, in general, in relation to the definition of sexual consent, jurisdictions employ some variation of the concept of 'free and voluntary agreement' which broadly reflects the communicative model of consent. However, there are more significant differences in the expression of offence provisions, elaboration of circumstances where consent is vitiated, and applicable defences that inform the application of the definition of sexual consent in particular cases. Additionally, the difference in approach between jurisdictions to the rules of criminal evidence and procedure may have a significant impact on the realisation of consent provisions in particular cases. These are not noted in the Appendix.

22. In 2010, the Australian Law Reform Commission recommended that all federal, state and territory sexual offence provisions 'include a statutory definition of consent based on the concept of free and voluntary agreement':

> *A definition based on agreement properly reflects the two objectives of sexual offences law: protecting the sexual autonomy and freedom of choice of adults; and reinforcing both positive and communicative understandings of consent through use of the term agreement.*[26]

23. The New South Wales Law Reform Commission came to a similar conclusion, and recommended that consent continue to be defined in terms of free and voluntary agreement on the basis that it reflected a communicative model of consent, and the definition was 'generally well regarded and understood'.[27]

24. In Queensland and Western Australia, the definition of sexual consent does not refer to 'free and voluntary agreement' but requires consent be 'freely and voluntarily given'.[28] However, this divergent approach to the definition of sexual consent has already been subject to scrutiny in the context of ongoing law reform projects in each jurisdiction.

25. The Law Reform Commission of Western Australia is currently investigating the merits of introducing a definition of sexual consent that refers to free and voluntary agreement.[29] However, it is important not to overstate the significance of these divergences in the expression of the definition of consent: for example, the Law Reform Commission of Western Australia noted that the Supreme Court of WA has held that 'consent requires, in effect, an agreement as to what it is that is being consented to'[30] and that 'consequently, changing the wording of the Code provision to refer to agreement may have little effect'.[31]

26. Similarly, the Queensland Law Reform Commission was doubtful that the difference in terminology between Queensland and other jurisdictions in relation to the expression of the definition of sexual consent had any practical significance. That Commission reasoned that the current definition of consent already reflects a communicative model of consent, in that it requires consent to be 'given' (that is, communicated) to the other person and the introduction of a new term like

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[26] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) Vol. 1 ALRC Report 114; NSWLRC Report 128 1150 [25.86].
[27] New South Wales Law Reform Commission, Consent, [5.12].
[28] *Criminal Code Act Compilation Act 1913* (WA) s 319(2); Criminal Code Act 1899 (Qld) s 348(1).
[29] Law Reform Commission of Western Australia, Sexual Offences [4.14] - [4.27].
[30] *Saibu v The Queen* (1993) 10 WAR 279, 291 cited by Law Reform Commission of Western Australia, Sexual Offences 42 [4.23].
[31] Ibid.

'agreement' would not substantially change the operation of the law, and might contribute to uncertainty in interpretation because of the loss of case law guidance applying to the existing definition.[32]

27. More recently, the Queensland Women's Safety and Justice Taskforce adopted a different view and recommended that the terminology of agreement be adopted in its 2022 review of sexual offences, noting that the Taskforce was:

> *… persuaded by what they heard from so many women all over Queensland: that, in practice, the 'giving' of consent suggests that women and girls are sexual 'gatekeepers'. This makes them liable to be pressured by others to 'give' or perhaps 'give up' their consent. The Taskforce accepted the contentions of these women, and those who work with and support them, that the term 'agreed' was more reflective of modern community standards, which value equality and mutual respect in sexual relationships, and better promotes and upholds those contemporary standards. The Taskforce also concluded that this change to the criminal law would not compromise the right of the accused person to a fair trial.*[33]

Circumstances where consent is vitiated

28. The Law Council recognises that an important aspect of several recent changes across jurisdictions, to better realise principles of communicative consent, includes modernisation of the categories of coercion where consent is deemed to be absent. However, this process of modernisation has been achieved in different ways across different jurisdictions.

29. In this regard, the Tasmanian Law Reform Institute has noted:

> *… the insistence on affirmative consent has been particularly significant in the law of rape and sexual assault. Previously, proof of absence of consent relied on proof that the victim lacked the capacity to consent or that submission was procured by force, or by the fraud of the accused in a very restricted sense. In other circumstances, coerced sex went unpunished. Section 2A(2) of the Code confirms that consent is to be understood as a positive state of mind by setting out examples of situations where it is presumed there is no consent. Included in the list are the traditional, common law derived categories of force, fraud and mistake but these vitiating circumstances have been supplemented to reinforce and strengthen the notion of free agreement, and to ensure that 'absence of consent is not limited to cases where rational choice is impossible but is extended to circumstances where choice is affected in other ways'. These might include where consent is induced as a result of a power imbalance in a relationship or where one party is economically dependent on the other.*[34]

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[32] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) [5.72]-[5.76]. ('***Queensland Law Reform Commission, Review of Consent Laws***')
[33] Women's Safety and Justice Taskforce (Qld), *Hear Her Voice* (Report No 2, July 2022) 212.
[34] Tasmanian Law Reform Institute, *Consensual Assault*, Final Report No 25 (2018) 2.3.1-2.3.2.

Stealthing

30. Jurisdictions have taken different approaches to strengthen the specification of 'free agreement' to recognise 'stealthing', which refers to non-consensual condom removal or tampering. For example, in Victoria, recent amendments provide that consent is vitiated where a person consents on the basis that a condom is used and then either before or during the act any other person intentionally removes or tampers with the condom or the person who was to use the condom does not use it.[35]

31. Other jurisdictions have addressed the issue of stealthing as a jury directions matter. For example, in South Australia the judge must direct the jury that a person is not to be regarded as having consented to a sexual activity merely because 'the person freely and voluntarily agreed to sexual activity of a different kind with the defendant'.[36]

Challenges of national harmonisation

32. National harmonisation of sexual consent laws would be a substantial undertaking and would need to involve iterative consultations with all relevant stakeholders, extensive technical drafting, and a detailed implementation process.

33. The Law Council notes that many of the challenges that might impede the adoption of model sexual consent definitions and offence provisions were obstacles in the context of the Model Criminal Code Project in the 1990s which failed to achieve wider adoption.[37] However, the challenges outlined in this section are by no means prohibitive and, with sustained consideration, may be overcome.

