



Review of sexual consent laws in South Australia

Discussion paper

December 2023

Introduction.....	3
How to make a submission	4
Sexual violence in Australia	5
Consent and the law in South Australia	10
Recent reform in South Australia.....	12
Affirmative consent	14
In South Australia	14
An affirmative consent model.....	15
Circumstances in which there is no consent	17
Directions about sexual offences.....	19
Jury directions	19
Timing of jury directions.....	22
Image-based sexual offences	24
Protection of victims in sexual offence trials.....	29
Victims' right to privacy	32
In South Australia	33
Support services.....	35
Appendices	36
Appendix 1 – Discussion questions	36
Appendix 2 – Jurisdictional comparison: list of circumstances where there is no consent.....	38
Appendix 3 – Image-based sexual offences	48

Introduction

In its election policy *Women: Safety, Wellbeing, Equality* the South Australian Government made a commitment to review legislation relating to consent to sexual activity.

The review was undertaken by the South Australian Attorney-General's Department and considered the existing legislation in South Australia as well as:

- the recent work by law reform commissions in New South Wales, Victoria and Western Australia
- the reports of the Queensland Women's Safety and Justice Taskforce
- affirmative consent laws in New South Wales, the Australian Capital Territory and Victoria
- the Northern Territory Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023
- the Report of the Senate Legal and Constitutional Affairs References Committee (the Senate Committee) inquiry into current and proposed sexual consent laws in Australia (the Senate Committee Report)
- the work being undertaken by the National Working Group on Criminal Justice Responses to Sexual Assault.

This Discussion Paper sets out the key issues that arose during the review and seeks the views of stakeholders on potential reform of sexual offence laws in South Australia. It is confined to considering legislative reform of the laws around consent to sexual activity, as well as procedural protections and sexual offences generally.

It **does not** address matters such as primary prevention, processes for reporting offences to police and investigation of those offences by police, charging and prosecutorial discretion, post-sentence measures or other matters related to the operation of the criminal justice system.

It **does not** address child sexual offences where lawful consent cannot be given.

How to make a submission

Submissions in response to this discussion paper can be made until **Monday 12 February 2024**. Individuals and organisations can make a submission (confidentially if desired) by email to LLPsubmissions@sa.gov.au.

This discussion paper poses a number of questions. A summary of these questions is provided at **Appendix 1**. You may respond to all questions, or only those that are of interest to you.

While this paper focuses on opportunities for legislative reform, you may raise any additional issues and provide comments on non-legislative matters.

You can also complete our survey on YourSAy – the survey is a simplified version of the discussion questions posed in this paper. Visit www.yoursay.sa.gov.au/consent-laws.

Submissions and confidentiality

Please be aware that, unless a request for confidentiality is made, information contained in any submission may be referred to publicly or published. Any material identified as 'confidential' is still subject to the *Freedom of Information Act 1991* and, while efforts will be made to keep the material confidential, in some circumstances it may be disclosed under that Act.

Where disclosure of information may identify you attempts will be made to consult with you under the *Freedom of Information Act 1991* before the documents are disclosed.



This discussion paper references sexual assault, domestic and family violence and child sexual abuse. If you or someone you know has experienced this, there are support services that can help.
See the back of this document for details.

Sexual violence in Australia

Sexual violence is an ongoing problem across the country, including South Australia, and there is some evidence that it is increasing.

In the most recent Australian Bureau of Statistics (ABS) publication *Recorded Crime – Victims*, the number of victims of sexual assault recorded by police in SA increased by 2% from 1,783 in the previous year to 1,816 victims in 2022.¹

For victims of sexual assault, the number of female victims in SA (176 victims per 100,000 females) was more than eight times higher than the number of male victims (21 victims per 100,000 males) and 35% of victims were under the age of 18 years at the date of the incident.²

In SA in 2022:

- The number of sexual assault victimisations increased by 33 victims and was the highest recorded figure in the past 19 years.
- The sexual assault victimisation rate for Aboriginal persons was twice the overall rate.
- Most sexual assault victimisations occurred in a residential setting and did not involve a weapon.³
- Across all age ranges, the majority of sexual assault victims were female with 35% of these aged between 0 and 17 years (see **Figure 1**).
- The majority of both female and male victims of sexual assault knew the offender (see **Figure 2**).

¹ Australian Bureau of Statistics, *Recorded Crime – Victims* (reference period 2022, released 29 June 2023)

² Ibid

³ Ibid

Figure 1 Number of sexual assault victims by age and gender, SA, 2022**Figure 2** Number of *assault* and *sexual assault* victimisations by gender and age of victim, and relationship of offender to victim, SA, 2022

Despite the increase in numbers, sexual violence is still under-reported to police. According to the 2021-22 ABS Personal Safety Survey, Australia-wide figures show the majority (92% or 680,300) of women who experienced sexual assault by a male did not report the most recent incident to police.

The most common reasons women did not report the incident included:

- not regarding the incident as a serious offence
- feelings of shame or embarrassment
- thinking that there was nothing the police could do.⁴

Further analysis of sexual offence cases⁵ in SA over a five-year period from 25 July 2017 to 24 June 2022, found that of the 2,640 defendants finalised with at least one sexual offence of interest:

- 66% were finalised in the Magistrates Court
- 98% of the defendants were male; and
- 84% (2,207) had the sexual offence as the most serious charge on their case.

Of the 2,207 defendants with the sexual offence as the most serious charge on their case:

- 69% (1520) were finalised in the Magistrates Court with a most serious charge of either indecent assault or rape.
- 13% were not proceeded with due to fresh information.⁶

Across all court levels, 2,189 defendants were finalised with a most serious charge of either indecent assault or rape. Of these:

- 65% (1,415) were withdrawn, not proceeded with or dismissed.

Sexual assault can be extremely difficult to successfully prosecute as a significant number of sexual assaults never come to the attention of the criminal justice system. Of those offences that are actually reported, only a small proportion proceed to trial (a prosecution may be

⁴ ABS, *Sexual Violence*: Statistics on female experiences of sexual assault, including victimisation, rates, socio-demographics, incident characteristics and responses (released 23 August 2023).

⁵ The analysis considered the following sections of the CLCA: s48 – rape; s48A – compelled sexual manipulation; s51 – sexual exploitation of a person with a cognitive impairment; and s56 – indecent assault.

⁶ Source: Defendants charged with sexual offences – Court outcomes. Court data extract analysed by AGD Justice Analytics Team – 25 July 2017 to 24 July 2022 inclusive.

withdrawn at any stage of the criminal process), with an even smaller percentage of these cases resulting in a successful conviction.

The high rate of attrition in sexual assault cases can be due to a number of factors. This can include police being unable to find the perpetrator, victims' poor experiences with police and the criminal justice system, the unwillingness of victims to give evidence, misconceptions about the nature of sexual violence and the meaning of consent, insufficient evidence to provide a reasonable chance of conviction, change of mind in the victim due to shame or fear or distress, delays in trials resulting in victims being unwilling to continue and a lack of witnesses.

Australia's National Research Organisation for Women's Safety (ANROWS) recently published *Attitudes Matter: The 2021 National Community Attitudes Towards Violence Against Women Survey* (the NCAS Report). The NCAS is a periodic, representative survey of the Australian population that is conducted every four years. It benchmarks the community's understanding and attitudes regarding violence against women and gender inequality and how these change over time.