34. The Law Council considers that a crucial determinant of the prospects of realising national harmonisation of sexual consent laws will be the level of granularity at which norms are prescribed.

Benefits

35. As recognised at the outset of this submission, sexual violence is a widespread harm, with indisputably serious and long-term impacts across the Australian community. It disproportionately affects marginalised groups and is underreported. Sexual violence matters suffer from high attrition within the criminal justice system.

36. This may be, in part, because of unfortunate community attitudes which continue to prevail. These tend to minimise the recognition of sexual violence and the harms caused by it. These can perpetuate myths and misconceptions about the nature of sexual violence and damaging assumptions about perpetrators and victim-survivors.

37. Against this backdrop, the Law Council recognises that a uniform approach, backed by national consensus and government leadership, has the benefit of facilitating clear messaging and allows for consistent education on sexual consent across all jurisdictions. Scholars note that 'it has the potential to clarify the standard of

[35] S 36(1)(ka) of the *Crimes Act 1958* (Vic) inserted by s 3 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic).
[36] *Evidence Act 1929* (SA) s 34N(1)(d)(i).
[37] Matthew Goode, *The Model Criminal Code Project*, Australian Law Librarian 5(4) (December 1997).

ongoing communication expected before and during sex—a crucial component of affirmative consent models' and, thereby, reduce confusion about the law'.[38]

38. Legislative reforms set new national norms, which underpin community education, which in turn informs behavioural change. In this context, the New South Wales Law Reform Commission indicated, in strong terms, that legislative change intended to strengthen sexual consent provisions and achieve better realisation of communicative consent principles in New South Wales would 'provide the foundation for education initiatives' on the basis that:

> *During our consultations, we heard from educators who teach people about consent in different contexts, including in schools and universities. They said that stating in the legislation that consent requires communication could help to educate people about what constitutes consent. Consent educators in Tasmania and Victoria draw upon communication standard in the legislation to educate people about giving and seeking consent. This, it might be thought, is self-evident: those who teach about consent will start from legal concepts and definitions.*[39] (Citations omitted)

39. The Law Council recognises that differences in victim-survivor experiences of the justice system might arise from jurisdictional differences in the definition of sexual consent laws and variations in offence provisions.

Challenges

40. The practical implementation of national harmonisation may be impeded by challenges that should also be considered carefully. In this regard, the Committee should give consideration to the following factors:

- frequent change in this area may undermine legal certainty;
- harmonisation of the law of consent will not necessarily result in harmonisation of the law's application in the context of different criminal justice and law enforcement systems in different states and territories;
- the sustained, cross-jurisdictional and bipartisan commitment required to maintain broad-based consensus on both the need for harmonisation and on shared national standards for a model sexual consent definition;
- the risk that harmonisation will lead to 'levelling down' in order to achieve uniformity;
- uniformity may increase the complexity of the law relating to consent; and
- vulnerable persons may be over-criminalised by the law.

41. Several of these risks are elaborated on further below.

Frequent change may undermine certainty

42. The area of sexual offences has been subject to significant and ongoing reform across multiple jurisdictions, particularly in the last decade.

43. Changes introduced by legislation take time to have practical effect on criminal charges before the courts. For instance, new legislation, in a criminal context, often

[38] Jonathan Crowe and Guzyal Hill, 'It's time we aligned sexual consent laws across Australia – but this faces formidable challenges,' *The Conversation* (online, 15 December 2022).
[39] New South Wales Law Reform Commission, 87 [6.44].

applies only to charges after the commencement date. Thus, it can take four to five years to ascertain whether legislative changes are having their intended effect. This is because trials involving those new provisions will only come before the higher courts 12–24 months after those provisions have come into force. So, in order to consider three years of relevant data, it would be necessary to wait five years after changes have commenced operation. However, the impact of reforms may also be felt more immediately outside the courtroom: e.g., through norm-setting, education and subsequent behavioural change, as set out above.

44. The Law Council notes that frequent changes to multiple aspects of sexual offence provisions and the definition of sexual consent make it more difficult to infer the effectiveness of specific changes on the criminal justice system.

45. The experience of practitioners in this area is that frequent legislative amendment of sexual assault offence provisions and the definition of consent has resulted in the diminished applicability of case law guidance in interpreting the meaning of key provisions. This has the potential to undermine legal certainty for all parties involved. It is necessary to ensure that any reforms are evidence-based, principled, carefully considered to avoid unintended consequences, and designed to minimise the likelihood of further legislative tinkering.

Jurisdictional considerations

46. As a general comment, the Law Council notes that criminal law is a residual power that has been left largely to the Australian states and territories. Scholars have suggested that criminal law is one of the final areas in the context of Australian federalism where states and territories 'continue to hold the reins'.[40]

47. Practically, this recognition of the diverse needs of states and territories continues to reflect the reality that judgments will often differ, among different states and territories, about what should be criminalised, the extent to which it should be criminalised, and the appropriate penalty for the offence.[41] Historically, the traditional rationale for the distribution of residual powers to states and territories is to allow for diversity at the local level, such that states and territories act as 'laboratories of democracy'[42]—that is, the best solutions may be designed and tested locally.

48. Against this background, the Law Council recognises the risk that pressing for a uniform, national approach to sexual consent laws may result in 'drowning out the voices of the local communities' and crowding out 'progressive local solutions'.[43]

49. Differences between jurisdictions including differences in the specification of sexual consent definitions, sexual offences, elements of offences and applicable defences, should be viewed in the context of entrenched differences between jurisdictions that have tried, statutorily, to codify rules of evidence and procedure through implementation of the Model Uniform Evidence Bill[44] and common law jurisdictions.[45] Consideration should be given to the difficulties encountered in

[40] Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of Kable,' (2012) 40 *Federal Law Review* 1, 1.
[41] *Strickland (a pseudonym) v Director of Public Prosecutions* (Cth) (2018) 266 CLR 325, [199] (Gordon J).
[42] This process of policy experimentation among states and territories is sometimes called 'laboratory federalism': Brendan Lim, 'Laboratory Federalism and the Kable Principle,' (2014) 42 *Federal Law Review* 519.
[43] William Partlett, 'Criminal Law and Cooperative Federalism,' (2019) 56 *American Criminal Law Review* 1663, 1672.
[44] *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic), *Evidence Act 2001* (Tas).
[45] Such as Queensland and Western Australia.

relation to material changes in the implementation of the Model Uniform Evidence Bill across states and territories, and the realities that case law interpretation in a jurisdiction may create jurisdiction-specific differences over time.[46]

Risk of 'levelling down'

50. Some proponents of harmonisation have warned that the introduction of a harmonised scheme may require 'levelling down' protections in more progressive jurisdictions to achieve common standards.[47] In other words, to achieve agreement on common legal principles and definitions, minimalist standards may be the most likely to obtain unanimous agreement.

51. While harmonisation and consistency may assist in educative efforts and improved understanding of sexual consent laws, it seems unlikely that jurisdictions that have invested, over time, in law reform intended to strengthen the realisation of communicative models of consent will agree to any perceived dilution in order to achieve consistency. Conversely, it is also possible that a sustained national campaign may produce the kind of broad-based consensus required to lift standards across jurisdictions.

Evidence base for harmonisation

52. As noted above, any reforms in this area should be evidence based, given the challenges in achieving national legislative harmonisation. In this context, the Law Council notes that it is uncertain whether the confusion arising from inconsistent consent definitions across jurisdictions is a material explanation of either the problem of under-reporting or high attrition of sexual offence matters.

53. The opportunity cost of pursuing harmonisation of sexual consent definitions should be weighed against measures that may be more tangibly directed to the experience of victim-survivors in the criminal justice system, along with restorative justice options that may be better targeted at reducing the incident of sexual violence in the community over the long run. These alternative measures are discussed in the following section.

Criminalisation and its impact on vulnerable groups

People with disabilities

54. The Law Council notes that the progressive realisation of the communicative model of consent risks disproportionately impacting vulnerable people, including people with disabilities, whether as victim-survivors, complainants, or accused persons.

55. It is well-established that changes to sexual offence laws require special consideration of the impact on those with intellectual or psychiatric disabilities.[48] This general need for special consideration is heightened in the context of consideration of laws designed to better realise the communicative model of

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[46] This table issued by the Attorney-General's Department gives examples of provisions where states have adopted a section 'substantially different' from the Commonwealth Act. Australian Government, Attorney-General's Department, *Uniform Evidence Act Comparative Tables* (27 August 2015).
[47] Jonathan Crowe and Guzyal Hill, 'It's time we aligned sexual consent laws across Australia – but this faces formidable challenges,' *The Conversation* (15 December 2022).
[48] See, for example, Attorney-General's Department (NSW), Criminal Law Division, 'Intellectual Disability and Sexual Assault: Discussion Paper' (June 2007); Clare Graydon, Guy Hall, Angela O'Brien-Malone, 'The concept of sexual exploitation in legislation relating to persons with intellectual disability,' eLaw Journal: *Murdoch University Electronic Journal of Law*.

consent.[49] This is because some people with disabilities, while capable of consent (and holding a right to sexual self-expression and autonomy) may be less attuned to the social cues of other persons.

56. In this context, the Royal Commission into Violence Abuse Neglect and Exploitation of People with Disability recently found that 'people with disability are overrepresented throughout the criminal justice system,' noting that understanding of this overrepresentation is constrained by the paucity of nationally consistent data.[50]

57. The Australian Institute of Health and Welfare has found people with disability make up 29 percent of Australia's prison population, despite forming only 18 percent of the general population.[51] In addition, people with disability are more likely to experience sexual violence and intimate partner violence compared with people without a disability.[52]

58. Particular regard should be given to the experience of trauma and violence of First Nations people with intellectual or psychiatric disabilities in the criminal justice system. A recent report found First Nations people with intellectual or psychiatric disabilities, and in particular girls and women, are at heightened risk of physical and sexual violence including while in detention.[53]

59. The Law Council has previously extensively outlined the barriers to access to justice experienced by people with disabilities in the criminal justice system.[54]

60. The Law Council encourages further consideration of perspectives of people with lived experience of disabilities and their allies on these issues.

Young people

61. The Law Council notes that sexual offences are not only disproportionately committed against[55] but also investigated and prosecuted against, teenagers and other young people.[56] In 2018–19, among sexual assault offenders, males aged 15–19 had the highest offender rates (102.9 per 100 000) of any age group.[57] Further, the Australian Bureau of Statistics Prisoners in Australia data series shows that of 6446 prisoners convicted for sexual assault and related charges, as their

[49] Jasmine E Harris, 'Sexual Consent and Disability,' (2018) 93 *New York University Law Review* 480.
[50] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Overview of responses to the criminal justice system issues paper* (December 2020), 2.
[51] Ibid.
[52] Commonwealth of Australia, Australian Institute of Health and Welfare, People with disability in Australia 2022: in brief, Table 7: types of violence experienced, by disability status, 14.
[53] Eileen Baldry, Ruth McCausland, Leanne Dowse & Elizabeth McEntyre, '*A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*,' (October 2015) UNSW Sydney.
[54] Law Council of Australia, *The Justice Project – Final Report Part 1: People with Disability*, (August 2018).
[55] For example, in New South Wales, in 2022 of the 3,444 adult victim-survivors of sexual assault 56% were aged between 16 and 25 years at the time of the incident: New South Wales Government, New South Wales Bureau of Crime Statistics and Research, *Sexual offence incidents* (December 2022).
[56] For example, over the period 2010/11 to 2019/20, across Australia, police agencies recorded 51 875 male sexual assault offenders, with a median age of 34 years and 1,609 female sexual assault offenders, with a median age of 26 years. More specifically, of male sexual assault offenders, 14.5% were between the ages of 10 to 17 and 16.3% were between the ages of 18 to 24: Commonwealth of Australia, Australian Bureau of Statistics, *Sexual Assault Perpetrators – Characteristics of sexual assault offenders* (2 February 2022).
[57] Australian Government, Australian Institute of Health and Welfare, *Sexual assault in Australia* (August 2020).

most serious offence, 378 were aged 20–24 (5.86%) and 594 (9.21%) were aged 25–29.