In relation to sexual assault, the NCAS Report found that problematic myths and stereotypes about sexual assault, sexual consent, and victims and survivors are evident amongst a sizeable minority of respondents. For example, some respondents agreed with:

- hostile gender stereotypes of women as malicious, vengeful and untrustworthy, who lie about sexual assault as a way of 'getting back at men' (34%) or because they later regret consensual sexual interactions (24%).
- problematic heterosexual scripts that privilege men's entitlement to sex and position women as the "gatekeepers" who must resist men's advances, including attitudes that disregard consent because an aroused man "may not realise" the woman does not want to have sex (25%).
- rape myths that sexual assault is primarily committed by strangers (18%) or that "genuine" sexual assault victims immediately report their assault to police (7%) and have evidence of physical injuries (5%).⁷

⁷ NCAS Report, p. 25

The NCAS Report also found that a minority of Australians do not appreciate the gravity and impacts of technology facilitated-abuse. For example some respondents:

- agreed that it was lawful / okay to disregard consent in some circumstances, such as when a woman sends an intimate image to her partner and he shares it without her consent (21%).
- did not recognise some forms of technology-facilitated abuse, such as sending an unwanted sexual picture (9%) and targeting women on social media (6%).

Consent and the law in South Australia

In South Australia, the laws relating to rape and other sexual offences, are set out in Division 11 of Part 3 of the *Criminal Law Consolidation Act 1935*.

Section 46 of the *Criminal Law Consolidation Act 1935* (the CLC Act) defines consent to sexual activity as follows:

(1) In this section –

sexual activity includes sexual intercourse

(2) For the purposes of this Division, a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity.

(3) Without limiting subsection (2), a person is taken not to freely and voluntarily agree to sexual activity if –

(a) the person agrees because of –

(i) the application of force or an express or implied threat of the application of force or a fear of an application of force to the person or to some other person; or

(ii) an express or implied threat to degrade, humiliate, disgrace or harass the person or some other person; or

(b) the person is unlawfully detained at the time of the activity; or

(c) the activity occurs while the person is asleep or unconscious; or

(d) the activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity; or

(e) the activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing; or

(f) the person is unable to understand the nature of the activity; or

(g) the person agrees to engage in the activity with a person under a mistaken belief as to the identity of that person; or

(ga) the person agrees to engage in the activity because of a misrepresentation (whether express or implied) as to the use of a condom during the activity; or

(h) the person is mistaken about the nature of the activity.

For the purposes of the offences in Division 11, section 47 of the CLC Act provides that a person is considered to be recklessly indifferent to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she –

- (a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or
- (b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or
- (c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

The most common offence where consent is likely to be an issue, is that of rape. Section 48 of the CLC Act provides that a person is guilty of the offence of rape if he or she engages, or continues to engage, in sexual intercourse with another person who does not consent, or has withdrawn consent, and the offender knows, or is recklessly indifferent to that fact.

The issue of consent is also relevant to the offence of compelled sexual manipulation. Section 48A of the CLC Act provides that it is an offence for a person to compel another person to engage, or continue to engage, in an act of sexual manipulation of the offender; or an act of sexual manipulation of a person other than the offender; or an act of sexual self-manipulation, where the person who is compelled does not consent to the act and the offender knows of, or is recklessly indifferent to, the fact that the person does not consent or has withdrawn consent.

Other sexual offences where consent is an element include indecent assault (sections 56 and 57 of the CLC Act) and image-based sexual offences in Part 5A of the *Summary Offences Act 1953* (SO Act).

Recent reform in South Australia

The South Australian Government is committed to ongoing reform to help prevent sexual violence and to support and empower people experiencing sexual violence.

Alongside the important work that is being carried out under South Australia's Women's Equality Blueprint 2023-2026, such as establishing new recovery supports for victim-survivors of family, domestic and sexual violence and expanding services to address perpetrator behaviours, the South Australian Government has passed and commenced legislative reform to strengthen legal frameworks and ensure that victim-survivors have improved justice outcomes and protections.

Increasing penalties for child sex offences

The *Statutes Amendment (Child Sex Offences) Act 2022* commenced on 1 October 2022. This reform aims to protect the community from child sex offenders by increasing penalties on a range of child sex offences and ensuring predators are not entitled to leniency because they were mistaken in their belief that the victim was a child.

Criminalising stealthing behaviour

The *Statutes Amendment (Stealthing and Consent) Act 2022*, which was introduced by the Hon Connie Bonaros MLC and supported by the Government, commenced on 8 March 2023.

Stealthing refers to the practice whereby a person deliberately and without consent does not use, damages, or removes a condom before or during sexual activity. The reform makes it clear that such an action vitiates the consent given by the other person, especially where consent to the sexual activity was conditional upon the use of a condom.

The reform also amended the *Evidence Act 1929* to broaden the jury directions that must be given in cases involving a sexual offence where consent is an issue, and to allow for the admission of expert evidence to address certain misconceptions about non-consensual sexual activity.

Changing legislative language

The *Criminal Law Consolidation (Child Sexual Abuse) Amendment Act 2023* commenced operation on 22 June 2023. Although a short and relatively straight forward piece of legislation, this reform made an important change to the heading of section 50 of the CLC Act from

'Unlawful sexual relationship with child' to *'Sexual abuse of a child'* in recognition of the advocacy of Ms Grace Tame and the Harmony Campaign.

The new heading appropriately reflects the gravity of the offence which is entirely exploitative and predatory in nature, and also seeks to change how such offences might be reported on in the media, adding to the awareness of child sexual abuse and bringing accountability and transparency to this vile act.

Statutes Amendment (Sexual Offences) Act 2023

The *Statutes Amendment (Sexual Offences) Act 2023* commenced on 1 October 2023 (other than Part 5 relating to sentence discounts, which will commence on 1 January 2024). This reform continues the Government's commitment to ensuring that South Australia's bail and sentencing laws dealing with child sex offenders are fit for purpose and that they properly account for the harm that this kind of offending does to children.

Affirmative consent

Affirmative consent can be summarised as a positive obligation to do or say something to find out if another person consents to sexual activity.

In a reflection of changing community attitudes to the issue of consent, a number of jurisdictions in Australia have either introduced, or committed to introducing, affirmative consent laws. Other jurisdictions are consulting on whether to adopt an affirmative consent model.

- New South Wales, the Australian Capital Territory and Victoria introduced affirmative consent models in 2022/23.
- The Queensland Government introduced the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 on 11 October 2023.
- The Northern Territory Law Reform Committee is currently undertaking an inquiry into the topic of consent in sexual offences, including whether the Northern Territory should adopt an affirmative consent model.
- The Law Reform Commission in Western Australia has recently completed its inquiry into sexual offences, including whether the concept of affirmative consent should be reflected in the legislation.

In South Australia

There is currently no requirement in South Australia to take positive steps to ascertain consent.

A person is **guilty** of the offence of rape or compelled sexual manipulation in South Australia if they engage, or continue to engage, in the relevant act with a person who does not consent or who has withdrawn consent and the offender knows or is *recklessly indifferent* to the fact that the person does not consent or has withdrawn consent.⁸

A person consents to sexual activity if they freely and voluntarily agree to the activity.⁹

Although there is no requirement to take positive steps to find out if the other person consented to the sexual activity, section 47 of the CLC Act provides that a failure to take 'reasonable steps' to ascertain whether a person has consented to sexual intercourse, or has withdrawn consent, can be relevant to an assessment of recklessness.

⁸ CLC Act, s48A

⁹ Ibid, s46

An affirmative consent model

An affirmative consent model is primarily concerned with emphasising that for sexual activity to consensually begin and progress, there must be an actual communication of consent (whether by words or actions) between the parties involved. This is accompanied by the fact that consent can be withdrawn at any time, at which point any further progression of the sexual activity occurs without consent.

This places a responsibility on the parties involved in the sexual activity to continually ensure that consent is given throughout the activity. The affirmative consent model places particular responsibility on the initiator of the sexual activity, who must say or do something to determine whether the other person consents, in order to support the defence that they had a 'reasonable belief' as to the existence of consent.

The affirmative consent model also aims to recognise the common 'freeze response' to trauma, in instances where the complainant could not physically do or say anything to express that they do not consent. Provisions make it clear that consent cannot be inferred because the complainant offered no physical or verbal resistance.

At present, a lack of physical resistance on the part of the complainant is not part of the consent definition in section 46 of the CLC Act. Instead it is dealt with under section 34N(1)(a)(ii) of the *Evidence Act 1929* (SA) (the Evidence Act) which requires the judge to direct the jury that there is no typical or normal response to non-consensual sexual activity and that the person is not to be regarded as having consented to the sexual activity merely because they did not protest or physically resist.

The Senate Committee was of the opinion that, given the relatively recent implementation of affirmative consent models in Australia and the different legislated provisions, it would be beneficial to monitor and evaluate the impact of those models so that evidence can inform further reform across Australia.¹⁰

The Senate Committee recommended that "Australian jurisdictions that have recently legislated an affirmative consent model, design and implement a framework for the evaluation of that standard, with outcomes to be reported to the Standing Committee of Attorneys-General and the Australian Law Reform Commission (the ALRC), to inform all Australian governments about

¹⁰ Senate Committee Report, paragraphs 5.12 – 5.14

the impacts of an affirmative consent model in sexual consent laws and to assist the ALRC in conducting its review process".¹¹

The Senate Committee further recommended that the ALRC "includes an affirmative consent standard in any proposal to harmonise Australia's sexual consent laws and taking into account the evidence of the operation of recently adopted affirmative consent laws".¹²

The South Australian Government acknowledges the recommendations of the Senate Committee Report, and the actions of the Australian Government in referring the issue of criminal law responses to sexual violence to the ALRC - however, the South Australian Government remains interested in hearing your views on the adoption of an affirmative consent model in South Australia.

An alternative to adopting an affirmative model of consent could be to include a requirement that the trier of fact have regard to things said or done to ascertain consent and, if so, what the accused said or did. This would focus the judge's attention on the conduct of the accused but does not create a positive obligation to obtain consent.

Discussion questions

Should the definition of consent in South Australia include a positive obligation to obtain consent, consistent with an affirmative model of consent?

What are the benefits of adopting an affirmative model of consent?

What are the risks of adopting an affirmative model of consent?

Alternatively, should the trier of fact be required to have regard to what the accused said or did to ascertain consent? Should the trier of fact be required to have regard to any other matter?

¹¹ Ibid, Recommendation 2, paragraph 5.17

¹² Ibid, Recommendation 4, paragraph 5.29

Circumstances in which there is no consent

In all states and territories, the relevant criminal legislation has a non-exhaustive list of circumstances in which a person is taken not to be consenting to sexual activity (see **Appendix 2**).

In many jurisdictions, the list of circumstances forms part of the definition of consent. In those jurisdictions that have adopted an affirmative model of consent, the circumstances are listed in a separate provision.

In South Australia, section 46 of the CLC Act provides that a person consents if they freely and voluntarily agree to the sexual activity. Section 46 sets out a number of scenarios which do not amount to free and voluntary consent – for example, if a person agrees to engage in sexual activity because:

- of the use of force or a threat
- they were asleep, unconscious or intoxicated to the point of being incapable of consent
- they held a mistaken belief as to the identity of the person
- of a misrepresentation as to the use of condom during the sexual activity (otherwise known as *stealthing*).¹³

Although there are circumstances that are the same or similar across states and territories, there are some differences. For example, section 46 of the CLC Act does not include the following circumstances [where a person is taken not to freely and voluntarily agree to sexual activity]:

- (a) there is a failure to offer physical and verbal resistance (QLD¹⁴, NSW, Victoria and ACT)
- (b) the person does not say or do anything to communicate/indicate consent (NSW, Victoria, QLD and Tasmania)
- (c) because the person consented to another act or the same act at a different time or place, or the same act with a different person, or a different act with a different person (ACT)
- (d) because of the fraud of the accused (Tasmania and ACT)

¹³ Section 46 of the CLC Act was amended by the *Statutes Amendment (Stealthing and Consent) Act 2022* on 8 March 2023 to include *stealthing*.

¹⁴ The QLD provision is worded differently and provides that a person is taken not to have given consent only because the person does not do or say anything to communicate that they do not consent.

- (e) the person submits to the act because the person is overborne by the abuse of a relationship of authority or trust (Victoria, ACT and Tasmania)
- (f) the act occurs in the provision of commercial sexual services and the person engages in the act because of false or misleading representations that they will get paid (Victoria)
- (g) having given consent, the person later withdraws consent to the act taking place or continuing (Victoria, QLD, ACT)

The list of circumstances is expressed to be non-exhaustive which means that the trier of fact is not precluded from considering other circumstances in order to determine whether or not consent has been 'free and voluntary'.

It is also noted that some of the circumstances listed above, specifically (a) – (c), are currently the subject of jury directions in South Australia pursuant to section 34N of the Evidence Act. In sexual offences trials, where consent is an issue, the directions address misconceptions that may be held by jurors around the nature of consent and the behaviours of the accused and the victim to ensure that a victim's evidence is assessed fairly and impartially by the jury.

Despite this, there may be benefit in expanding the list of circumstances further to specifically reflect changing community attitudes in this area of criminal law. An expanded list could also have a greater effect in terms of community education and cultural change to address common misconceptions around consent than jury directions which do not come into play until a trial and are not widely publicised.

Discussion questions

Should the list of circumstances in which a person is taken not to consent be changed?

What other circumstances could be included?

Directions about sexual offences

One of the issues that can lead to low reporting and high attrition rates of sexual offence cases is how sexual violence is perceived by the community.

Although misconceptions and stereotypes about sexual violence appear to be improving, the NCAS Report found that some misconceptions still persist.¹⁵

The Senate Committee also concluded that, based on information presented to the inquiry, 'there is a highly problematic consent culture in Australia that must be addressed through concerted and ongoing efforts at all levels'.¹⁶

Jury directions

In a trial by jury, the judge gives the jury directions to help them understand the law before they reach a verdict. In trials for sexual offences where one of the issues that juries must decide is whether the prosecution has proven beyond a reasonable doubt that there was no 'free or voluntary' consent, one aim of jury directions is to counter the misconceptions jurors might hold.

The list of matters in which a judge must direct a jury in sexual offences cases is set out in section 34N of the Evidence Act. These directions are aimed at addressing misconceptions about how a person might ordinarily respond to non-consensual sexual activity. For example, the judge must direct the jury that the person is not to be regarded as having consented merely because they did not protest or physically resist the sexual activity, or because they consented on an earlier occasion.

The list of jury directions in section 34N of the Evidence Act was recently expanded by Part 4 of the *Statutes Amendment (Stealth and Consent) Act 2022* to include other common misconceptions that exist within the community. The list of matters in which the judge must direct the jury now includes:

- there is no typical or normal response to non-consensual sexual activity
- non-consensual activity can occur in many different circumstances and is not always perpetrated by a stranger in a public place

¹⁵ Attitudes Matter: The 2021 National Community Attitudes Towards Violence Against Women Survey, Summary for Australia. Chapter 7, p. 51.

¹⁶ Senate Committee Report, paragraph 5.55

- non-consensual sexual activity can occur between different kinds of people, including people who are married or are in an established relationship with one another
- the presence or absence of emotional distress when giving evidence does not necessarily mean that a person is not telling the truth about an alleged sexual offence
- it should not be assumed that a person consented to sexual activity because the person wore particular clothing or had a particular appearance, consumed alcohol or drugs, or was present in a particular location.