62. Young people are often in the process of exploring their sexuality and having their first sexual experiences. This makes young people vulnerable to sexual offending, but also puts them at a higher risk, due to their relative inexperience, of contravening criminal prohibitions in this area. In this context, the Law Council notes the concerns of its Constituent Bodies, including the Law Institute of Victoria, the Victorian Bar, and other civil society stakeholders such as Liberty Victoria that recent measures to modify sexual consent laws may have unintended consequences for young people.[58]

63. The Law Council notes the concerns raised by Liberty Victoria in relation to requiring rigid requirements on young people to take active steps to ascertain consent:

> *Young people in the process of exploring their sexuality and relationships are likely to be disproportionately affected by the proposed amendments. It is our view that attempting to use the criminal justice system to drive changes in sexual behaviour is fraught, especially given the potentially punitive penalties for being found to have committed sexual offences.*[59]

64. The Law Council notes that, in some jurisdictions, certain guiding principles have been incorporated in legislation.[60] For the avoidance of doubt, the Law Council does not express a view on the codification of overarching principles in criminal offence legislation on the basis that there are divergent views on the effectiveness of codification of general principles. Most recently, the Queensland Law Reform Commission disagreed that general legislative statements of objectives or guiding principles are helpful to juries, in their role as triers of fact in criminal trials to evaluate factual issues in specific cases, or to judges in their application of the law.[61]

Overarching principles to evaluate the adequacy of sexual consent laws

65. To promote further discussion, the Law Council suggests the following principles could guide the assessment of sexual consent laws and be the basis for further consultation.

- **Principle 1**: sexual consent laws and sexual assault offences should be expressed clearly.
- **Principle 2**: the fundamental principles that underpin the criminal justice process, such as the presumption of innocence and right to silence, must be maintained.
- **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.

[58] Liberty Victoria, Submission, *the Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022* (12 August 2022) 5 [17]];
[59] Ibid.
[60] For instance, s 37B *Crimes Act 1958* (Vic).
[61] Queensland Law Reform Commission, [8.102] 228.

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

66. Some of these principles are elaborated on in greater detail below.

Principle 2: the fundamental principles that underpin the criminal justice process must be maintained

67. The rule of law requires maintaining the presumption of innocence as a fundamental principle underpinning the criminal justice system.[62] Australian courts have clearly identified that the fundamental principle of the common law is that the onus rests on the Crown to prove guilt beyond reasonable doubt.[63] The companion rule to the fundamental principle is that an accused person cannot be required to testify, and that the prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.[64] An accused person is not to suffer a penalty for exercising those rights.

[62] Law Council of Australia, Policy Statement, Rule of Law Principles (March 2011).
[63] *Woolmington v The Director of Public Prosecutions* [1935] AC 462; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; [1993] HCA 74; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 119-120 [46], *Lee v The Queen* [2014] HCA 20, [32].
[64] *Lee v The Queen* [2014] HCA 20, [33]. *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 at 1095 [20].

68. The Victorian Law Reform Commission reiterated the importance of maintaining these fundamental principles in the context of sexual offences in the following terms:

> *Changing fundamental features of our criminal justice system, such as the burden and standard of proof or the adversarial nature of the trial, would have wide-ranging effects, including on the right to a fair trial. Any such changes would need to have strong support and evidence. We did not find such support or evidence in this inquiry.*[65]

69. It has been suggested, including by some of the Law Council's Constituent Bodies, that recent measures designed to further realise a communicative model of consent are unnecessary and adversely impact these fundamental principles of the criminal justice system.

70. For example, the Law Institute of Victoria, the Victorian Bar and other civil society stakeholders, such as Liberty Victoria expressed concerns arising from the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic). They said that some aspects of the reforms, which effectively impose an obligation on an accused person to give evidence to demonstrate what steps he or she took to ascertain consent, were not necessary to realise communicative consent and unacceptably erode the presumption of innocence and the right to silence.[66]

Principle 3: any change should be justified on the basis of proportionality analysis

71. The guiding principles to assess the adequacy of sexual consent laws must include proportionality analysis that balances the conflicting human rights at stake. This means balancing the rights of victim-survivors, for example, to bodily integrity and the right of an accused to a fair trial, which is underpinned by the presumption of innocence and right to silence.

Rights of victim-survivors

72. Sexual offending infringes the rights of victim-survivors—who are often women and girls. The infringement of the following specific rights must be considered:

- **The right to privacy, security of the person and bodily integrity**—the right to bodily integrity is recognised in some international instruments: for instance, it is implicitly protected in the *International Covenant on Civil and Political Rights* (**ICCPR**).[67] The United Nations Human Rights Committee has affirmed that the ICCPR right to privacy (Article 17) and security of the person (Article 9) encompass bodily integrity and autonomy.[68] Further, it is also implicit in Article 12 of the International Covenant on Economic, Social and Cultural Rights,[69] which protects enjoyment of the highest attainable standard of physical and mental health.

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[65] Victorian Law Reform Commission, Improving Justice System Response, 413 [19.12].
[66] Liberty Victoria, Submission, *the Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022* (12 August 2022) 5 [18]-[19]; Sumeyya Ilanbey, 'Lawyers criticise state's proposed sexual consent laws,' *The Age* (online, August 11 2022).
[67] Opened for signature 19 December 1966, entered into force generally in Australia (except Article 41) 13 November 1980.
[68] Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN doc CCPR/C/GC/35 (16 December 2014) [9].
[69] Opened for signature 19 December 1966, entered into force in Australia on 3 January 1976.

- **The right to be free from gendered discrimination**—the *Convention on the Elimination of All Forms of Discrimination Against Women* (**CEDAW**)[70] requires Australia 'to take appropriate and effective measures to overcome all forms of gender-based violence'.[71] Additionally, state parties are obliged, under articles 2 and 15 of CEDAW, to ensure women have access to the 'protections and remedies offered through criminal law' in light of the fact that criminal codes and rules of criminal procedure discriminate against women by 'failing to criminalize or to act with due diligence to prevent and provide redress for crimes that disproportionately or solely affect women'.[72]

73. The importance of consent to sexual offence laws has been emphasised by the United Nations Committee on the Elimination of Discrimination Against Women, which has stated that State parties should ensure sexual assault offences are 'characterized as a crime against the right to personal security' and the definition of these offences is 'based on the lack of freely given consent and takes into account coercive circumstances'.[73]

74. In this regard, the CEDAW General Committee has recommended that State parties:

> *Review rules of evidence and their implementation, especially in cases of violence against women, and adopt measures with due regard to the fair trial rights of victims and defendants in criminal proceedings, to ensure that the evidentiary requirements are not overly restrictive, inflexible or influenced by gender stereotypes.*[74]