There is potential to further expand on the list of jury directions in section 34N of the Evidence Act. In its November 2021 report entitled *Improving the responses of the justice system to sexual offences* the Victorian Law Reform Commission recommended a broader range of jury directions to cover the diverse contexts of, and responses to sexual violence.¹⁷

The Victorian *Jury Directions Act 2015*, as amended by the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022*, includes the following directions about sexual offences that are not captured under section 34N of South Australia's Evidence Act:

- a direction to address misconceptions about behaviour which is perceived to be flirtatious or sexual.¹⁸
- expanding the list of circumstances where non-consensual activity may take place to include: a consumer of sexual content or services and the worker providing the content or services (i.e. the sex industry); and people of the same or different sexual orientations and gender identities.
- a direction to address misconceptions about counterintuitive behaviours, such as maintaining a relationship or communication with the perpetrator after non-consensual activity.

In addition, new section 44P of the Victorian *Jury Directions Act 2015* (Vic) provides that, before the trial commences, the trial judge may request that the prosecution and defence counsel each inform the trial judge of whether it is likely that evidence will be adduced in the trial that would provide a good reason for giving a direction to which Part 5 (Sexual Offences) of that Act applies.¹⁹

¹⁷ VLRC, *Improving the responses of the justice system to sexual offences* - November 2021, pp. 430 - 441

¹⁸ This was also a recommendation of the Queensland taskforce Report 2 – page 347

¹⁹ As amended by the Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022, s 43.

This new section provides flexibility for the trial judge to request information if appropriate. However, the trial judge is not required to form a view at that time about whether to give a particular direction and, if the judge does form a view, they can later reconsider it.

Discussion questions

Should the list of jury directions in section 34N of the Evidence Act be expanded?

Are there any other common misconceptions about sexual violence that could be addressed through jury directions?

Should parties be required to indicate before a trial whether it is likely evidence will be presented that would provide a good reason for giving a jury direction?



Timing of jury directions

The timing of jury directions has also been the subject of discussion in other jurisdictions. Both the NSW Law Reform Commission and the Victorian Law Reform Commission recommended that jury directions be given early in the trial and repeated if necessary.²⁰ The QLD Taskforce also acknowledged the benefit of giving directions to a jury about evidence at the time that the evidence is being presented to the court.²¹

The Senate Committee, in recommending that the ALRC give consideration to the development of model jury directions, also recommended that the model should 'include express requirements as to the timing and circumstances in which jury directions must be given'.²²

In South Australia, Part 3, Division 2 of the Evidence Act generally provides that jury directions are to be given during the trial, but does not specify if this must occur early or towards the end of the trial. Although the lack of specificity means that the judge may choose the point in the trial at which to give directions to the jury, and also whether those directions should be repeated at any point, there may be benefit in ensuring that jury directions are given early in the trial and repeated if necessary.

As noted in the Victorian Law Reform Commission Report, research suggests that jurors start deliberating early and throughout the trial and that if they only get given the 'rules' at the end of the trial it is hard to undo the process of decision making.²³

One way to ensure that jury directions are given earlier in the trial is via legislative amendment. For example, in NSW, new section 292(2) of the *Criminal Procedure Act* (NSW) provides that the judge must give any one or more of the directions set out in ss 292A – 292E if there are good reasons to do so or if requested to do so.²⁴ The judge is not required to use a particular form of words and may give a consent direction at any time and on more than one occasion during the trial.

²⁰ See the NSW Law Reform Commission Report, *Consent in relation to sexual offences*. September 2020 recommendation 8.2 and the Victorian Law Reform Commission Report, *Improving the responses of the justice system to sexual offences*. November 2021, recommendation 79.

²¹ Hear Her Voice Report 2 – Women and girl's experiences of the criminal justice system - July 2022

²² Senate Committee Report, recommendation 12 at paragraph 5.73

²³ VLRC, *Improving the responses of the justice system to sexual offences* - November 2021, pp. 441- 442

²⁴ As amended by the Crimes Legislation (Sexual Consent Reforms) Act 2021, Schedule 2, Subdivision 3.

The Victorian *Jury Directions Act 2015*, as amended by the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022*, also provides guidance for the judge on the timing of jury directions. For example, section 47C requires a trial judge to give certain directions on consent and reasonable belief in consent. Such directions must be given at the earliest time in the trial that the judge determines is appropriate, however, this does not prevent the judge from giving a direction at any time during the trial, including before any evidence is adduced and in the judge's summing up to the jury.

In trials by judge alone, which can be quite common for sexual offences, there is no specific requirement that the trial judge give themselves the directions mandated by, for example, sections 34M or 34N of the Evidence Act. However, it would be expected that the trial judge would still turn their mind to the matters identified in those sections in reaching a decision.²⁵

Discussion questions

Should the Evidence Act specify the timing or frequency of directions?

Should a trial judge be required to give themselves the same directions that must be given to jurors in a jury trial?

²⁵ See *R v Wickers* [2019] SASFC 102 at [186] per Kelly J - Although a trial judge is required to consider the evidence of complaint if admitted under s 34M(3) and to use it only for the purposes set out in s 34M(4), I do not consider that, in a trial by judge alone, the judge is required to direct himself in the precise terms set out by s 34M(4). I consider it is obvious on the face of s 34M(4) itself that the direction therein is mandated only in respect of a trial by jury.

Image-based sexual offences

The notion of consent is also relevant to filming and sexting offences. These offences, better known as image-based sexual offences, involve the sharing and distribution of intimate and invasive images without consent.

These forms of abuse can occur in contexts such as family violence, blackmail, and sexual harassment.

In 2017, the Office of the eSafety Commissioner commissioned a three-part research project to inform the development of an online national complaint portal to combat image-based abuse.

In its summary report, which was based on the key findings of a national survey conducted in May 2017, the Office of the eSafety Commissioner noted that image-based abuse is more prevalent, and affects a wider range of Australians, than is commonly understood.²⁶

In particular, the national survey found that:

- Amongst online adult Australians, 11% have had a nude or sexual photo/video of them posted online or sent on without their consent.²⁷
- The prevalence of image-based abuse is higher amongst women and young adults.²⁸
- Sixty-three percent of online adults who had experienced image-based abuse said that someone close to them had distributed the photo/video without their consent. They said the perpetrator was either a friend that they knew offline (29%), an ex-partner (13%), current partner (12%) or family member (10%).²⁹
- Taking action in response to experiences of image-based abuse was low amongst online adults, with 24% saying they had taken some form of action in response to their most recent experience. The main barriers for not taking action related to beliefs that taking action would not change anything (29%), lack of knowledge on what to do (22%) and feeling embarrassed (18%).³⁰

²⁶ Office of the eSafety Commissioner. (2017), Image-based Abuse, National Survey: Summary report, Melbourne: Office of the eSafety Commissioner., p. 3

²⁷ Ibid

²⁸ Ibid, p.4

²⁹ Ibid, p. 5

³⁰ Ibid, p. 10

- Although most online adults recognise the harms of image-based abuse, many hold attitudes that blame the victims for the image-based abuse they have experienced.³¹

In 2019, a cross-national survey on image-based sexual abuse was conducted in Australia, New Zealand and the United Kingdom. The findings were published in February 2020 in a report entitled *Image-Based Sexual Abuse: An International Study of Victims and Perpetrators*.³² The survey found that:

- Overall, 1 in 3 respondents had experienced image-based sexual abuse victimisation and 1 in 6 respondents had engaged in image-based sexual abuse perpetration.
- 1 in 5 reported that someone had shared a nude or sexual image of them without their consent and almost 1 in 5 reported that someone had threatened to share a nude or sexual image of them.
- Young people are more commonly perpetrators, and men are more commonly perpetrators than women.
- Most victims are targeted by known perpetrators.
- Most respondents agree that image-based sexual abuse should be a crime, however, less than half of the respondents were aware that it is a crime in their country.
- Non-consensual sharing and threats to share have almost doubled since the first Australian survey in 2016.³³

In South Australia, an analysis of the cases over the period from 1 January 2018 to 30 June 2023, found that of the 305 defendants finalised with at least one filming and sexting charge:

- 70% (213) were finalised in the Magistrates Court
- 16% (48) were finalised in the Youth Court
- 86% (262) of the defendants were male; and
- 53% (161) of the 305 defendants had a finding or admission of guilt.

³¹ Ibid, p. 13

³² Powell, A., Scott, A. J., Flynn, A. & Henry, N. (2020). *Image-Based Sexual Abuse: An International Study of Victims and Perpetrators*. Summary Report. Melbourne: RMIT University.

³³ Ibid, pp 3 - 10

Of the 106 defendants where a Part 5A offence was the most serious offence with a finding or admission of guilt:

- 4% received a term of imprisonment
- 19% received a suspended sentence bond
- 34% received a good behaviour bond; and
- 97% of youth defendants received a formal caution or warning.³⁴

All states and territories criminalise non-consensual distribution of invasive or intimate images. In all jurisdictions except for South Australia and Tasmania, the relevant offences are set out in the jurisdiction's Crimes Act or Criminal Code.³⁵

In South Australia, image-based sexual offences are set out in Part 5A of the SO Act. There are four types of offences:

- humiliating or degrading filming
- distribution of invasive images
- indecent filming
- threats to distribute invasive images or images obtained from indecent filming.

The penalties and defences for the offences are set out in Appendix 3.

Unless the offence relates to a victim who is under the age of 17 years, in which case the maximum penalty is up to four years imprisonment, image-based offences in South Australia are summary offences and the maximum term of imprisonment that may be imposed is two years. Summary offences are prosecuted by South Australia Police (SAPOL) in the Magistrates Court.

Minor indictable offences, which are offences with a maximum term of imprisonment between three and five years, are also prosecuted by SAPOL in the Magistrates Court unless the defendant elects to be tried in the District Court. In these cases the Office of the Director of Public Prosecutions would take over the matter.

³⁴ Source: Filming and sexting offences. Court data extracted from the Attorney-General's Department Justice Sector Analytics Database – 1 January 2018 to 30 June 2023.

³⁵ Victoria recently re-located its image-based offences from the *Summary Offences Act 1966* to the *Crimes Act 1958* as indictable offences, increasing the maximum term of imprisonment from two years to three years.

In all other Australian jurisdictions except Tasmania, the maximum term of imprisonment that may be imposed for similar offences, such as distributing intimate images without consent, is three years. That penalty increases to five years imprisonment in the ACT where the intimate image is of a young person under the age of 16 years.

Under the CLC Act some offences will attract harsher penalties if they occur in circumstances of aggravation. For example, the offence of compelled sexual manipulation in section 48A of the CLC Act attracts a maximum penalty of imprisonment for 10 years for a basic offence and imprisonment for 15 years if the offence is aggravated. Aggravating circumstances are set out in section 5AA of the CLC Act and include where the victim was under 12 years of age or where the victim was in a relationship with the offender.

Consideration could be given to moving these offences into the CLC Act and increasing the penalties where aggravating circumstances exist. This would emphasise the serious nature of these offences. If the current approach is to be changed, care would need to be taken to avoid overcriminalisation, particularly of young people, as the act of taking or sharing intimate images or videos has become increasingly common.

In some jurisdictions, such as NSW and the Northern Territory, the consent of the Director of Public Prosecutions is needed in order to commence a prosecution of a defendant who was under the age of 16 years at the time of the offence. Such a provision is considered an additional safeguard against the overcriminalisation of young people.

The approval of the Director of Public Prosecutions is not currently required to commence a prosecution in South Australia under Part 5A of the SO Act. In part, this would be because minor indictable offences in South Australia are still prosecuted by SAPOL in the Magistrates Court.

Another factor would be the existence of prosecutorial discretion. There is no automatic rule that all suspected criminal offences must be prosecuted. A significant consideration is whether or not the prosecution is in the public interest. In determining whether or not a prosecution is in the public interest, considerations include the seriousness of the offence, the age of the accused, the degree of culpability of the accused in connection with the offence, the consequences of the alleged offence, the need for deterrence (both personal and general) and the attitude of the victim of the alleged offence.³⁶

³⁶ DPP SA, Statement of Prosecution Policy & Guidelines

Young offenders may also be given an informal police caution or a formal police caution under the *Young Offenders Act 1993* for minor offences. A minor offence is defined as an offence to which that Act applies that should, in the opinion of the police officer in charge of the investigation of the offence, be dealt with as a minor offence because of the limited extent of the harm caused, the character and antecedents of the alleged offender, the improbability of the youth re-offending and, where relevant, the attitude of the youth's parents or guardians.

The requirement for the Director of Public Prosecutions to approve the prosecution of a defendant who was under the age of 16 years at the time of the offence is also linked to the age of consent in NSW and the Northern Territory which is 16. The age of consent for sexual activity in SA is 17.

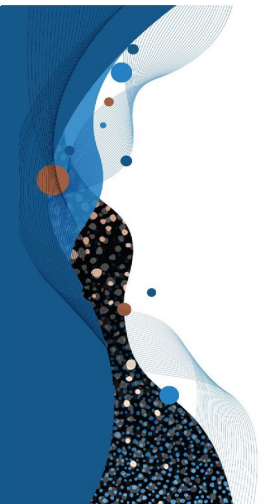
Discussion questions

Is there a need to change any of South Australia's image-based sexual offences, or their application? If so, what changes should be made?

Should there be any increase in the current penalties?

Would the offences be better placed in the *Criminal Law Consolidation Act 1935*?

Should prosecutions of minors require the approval of the Director of Public Prosecutions or some other person or body?



Protection of victims in sexual offence trials

The Evidence Act contains a number of provisions designed to reduce the trauma and distress of victims during the course of a sexual offence trial.

For example:

- Pre-trial special hearings are available in certain circumstances pursuant to section 12AB of the Evidence Act to allow witnesses to give evidence (evidence in chief, cross examination and re-examination) before trial without the defendant present. Such hearings alleviate the need for victims to be confronted by their abuser when they give evidence in court.
- Where appropriate facilities are available, special arrangements can be made for taking the evidence of vulnerable witnesses pursuant to section 13A of the Evidence Act. These arrangements can include taking evidence outside the trial court and either transmitting it to the trial court by:
 - closed-circuit television or replaying an audio-visual record of the evidence in the trial court
 - using partitions to obscure the view of a party to whom the evidence relates or some other person
 - taking evidence in a particular way to minimise the witness's embarrassment or distress.
- In child sexual offence trials, special arrangements can include directions from the court about, among other things, the manner and duration of questioning the witness, the questions that may or may not be put to the witness and the use of models, plans, body maps or similar aids to help communicate a question or an answer. This is similar to the concept of a 'ground rules' hearing in other jurisdictions such as Victoria.
- Defendants are not permitted to cross examine a victim in sexual offence trials unless the cross examination is by counsel (section 13B of the Evidence Act).
- Recorded evidence may be admitted in certain criminal proceedings pursuant to section 13BA of the Evidence Act. In order to be admitted under this section, the audio-visual record must have been made in a pre-trial special hearing conducted in accordance with section 12AB or made pursuant to Part 17 Division 3 of the SO Act (which requires police to audio visually record interviews of particular vulnerable witnesses, such as a person who is being interviewed as the victim of a child sexual offence).

The categories of witnesses who may give evidence at a pre-trial special hearing was expanded in June 2022 by the *Statutes Amendment (Child Sexual Abuse) Act 2021* to include:

- all child sexual abuse victims (no matter their age at the time of the trial)
- any other witness in a child sexual offence trial who is a child
- a vulnerable witness (within the meaning of the Evidence Act)
- any other witness if the court is satisfied that they should be allowed to give evidence in a manner contemplated by the section
- domestic abuse victims.