75. More recently, the Special Rapporteur on violence against women has reiterated similar concerns around 'revictimization of survivors and high attrition rates' in the criminal justice system. It is important to note that a victim-survivor's experience in the criminal justice system is likely to take a heavy toll as they 'relive traumatic experiences and suffer victim-blaming biases that still permeate societies and criminal legal systems'.[75] Some commentators in Australia have identified the risk that the sexual assault trial becomes an arena for 'character assassination of the complainant' arising from defence allegations about a victim survivor's character and past, including drug and alcohol use, psychiatric history and past criminal offences.[76]

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[70] Opened for signature 18 December 1979, entered into force for Australia 27 August 1983.
[71] Committee on the Elimination of Discrimination against Women, General recommendation 19, para 24, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), 305.
[72] Committee on the Elimination of Discrimination against Women, *General recommendation No 33 on women's access to justice*, UN Doc CEDAW/C/GC/33 (3 August 2015) [47]. ('***CEDAW General Recommendation No 33***')
[73] Committee on the Elimination of Discrimination against Women, *General recommendation No 35 on gender-based violence against women*, updating general recommendation No 19, UN Doc CEDAW/C/GC/35 (14 July 2017) [29](e). ('***CEDAW General Recommendation No 35***')
[74] CEDAW General Recommendation No 33, [51](h).
[75] Dubravka Simonovic, Report of the Special Rapporteur on violence against women, its causes and consequences, '*Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender based violence against women and girls, and its prevention*, Human Rights Council 27th session Agenda Item 3, A/HRC/47/26 (19 April 2021), [98]. ('***Simonovic 2021***')
[76] Annie Cossins, 'Why her behaviour is still on trial: the absence of context in the modernisation of the substantive law on consent,' *University of New South Wales Law Journal* (2019) Vol. 42(2) 462-499, 463.

76. In this regard, the Special Rapporteur concluded that states should consider changes to evidentiary rules that contribute to attrition in the criminal justice system:

> *Evidentiary rules of prosecution should significantly change to decrease impunity for perpetrators and increase the rate of prosecution, while protecting victims from revictimization.*[77]

77. The Special Rapporteur also recommended states ensure age-appropriate education of children and adolescents on sexual autonomy:

> *… including the importance of understanding lack of consent (the "no means no" approach) and of promoting affirmative consent (the "yes means yes" approach).*[78]

78. More generally, it is imperative that victim-survivors are treated with compassion and treated fairly by the criminal justice system. In particular, the Law Council notes the following key principle contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:[79]

- **Article 4**—Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress.
- **Article 5**—Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.
- **Article 6**—The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
  - informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases;
  - allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected;
  - providing proper assistance to victims throughout the legal process;
  - taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety; and
  - avoiding unnecessary delay in the disposition of cases.[80]

79. In light of the prevalence of sexual abuse before the age of 15,[81] special consideration should be given to the rights of children. In this regard, Article 19 of the Convention on the Rights of the Child provides that Governments should ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them.

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[77] Simonovic 2021, [113].
[78] Simonovic 2021, [117].
[79] UN GA, Res 40/34, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34 (29 November 1985). ('***Declaration of Basic Principles of Justice for Victims***').
[80] Declaration of Basic Principles of Justice for Victims.
[81] The 2016 Personal Safety Survey found that 2 million Australians (11%) have experienced sexual assault since the age of 15, including 17% of women and 4.3% of men: Commonwealth of Australia, Australian Bureau of Statistics, *Sexual Violence – Victimisation: Prevalence of sexual assault and childhood sexual abuse* (24 August 2021).

The rights of the accused

80. The rights of the victim-survivors should be considered carefully alongside the rights of the accused to a fair trial. Article 14 of the International Covenant on Civil and Political Rights enshrines the presumption of innocence, referring to the broader right to a fair and public hearing. The High Court in *Dietrich v The Queen* described the right of an accused to a fair trial as a 'fundamental element of our criminal justice system'.[82]

81. Australian courts have clearly identified that a fundamental principle of the common law is that the onus of proving guilt beyond reasonable doubt rests on the Crown.[83] This fundamental principle 'reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused'.[84] At a domestic level, the right to a fair trial is so fundamental that, in some basic respects, it is constitutionally protected.[85]

Framework for proportionality assessment

82. In this regard, where tensions between rights arise, the Law Council endorses[86] the approach of the Parliamentary Joint Committee on Human Rights to the assessment of limitations on human rights:

- whether and how the limitation is aimed at achieving a legitimate objective;
- whether and how there is a rational connection between the limitation and the objective; and
- whether and how the limitation is proportionate to that objective.[87]

83. In considering the final question of proportionality listed above, even if an objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.[88]

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[82] (1992) 177 CLR 292, 299–300 (Mason CJ and McHugh J).
[83] *Woolmington v The Director of Public Prosecutions* [1935] AC 462; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; [1993] HCA 74; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 119-120 [46], *Lee v The Queen* [2014] HCA 20, [32]; *Momcilovic v The Queen* (2011) 245 CLR 1, 51, citing *Howe v The Queen* (1980) 55 ALJR 5, 7.
[84] *Lee v The Queen* [2014] HCA 20, [32].
[85] See generally, Janet Hope, 'A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System,' (1996) 24 *Federal Law Review* 173.
[86] Law Council of Australia, *Policy Statement, Human Rights and the Legal Profession – Key Principles and commitments* (May 2017) 4.
[87] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (June 2015) 7. ('***Guide to Human Rights***')
[88] Guide to Human Rights, 8 [1.20].