Although the judge has a discretion to allow any other witness to give evidence via a pre-trial special hearing if satisfied that it should be allowed, the provisions do not expressly include witnesses of sexual abuse generally.

The *Statutes Amendment (Child Sexual Abuse) Act 2021* also amended the Evidence Act to introduce the concept of 'ground rules' hearings.³⁷ These new provisions allow for orders to be made about the manner, duration and type of questions that may be asked of witnesses at pre-trial special hearings (Section 12AB) and of vulnerable witnesses giving evidence in a trial of child sexual offences (section 13A).

As it presently stands in South Australia, these 'ground rules' hearings are not available in trials for victims of sexual abuse who have been offended against as adults.

The other relevant change effected by the *Statutes Amendment (Child Sexual Abuse) Act 2021* was to expand the scheme in section 74EA of the SO Act and section 13BA of the Evidence Act.

Prior to the amendments, there was only an obligation to record interviews with children under the age of 14 or with a person with a disability that adversely effects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions. There is now an obligation under section 74EA of the SO Act to record interviews for all child sexual abuse victims, no matter what their age is at trial.

Applications can then be made under section 13BA of the Evidence Act for these recorded interviews to be admitted at trial instead of the witness having to give evidence.

³⁷ New subsections 12AB(11a) and 13A(14) of the Evidence Act.

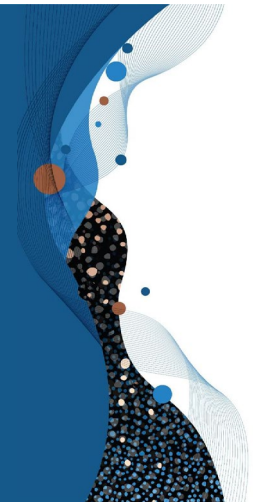
The benefits of the schemes discussed above include a reduction in the amount of time that a witness needs to spend giving evidence in court (and having to interact with the perpetrator) and the fact that their account is given at a point in time when events are more fresh in their memory. Expanding these schemes to all sexual abuse victims regardless of age could be beneficial.

Discussion questions

Should the categories of witnesses that may give evidence at pre-trial special hearings be expanded to expressly include witnesses of sexual abuse generally?

Should 'ground rules' hearings be available in trials for victims of sexual abuse who have been offended against as adults?

Should police be required to record interviews with all sexual abuse victims regardless of their age?



Victims' right to privacy

The Evidence Act contains a number of procedural protections relating to a victim's right to privacy. Part 7 Division 9 governs the right of the accused to access the victim's protected communications.

In summary, a communication relating to a victim or alleged victim of a sexual offence is, if made in a therapeutic context, protected from disclosure in legal proceedings by public interest immunity. The principle underpinning this is that victims of sexual offending should be able to seek counselling without fear of their communications being disclosed to others.

There are provisions to make an application to the court to present evidence of such conversations, but a high-threshold test must be met before a court will make such an order. The court must be satisfied that the public interest in preserving the confidentiality is outweighed by the public interest in preventing a miscarriage of justice that might arise from suppressing relevant evidence.

In its 2021 Report, the Victorian Law Reform Commission recommended changes to the Victorian *Evidence (Miscellaneous Provisions) Act 1958* to strengthen procedural protections relating to a victim's rights to privacy. In response, the Victorian Government amended the *Evidence (Miscellaneous Provisions) Act 1958* to:

- expand the protection of complainant's records to include 'health information' (such as personal information about a sexual offence victim-survivor that is collected in providing a health service); and
- make it clear that victim-survivors' concerns regarding the use of their sensitive records are heard and considered, including by:
 - requiring the prosecuting party to ensure victim-survivors are notified about applications to access their information, and are advised that they have a right to appear and may wish to consider obtaining legal advice; and
 - providing victim-survivors a clear right to appear in applications and permitting them to provide a confidential statement describing the harm they are likely to suffer if the application is granted. The court will only be able to disclose this statement in very limited circumstances, where doing so would be in the interests

of justice, such as where necessary to ensure the accused's right to a fair trial is upheld.³⁸

The issue of access to confidential communications was also discussed in the Senate Committee Report. The Senate Committee queried the probative value in sharing the 'deeply personal impacts of a sexual crime with a perpetrator' and expressed concerns that allowing access to such communications 'may dissuade victim-survivors from seeking the counselling they need'.³⁹

Linked to the above, the Victorian Law Reform Commission also recommended changes to the requirements in the Victorian *Criminal Procedure Act 2009* for the introduction of information about prior sexual history into evidence to:

- require the prosecution, to the satisfaction of the court, to notify the complainant of their right to appear in relation to an application by the defence seeking to introduce questions or admit evidence about the prior sexual activity of the complainant
- prohibit the court from waiving the notice requirements except in specific circumstances
- provide complainants with standing to appear
- permit complainants to provide a confidential sworn or affirmed statement to the court specifying the harm they are likely to suffer if the application is granted.

In South Australia

In South Australia, the introduction of prior sexual history into evidence is governed by section 34L of the Evidence Act. Pursuant to that section, no questions may be asked, or evidence admitted as to the sexual reputation of the alleged victim.

Questions may only be asked about the alleged victim's sexual activities before or after the events that are the subject of the charge with permission of the judge once certain criteria are met, including that the evidence is of substantial probative value and would, in the circumstances, be likely to materially impair confidence in the reliability of the evidence of the alleged victim.

In relation to both categories of evidence discussed above, there is currently no requirement in the Evidence Act for the alleged victim to be notified that an application has been made to

³⁸ See Second Reading Speech for the Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 – strengthening protections for confidential communications of sexual offence victim-survivors.

³⁹ Senate Committee Report, paragraph 5.39.

present evidence of this nature. The alleged victim does not have standing to make submissions in relation to such an application.

Discussion questions

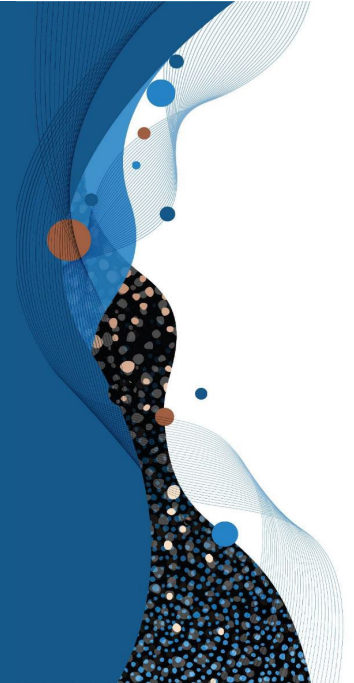
Do you consider there to be a gap in the way that the South Australian laws operate?

Should protected communications be expanded to include health information, such as personal information that is collected in providing a health service?

Should a victim be made aware of applications for disclosure of their protected communications?

Should a victim be made aware of applications by the defence to ask questions or admit evidence about the prior sexual history of the victim?

Should a victim be entitled to be heard in relation to such applications?



Support services

If you or someone you know has experienced sexual assault or domestic and family violence, there is confidential support available.

1800RESPECT

1800 732 737 (24 hours) | [1800respect website](#)

1800RESPECT is a national 24-hour online and telephone service offering counselling and support to anyone experiencing domestic and family violence and/or sexual assault and their family and friends.

Yarrow Place Rape and Sexual Assault Service

8226 8777 or 1800 817 421 | [Yarrow Place website](#)

Yarrow Place Rape and Sexual Assault Service is an inclusive service, including medical and counselling services for anyone in South Australia who has been sexually assaulted.