Principle 4: communicative model of consent

84. There is emerging consensus that definitions of sexual consent should reflect a 'communicative consent' model.[89] The New South Wales Law Reform Commission described the communicative model in the following general terms:

> *The communicative model of consent emphasises that consent to sexual activity cannot be assumed. Instead, consent should be communicated by one person to another. A person who initiates the sexual activity is expected to ensure that the other person consents before going ahead.*[90]

85. A key rationale for adopting the communicative model of consent is to address the impact of misconceptions about consent on the criminal justice process, briefly outlined below:

- to address the long-standing misconception that a person who does not consent will usually, if not always, offer physical or verbal resistance and to prevent silence, or an absence of resistance, being equated with consent;
- to better recognise research suggesting a common reaction to sexual assault is to "freeze" and remain unresponsive;
- to increase the likelihood that law enforcement officials will lay charges and prosecutors will prosecute in cases where the complainant was passive and did not say or do anything to indicate a lack of consent; and
- to assist in changing community attitudes. [91]

86. Crucially, the communicative model directs attention towards consent as a 'continuous process of mutual decision-making that occurs throughout a sexual activity'.[92] The New South Wales Law Reform Commission recently recommended that implementation of a communicative model of consent by ensuring the definition of sexual consent reflects the following three key aspects:

- every person has a right to choose whether or not to participate in a sexual activity;
- consent to a sexual activity is not to be presumed; and
- consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.[93]

87. The Law Council notes that views may differ across jurisdictions among Constituent Bodies and members of the legal profession on the proportionality of particular reforms intended to realise communicative consent principles.[94]

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[89] Sexual Assault Prevention and Response Steering Committee (ACT), Listen. Take Action to Prevent, Believe and Heal (Report, December 2021) 78-9; Queensland Law Reform Commission, Review of Consent Laws, 79 [5.12]; New South Wales Law Reform Commission Consent 38 [3.25].
[90] New South Wales Law Reform Commission, Consent, 38 [3.25].
[91] Ibid, 85-86 [6.35] – [6.44].
[92] New South Wales Law Reform Commission, Consent, 38 [3.25].
[93] Ibid, Recommendation 4.3 47.
[94] See, for example, New South Wales Bar Association, Media Release, *Consent Proposals Could Result in Significant Injustice* (25 May 2021).

Principle 6: consideration should be given to a broader range of legal and non-legal measures, including restorative justice options, to substantially reduce the incidence of sexual violence and its effects

88. The Law Council supports greater investment in restorative, or non-adversarial, means of justice in appropriate cases with the objective of reducing sexual violence by supporting people responsible for sexual violence in addressing the root causes of the violence. Relevantly, the Victorian Law Reform Commission found:

> *But in too many cases, criminal justice does not redress the wrong at all. In others, it deals with it in a way that does not meet the needs of victim survivors. Clearly, more justice options should be available. Restorative justice has powerful potential to provide choice, voice, acknowledgment and healing for some survivors of sexual violence.*[95]

89. Restorative justice can take many forms, including an exchange of letters between the person harmed and the person responsible, or a mediated conference with the person harmed and the person responsible. It is common for restorative justice schemes to allow for flexible processes to enable the needs of the person harmed to take priority. Often conferences aim to produce an agreement on what will be done to prevent future violence and promote healing.[96]

90. Critically, the Law Council considers that restorative justice options are a supplement to the criminal justice system and careful consideration should be given to the criteria for selecting appropriate matters for resolution on restorative justice principles. The importance of carefully selecting appropriate cases for restorative justice interventions was highlighted by the CEDAW General Committee which observed:

> *The use of those (alternative dispute resolution) procedures should be strictly regulated and allowed only when a previous evaluation by a specialized team ensures the free and informed consent of victims/survivors and that there are no indicators of further risks to the victims/survivors or their family members. Procedures should empower the victims/survivors and be provided by professionals specially trained to understand and adequately intervene in cases of gender-based violence against women, ensuring adequate protection of the rights of women and children and that interventions are conducted with no stereotyping or revictimization of women. Alternative dispute resolution procedures should not constitute an obstacle to women's access to formal justice.*[97]

[95] Victorian Law Reform Commission, Improving Justice System Response, 196
[96] Victorian Law Reform Commission, Improving Justice System Response, 187.
[97] CEDAW General Recommendation No 35, [32](b).

91. The Law Council highlights the important recommendations of the Victorian Law Reform Commission directed to ensuring greater investment in restorative justice options for sexual offences, guided by the following principles to manage the countervailing risks of restorative justice approaches:

- voluntary participation—participation should be contingent on the fully informed consent of participants;
- accountability—the person responsible should take accountability for their actions;
- the needs of the person harmed take priority;
- safety and respect—the process is flexible and responsive to diverse needs, including the needs of children and young people, and of First Nations communities;
- confidentiality;
- transparency—de-identified results are publicised to contribute to continuous program improvement;
- the process is part of an 'integrated justice response'—other criminal and civil justice options are available, as well as therapeutic treatment programs; and
- clear governance.[98]

92. The Victorian Law Reform Commission, persuasively, found that a crucial component of this investment should include investment in the ability of First Nations communities to be supported in designing accredited restorative justice programs for First Nations people.

93. In this regard, the Victorian Law Reform Commission recommended that restorative justice options should be made available in the following situations.

- where a person harmed does not wish to report the harm or to pursue a criminal prosecution;
- where a harm is reported but there are insufficient grounds to file charges;
- where charges were filed but the prosecution discontinues the prosecution;
- after a guilty plea or conviction and before sentencing;
- after a guilty plea or conviction and in connection with an application for restitution or compensation orders;
- at any time after sentencing.[99]

94. The Law Council also supports greater consideration of other civil measures to address the barriers faced by victim-survivors in the criminal justice system. Strengthening victim-survivor access to civil compensation schemes would also be consistent with Australia's international obligations.

95. Notably, the Victorian Law Reform Commission made detailed recommendations in favour of establishing a specialised stream, within the existing financial assistance schemes for victim-survivors of crime, for victim-survivors of sexual violence. In this regard, consideration can be given to relaxing rules regulating time limits for bringing compensation claims in relation to victim-survivors of sexual violence.[100]

[98] Victorian Law Reform Commission, Improving Justice System Response, Table 11 197.
[99] Ibid, Recommendation 31 211.
[100] Victorian Law Reform Commission, Improving Justice System Response, , Chapter 10.

96. The Law Council also supports the recommendations of the Victorian Law Reform Commission directed to increasing resourcing for legal assistance for victim-survivors wishing to bring civil proceedings against a non-institutional defendant (or defendants) for sexual assault where their case raises important 'systemic or legal issues,'[101] or they face multiple barriers to justice and their case has reasonable prospects of success.[102]

Principle 8: community education

97. Because of the limitations of criminal sanctions in changing social attitudes that contribute to sexual violence in society, the Law Council strongly supports investment in community education focussing on improving understanding of consent. This requires attitudinal change across both society and the criminal justice system regarding the prevalence, nature, and dynamics of sexual offending. Achieving this will require clear, accessible, pervasive, and sustained public and professional education campaigns.

98. In this regard, the Law Council notes the recommendations of the CEDAW General Committee calling on States to implement, in consultation with the participation of civil society stakeholders including women's organisations, preventative measures directed to:

> *… address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes, inequality in the family and the neglect or denial of women's civil, political, economic, social and cultural rights, and to promote the empowerment, agency and voices of women.*[103]

99. Measures directed to improve community education should consider the following matters:

- integration of content on gender equality into curricula at all levels of education, both public and private, from early childhood onwards and into education programmes with a human rights approach; and
- awareness-raising programmes that promote an understanding of gender-based violence against women as unacceptable and harmful, provide information about available legal recourses against it and encourage the reporting of such violence and the intervention of bystanders.[104]

[101] The Victorian Law Reform Commission reasoned that 'focusing public support for civil litigation on these cases will ensure the state's funding commitment is sustainable. It will mean that support is used for cases with the potential to improve the law for everyone, and where it is needed most and can bring the most benefit'. Ibid, [11.30].
[102] Victorian Law Reform Commission, Improving Justice System Response, Chapter 11.
[103] CEDAW General Recommendation No 35, [30](a).
[104] CEDAW General Recommendation No 35, [30](b).

100. The Law Council supports greater investment in training for members of the judiciary and members of the legal profession in relation to sexual consent. In particular, the Law Council notes the CEDAW General Committee has cited the importance of training promoting understanding of the following matters:

- how gender stereotypes and bias lead to gender-based violence against women and inadequate responses to it;
- trauma and its effects, the power dynamics that characterize intimate partner violence and the varying situations of women experiencing diverse forms of gender-based violence; and
- legal rights of victim-survivors and training on relevant international standards.[105]

101. The Law Council recommends that the overarching principles listed above be subject to further consultation through the Standing Council of Attorneys-General to inform the evaluation of sexual consent definitions across jurisdictions.

How consent laws impact victim-survivor experiences of the justice system

102. On one view, as the Discussion Paper notes, 'affirmative consent laws will improve the reporting rates for sexual assaults and conviction rates'.[106] The Discussion Paper also invites consideration of how victim-survivors' experience of the criminal justice system could be improved.[107]

103. The Law Council encourages the Committee to view sexual consent laws in the context of the constraints of the criminal trial process, recent changes to court processes, and broader options for policy reform. This may have a greater bearing on the experience of victim-survivors and, thereby, more directly address issues of under-reporting and attrition in the criminal justice system.

104. There is strong evidence for concluding both that sexual offences are under-reported by victim-survivors and that these matters experience a high degree of attrition within the criminal justice system. However, there is a limited basis to infer that the concerning disparities in outcomes experienced by victim-survivors are materially driven by differences in sexual consent laws.

105. Due to the inconsistencies between code and common law jurisdictions and differences in framing relevant offences, it is difficult to identify the degree to which concerning trends in relation to under-reporting and attrition in the criminal justice system are caused by definitions of sexual consent.

[105] CEDAW General Recommendation No 35, [30](e).
[106] Discussion Paper, 4.
[107] Ibid.

106. To some extent, the disproportionate attrition of sexual offence matters in the criminal justice system may arise from the fundamental features of the criminal justice system. For instance, the Victorian Law Reform Commission concluded:

> *We recognise, however, that some of these fundamental features mean that the criminal justice system will limit how much it can provide the form of justice that some people who experience sexual violence need… Some of these features also make sexual offences more difficult to prove in court. By their nature, sexual offending often happens in private, without other witnesses. The accused does not have to give evidence because they have a right to silence. For rape, the need to prove there was no consent means that many cases will end up focusing on the complainant. For these reasons, trials for sexual offences are also more likely to be more distressing and invasive for complainants.*[108]

107. Most recently, the Western Australian Law Reform Commission reviewed the complex underlying reasons for non-reporting by victim-survivors which include:

- confusion, shame, embarrassment, guilt or shock;
- fear of the person who has perpetrated sexual violence and the consequences of reporting;
- fear that they will not be believed;
- victim-survivors themselves may accept misconceptions about sexual violence believing that what they experienced is not defined as a sexual offence;
- victim-survivors may not regard the incident as a serious offence;
- victim-survivor's feeling that they could deal with it themselves;
- victim-survivor's lack trust in the justice system;
- ongoing or past relationship with the person who committed the sexual violence;
- lack of physical injuries; and
- specific issues experienced by children reporting.[109]

108. The Law Council notes the finding of the Victorian Law Reform Commission that not all of these barriers can be addressed through law reform, and that measures should be taken to address:

- public education to improve community knowledge and attitudes;
- 'front-end' reforms to improve access to the justice system for example, more information and options on reporting; and
- 'back-end' reforms to improve people's experience of the justice system itself—for example, more supports for people to engage with the justice system.[110]

Changes to criminal procedure

109. The Law Council notes that across Australia there have been reforms to improve court processes for dealing with sexual offences. These include limits on improper questioning (for instance, in relation to a complainant's sexual history); making giving evidence easier (for instance, by allowing the giving of pre-recorded

[108] Victorian Law Reform Commission, Improving Justice System Response, 413 [19.12].
[109] Law Reform Commission of Western Australia, *Sexual Offences: Background Paper*, Project 113, (December 2022) 26-27.
[110] Victorian Law Reform Commission, Improving Justice System Response 29 [2.29].

evidence);[111] jury directions;[112] enhancing access to justice (for instance, enabling greater use of intermediaries and ground rules hearings in cases involving vulnerable witnesses);[113] and enhancing the role of victim-survivors.[114] Notably, several recent High Court decisions have made it easier for courts to admit hearsay evidence[115] and tendency and coincidence evidence.[116]

110. The Law Council is supportive of strengthening protections and criminal justice outcomes for vulnerable witnesses and victim-survivors. The Law Council recently considered these issues in the context of the Exposure Draft: Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022.[117]

111. The Law Council supports reasonable and proportionate adjustments to court processes to enable victim-survivors to give their evidence in a manner that promotes safety and minimises re-traumatisation. To this end, the Law Council supports measures designed to strengthen available protections and provide courts with the necessary tools and flexibility, provided that such measures are carefully balanced alongside the fundamental right of the accused to a fair trial.[118]

112. Arguably, these changes are more tangibly directed to the experience of victim-survivors in the court room and may have a greater impact on victim-survivor experience than sexual consent definitions.