South Australian Domestic Violence Crisis Line

1800 800 098 (24 hours) | [Women Safety Services website](#)

The Domestic Violence Crisis Line is a state-wide service offering assistance to women experiencing domestic violence in South Australia by providing information, counselling and safe accommodation options.

Legal Services Commission

1300 366 424 | [Legal Services Commission website](#)

The Legal Services Commission provides free legal advice and support to all South Australians. They also operate the Women's Domestic Violence Court Assistance Service (WDVCAS), which supports women to apply for, vary or revoke an intervention order.

Appendices

Appendix 1 – Discussion questions

This discussion paper poses a number of questions. You may respond to all questions, or only those that are of interest to you.

While this paper focuses on opportunities for legislative reform, you may raise any additional issues and provide comments on non-legislative matters.

1. Should the definition of consent in South Australia include a positive obligation to obtain consent, consistent with an affirmative model of consent?
2. What are the benefits of adopting an affirmative model of consent?
3. What are risks of adopting an affirmative model of consent?
4. Should the list of circumstances in which a person is taken not to consent be changed?
5. What other circumstances could be included?
6. Should the list of jury directions in section 34N of the Evidence Act be expanded?
7. Are there any other common misconceptions about sexual violence that could be addressed through jury directions?
8. Should parties be required to indicate before the trial the likelihood that evidence will be presented that would provide a good reason for giving a jury direction?
9. Should the Evidence Act specify the timing or frequency of directions?
10. Should a trial judge be required to give themselves the same directions that must be given to jurors in a jury trial?
11. Is there a need to change any of South Australia's image-based sexual offences, or their application? If so, what changes should be made?
12. Should there be any increase in the current penalties?
13. Would the offences be better placed in the CLC Act?
14. Should prosecutions of minors require the approval of the Director of Public Prosecutions or some other person or body?
15. Should the categories of witnesses that may give evidence at pre-trial special hearings be expanded to expressly include witnesses of sexual abuse generally?

16. Should 'ground rules' hearings be available in trials for victims of sexual abuse who have been offended against as adults?
17. Should police be required to record interviews with all sexual abuse victims regardless of their age?
18. Do you consider there to be a gap in the way that the South Australian laws operate?
19. Should protected communications be expanded to include health information, such as personal information that is collected in providing a health service?
20. Should a victim be made aware of applications for disclosure of their protected communications?
21. Should a victim be made aware of applications by the defence to ask questions or admit evidence about the prior sexual history of the victim?
22. Should a victim be entitled to be heard in relation to such applications?

Appendix 2 – Jurisdictional comparison: list of circumstances where there is no consent

Jurisdiction	Provision
South Australia <i>Criminal Law Consolidation Act 1935</i>	s 46 Consent to sexual activity (1) In this section— sexual activity includes sexual intercourse. (2) For the purposes of this Division, a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity. (3) Without limiting subsection (2), a person is taken not to freely and voluntarily agree to sexual activity if— (a) the person agrees because of— (i) the application of force or an express or implied threat of the application of force or a fear of the application of force to the person or to some other person; or (ii) an express or implied threat to degrade, humiliate, disgrace or harass the person or some other person; or (b) the person is unlawfully detained at the time of the activity; or (c) the activity occurs while the person is asleep or unconscious; or (d) the activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity; or (e) the activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing; or (f) the person is unable to understand the nature of the activity; or (g) the person agrees to engage in the activity with a person under a mistaken belief as to the identity of that person; or (ga) the person agrees to engage in the activity because of a misrepresentation (whether express or implied) as to the use of a condom during the activity; or (h) the person is mistaken about the nature of the activity.

	<i>Example</i>— A person is taken not to freely and voluntarily agree to sexual activity if the person agrees to engage in the activity under the mistaken belief that the activity is necessary for the purpose of medical diagnosis, investigation or treatment, or for the purpose of hygiene.
	s 47—Reckless indifference For the purposes of this Division, a person is recklessly indifferent to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she— (a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or (b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or (c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.
New South Wales <i>Crimes Act 1900</i>	s 61HI Consent generally (1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity. (2) A person may, by words or conduct, withdraw consent to a sexual activity at any time. (3) Sexual activity that occurs after consent has been withdrawn occurs without consent. (4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity. (5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. (6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to sexual activity with - (a) that person on another occasion, or

(b) another person on that or another occasion.

s 61HJ Circumstances in which there is no consent

(1) A person does not consent to a sexual activity if—

- (a) the person does not say or do anything to communicate consent, or
- (b) the person does not have the capacity to consent to the sexual activity, or
- (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or
- (d) the person is unconscious or asleep, or
- (e) the person participates in the sexual activity because of force, fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of—
 - (i) when the force or the conduct giving rise to the fear occurs, or
 - (ii) whether it occurs as a single instance or as part of an ongoing pattern, or
- (f) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—
 - (i) when the coercion, blackmail or intimidation occurs, or
 - (ii) whether it occurs as a single instance or as part of an ongoing pattern, or
- (g) the person participates in the sexual activity because the person or another person is unlawfully detained, or
- (h) the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence, or
- (i) the person participates in the sexual activity because the person is mistaken about—
 - (i) the nature of the sexual activity, or
 - (ii) the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes, or
- (j) the person participates in the sexual activity with another person because the person is mistaken—

	(i) about the identity of the other person, or (ii) that the person is married to the other person, or (k) the person participates in the sexual activity because of a fraudulent inducement. (2) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity. (3) In this section— fraudulent inducement does not include a misrepresentation about a person's income, wealth or feelings.
Victoria <i>Crimes Act 1958 as amended by the Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022</i>	Section 36 - Consent (1) Consent means free and voluntary agreement. (2) A person does not consent to an act just because they do not resist the act verbally or physically. (3) A person does not consent to an act just because they consented to— (a) a different act with the same person; or (b) the same act with the same person at a different time or place; or (c) the same act with a different person; or (d) a different act with a different person. Section 36AA - Circumstances in which a person does not consent (1) Circumstances in which a person does not consent to an act include, but are not limited to, the following— (a) the person does not do or say anything to indicate consent to the act; (b) the person submits to the act because of force or the fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal, regardless of – (i) when the force, harm or conduct giving rise to the fear occurs; and (ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern; (c) the person submits to the act because of coercion or intimidation –

(i) regardless of when the coercion or intimidation occurs; and

(ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

(d) the person submits to the act because the person is unlawfully detained;

(e) the person submits to the act because the person is overborne by the abuse of a relationship of authority or trust;

(f) the person is asleep or unconscious;

(g) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;

(h) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

Note: This circumstance may apply where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting.

(i) the person is incapable of understanding the sexual nature of the act;

(j) the person is mistaken about the sexual nature of the act;

(k) the person is mistaken about the identity of any other person involved in the act;

(l) the person mistakenly believes that the act is for medical or hygienic purposes;

(m) the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid;

(n) if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes;

(o) the person engages in the act on the basis that a condom is used and either –

(i) before or during the act, any other person involved in the act intentionally removes the condom or tampers with the condom; or;

(ii) the person who was to use the condom intentionally does not use it;

(p) having given consent to the act, the person later withdraws consent to the act taking place or continuing.

	(2) For the purposes of subsection (1)(m), a false or misleading representation may be made by words or conduct (including by omission) and may be explicit or implicit.
Queensland <i>Criminal Code Act 1899</i> ⁴⁰	Section 348 - Meaning of consent (1) In this chapter, consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent. (2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained— (a) by force; or (b) by threat or intimidation; or (c) by fear of bodily harm; or (d) by exercise of authority; or (e) by false and fraudulent representations about the nature or purpose of the act; or (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner. (3) A person is not to be taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act. (4) If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.
Western Australia	Section 319 - Terms used (Chapter XXXI – Sexual Offences) (2) For the purposes of this Chapter — (a) consent means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;

⁴⁰ Note that the Criminal Law (coercive Control and Affirmative Consent) and other Legislation Amendment Bill 2023 was introduced into the Queensland Parliament on 11 October 2023. Among other things, the Bill will amend the Queensland Criminal Code to introduce a model of affirmative consent.