113. Additionally, as outlined above, the Committee should adopt a holistic approach in considering sexual consent laws alongside other policy options that may have a greater impact on the issues of under-reporting and high attrition. Such options include 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.

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[111] For example, in Victoria, successive reforms have sought to make giving evidence easier by allowing pre-recorded evidence (Visual and Audio Recorded Evidence) and special hearings for children and people with cognitive impairment, and alternative arrangements for other complainants in sexual offences: see further, Victorian Law Reform Commission, Improving Justice System Response, Chapter 21.
[112] Victorian Law Reform Commission, Improving Justice System Response, Chapter 20.
[113] In Victoria, these hearings may be held in sexual offences and other cases with a child or person with a cognitive impairment who is a witness. The Victorian Law Reform Commission concluded ground rules hearings have been a successful reform: Victorian Law Reform Commission, Improving Justice System Response, 457 [21.20]
[114] For example in Victoria, *Victims' Charter Act 2006* (Vic) and greater use of victim impact statements.
[115] *IMM v the Queen* (2016) 257 CLR 300; *The Queen v Bauer* (2018) 266 CLR 56.
[116] *Hughes v the Queen* (2017) 263 CLR 338; *The Queen v Bauer* (2018) 266 CLR 56.
[117] Law Council of Australia, Submission, Attorney-General's Department, '*Exposure Draft: Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022*,' (1 March 2022). ('***Law Council Strengthening Criminal Justice Response Submission***')
[118] Law Council Strengthening Criminal Justice Response Submission, 5.

Effectiveness of jury directions

114. By way of background, it is important to contextualise the assessment of state or territory frameworks for authorisation of jury directions in the following terms:

    - some jurisdictions seek to exhaustively prescribe the bases for authorisation of jury directions in relation to sexual offence trials;[119]
    - some jurisdictions seek to prescribe some or most circumstances where jury directions should be made in relation to sexual offence trials;[120] and
    - some jurisdictions regulate the giving of jury directions substantially by reference to case law.[121]

115. In other jurisdictions, codification of guidance on directing the jury has occurred in a non-legislative context. For instance, in the United Kingdom, relevant directions have been included in the Crown Court Compendium without the need for legislative intervention.[122]

116. The Law Council does not express a view in favour of any of these alternative approaches to codification, noting that different conclusions have been reached by law reform commissions in light of the differing experiences in each state or territory.

117. For example, the Victorian Law Reform Commission in 2009 found legislative codification of jury directions necessary to address a concerning trend in judicial error leading to appeals that was driven by the complexity of case law on jury directions.[123] However, more recently, the Western Australian Law Reform Commission found in relation to the Western Australian system which relies on case law regulating the issuance of jury directions: 'there is no reliable WA data to indicate that WA has these problems to the same, or any, extent'.[124]

118. Notwithstanding these differences in approach, the overarching objective of the criminal justice system has been to evolve a balanced approach circumscribing the role of juries to ensure verdicts reflect the standards and conscience of the community while guarding against 'uninhibited popular reaction:'

> *The jury is the means by which the people play a direct part in the application of the law. It is a contributory part. The interrelation between judge and jury, slowly and carefully worried out over several hundred years, secures that the verdict will not be demagogic; it will not be the simple uninhibited popular reaction. But it also secures that the law will not be applied in a way that affronts the conscience of the common man.*[125]

119. Research suggests that jurors, like other members of the public, can have difficulty understanding the legal definition of consent and that they can be influenced by

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[119] *Jury Directions Act 2015* (Vic).
[120] Subdivision 3, *Criminal Procedure Act 1986* (NSW) prescribes circumstances in which directions pertaining to consent may be made by a judge.
[121] For example, this is the position in South Australia, WA and Queensland.
[122] UK Government, Courts and Tribunals Judiciary, *Crown Court Compendium – June 2022* (4 July 2022).
[123] Victorian Law Reform Commission, *Jury Directions – Final Report* (1 May 2009), 8.
[124] Law Reform Commission of Western Australia, '*Should WA legislate jury directions for sexual offence trials*,' Issues Paper 6.1, Project 113 (January 2023).
[125] Patrick Devlin, The Judge (Oxford University Press, 1979) 127, cited in *Alqudsi v The Queen* (2016) 258 CLR 203, 255 (French CJ).

myths and misconceptions about sexual violence and consent.[126] However, it is difficult to know the extent to which jurors are influenced by such misconceptions in coming to a verdict because juries are not required to give reasons for their decisions.[127]

120. Jury directions can play a powerful educative role by clarifying the law, and on legal standards of behaviour required in the context of sexual relations. They are an important mechanism by which such myths and misconceptions about consent can be addressed, including, for example, that physical resistance is required to demonstrate a lack of consent.[128]

121. As a general principle, it is also important to ensure that the framework for prescribing jury directions accommodates the need to preserve flexibility:[129] for instance, by not requiring a particular form of words to be used by a judge when giving directions, and preserving a judge's discretion to not issue a requested direction if there is good reason for not giving it.[130]

122. The benefits outlined above need to be weighed against the costs of over-prescribing the conditions under which jury directions should be made which include:

- complicated or unnecessary warnings or directions may confuse jurors;
- following the crystallisation of directions in a general codified form, the issuance of a direction in a particular case may become formulaic and inapt;
- increasing scope for collateral disputes over the issuance or non-issuance of warnings or directions may lead to delay and cost;
- excessive reliance on jury directions may impinge on the important democratic role of jurors as the fact finders in a criminal trial; and
- increasing scope for appeals in relation to judicial errors in applying the legal framework governing directions and warnings.[131]

[126] Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases' (August 2007) 344 *Trends and Issues in Crime and Criminal Justice*.
[127] New South Wales Law Reform Commission, Consent 159 [8.32].
[128] Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) [7.3].
[129] New South Wales Law Reform Commission, Consent 181 [8.152].
[130] Ibid.
[131] For example, it was observed of the situation in Victoria, prior to the *Jury Directions Act 2015*, that it was conducive to judicial error resulting in a number of retrials. Victorian Law Reform Commission, *Jury Directions – Final Report* (1 May 2009), 8.