<i>Criminal Code Act Compilation Act 1913</i>	(b) where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act; (c) a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.
Tasmania <i>Criminal Code Act 1924</i>	Section 2A - Consent (1) In the Code, unless the contrary intention appears, "consent" means free agreement. (2) Without limiting the meaning of "free agreement", and without limiting what may constitute "free agreement" or "not free agreement", a person does not freely agree to an act if the person – (a) does not say or do anything to communicate consent; or (b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or (c) agrees or submits because of a threat of any kind against him or her or against another person; or (d) agrees or submits because he or she or another person is unlawfully detained; or (e) agrees or submits because he or she is overborne by the nature or position of another person; or (f) agrees or submits because of the fraud of the accused; or (g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or (h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or (i) is unable to understand the nature of the act. (2A) Without limiting the application of subsection (2) to an act of sexual intercourse, a person does not freely agree to an act of sexual intercourse with another person if the person says or does anything to communicate to the other person that a condom must be used for that sexual intercourse and the other person intentionally – (a) does not use a condom; or (b) tampers with the condom; or

	(c) removes the condom before or during the sexual intercourse. (3) If a person, against whom a crime is alleged to have been committed under chapters XIV or XX , suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.
Australian Capital Territory <i>Crimes Act 1900</i>	s 50B Meaning of consent—pt 3 In this part: consent, to a sexual act, means informed agreement to the sexual act that is— (a) freely and voluntarily given; and (b) communicated by saying or doing something. s 67 When a person does not consent to an act (1) For a sexual offence consent provision, and without limiting the grounds on which it may be established that a person does not consent to an act mentioned in the provision, a person does not consent to an act mentioned in the provision if the person— (a) says or does something to communicate withdrawing agreement to the act either before or during the act; or (b) participates in the act because of the infliction of violence or force on the person, or another person, an animal or property; or (c) participates in the act because of a threat to inflict violence or force on the person, or another person, an animal or property; or (d) participates in the act because of extortion, coercion, blackmail, intimidation or a fear of public humiliation or disgrace of the person or another person; or (e) participates in the act because of a threat to mentally or physically harass the person or another person; or (f) participates in the act because of force or fear; or (g) is incapable of agreeing to the act because of intoxication; or (h) is mistaken about the identity of the other person; or

- (i) participates in the act because of fraudulent misrepresentation of any fact made by someone else; or
 - (j) participates in the act because of an intentional misrepresentation by another person about the use of a condom; or
 - (k) participates in the act as a result of an abuse of—
 - (i) a relationship of authority, trust or dependence; or
 - (ii) a professional relationship; or
 - (l) does not have the capacity to agree to the act; or
 - (m) is unconscious; or
 - (n) is asleep; or
 - (o) is unlawfully detained or knows that another person is unlawfully detained.
- (2) A person also does not consent to an act with another person (the "accused person") only because the person—
- (a) does not say or do something to resist the act; or
 - (b) consented to—
 - (i) another act with the accused person; or
 - (ii) the same act with the accused person at a different time or place; or
 - (iii) the same act with a person other than the accused person; or
 - (iv) a different act with a person other than the accused person.
- (3) If it is established that an accused person who knows, or is reckless about whether, the consent of another person to an act mentioned in a sexual offence consent provision has been caused by any of the circumstances set out in subsection (1) (a) to (o), the accused person is taken to know that the other person does not consent to the act.
- (4) An accused person is taken to know that another person does not consent to an act mentioned in a sexual offence consent provision if any belief that the accused person has, or may have, that the other person consents to the act is not reasonable in the circumstances.

	(5) For subsection (4), without limiting the grounds on which it may be established that an accused person's belief is not reasonable in the circumstances, the accused person's belief is taken not to be reasonable in the circumstances if the accused person did not say or do anything to ascertain whether the other person consented. (6) In this section: intoxication means intoxication because of the consumption of alcohol, a drug or any other substance. sexual offence consent provision means any of the following: (a) section 54; (b) section 55 (3) (b); (c) section 60; (d) section 61 (3) (b).
Northern Territory <i>Criminal Code Act 1983</i>	s 192 - Sexual intercourse and gross indecency without consent (1) For this section, consent means free and voluntary agreement. (2) Circumstances in which a person does not consent to sexual intercourse or an act of gross indecency include circumstances where: (a) the person submits because of force, fear of force, or fear of harm of any type, to himself or herself or another person; (b) the person submits because he or she is unlawfully detained; (c) the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing; (d) the person is incapable of understanding the sexual nature of the act; (e) the person is mistaken about the sexual nature of the act or the identity of the other person; (f) the person mistakenly believes that the act is for medical or hygienic purposes; or (g) the person submits because of a false representation as to the nature or purpose of the act.

Appendix 3 – Image-based sexual offences

The following table outlines the offences, penalties and defences for image-based sexual offences under the *Summary Offences Act 1953*.

Offence	Penalty	Defence
Engaging in humiliating or degrading filming – s26B(1)	1 year	It is a defence to prove 1 or more of the following: - they did not knowingly film the images - they reasonably believed that the victim consented to the filming - the conduct was for a legitimate public purpose
Distributing an image obtained by humiliating or degrading filming knowing or having reason to believe that the victim does not consent – s26B(2)	1 year	It is a defence to prove one or more of the following: - the distribution was neither intentional nor reckless - the conduct was for a legitimate public purpose.
Taking part in a humiliating or degrading act and engaging in the conduct the subject of the previous two offences – s26B(3)	2 years	If the conduct relates to filming, it is a defence to prove 1 or more of the following: - they did not knowingly film the images - they reasonably believed that the victim consented to the filming - the conduct was for a legitimate public purpose. If the conduct relates to distribution, it is defence to prove one or more of the following: - the distribution was neither intentional nor reckless - the conduct was for a legitimate public purpose.
Distribution of an invasive image knowing or having reason to believe that the other person does not consent – s26C	\$20,000 or 4 years if victim under 17 Otherwise, \$10,000 or 2 years	It is a defence to prove that the conduct constituting the offence was for a purpose connected to law enforcement or for a medical, legal or scientific purpose. It is also a defence to prove that the image was filmed by a licensed investigation agent in the course of obtaining evidence in connection with a claim for compensation, damages, etc and the distribution was for a purpose connected with that claim.

Offence	Penalty	Defence
Engaging in indecent filming – s26D(1)	\$20,000 or 4 years if victim under 17 Otherwise, \$10,000 or 2 years	It is a defence to prove that the indecent filming occurred with the consent of the person filmed or that the indecent filming was undertaken by a licensed investigation agent in the course of obtaining evidence in a claim for damages, compensation, etc.
Distributing an image obtained by indecent filming – s26D(3)	\$20,000 or 4 years if victim under 17 Otherwise, \$10,000 or 2 years	It is a defence to prove one or more of the following: - that the person filmed consented to that particular distribution of the image or distribution of the image generally. - that the defendant did not know, and could not be reasonably expected to have known, that the indecent filming was without the person's consent. - that the filming was undertaken by a licensed investigation agent in the course of obtaining evidence in connection with a claim for compensation, damages, etc and the distribution was for a purpose connected with that claim.
Threatening to distribute an invasive image or an image obtained by indecent filming intending to arouse fear that the threat will be, or is likely to be carried out, or being recklessly indifferent as to whether such a fear is aroused – s26DA(1) and (2)	\$10,000 or 2 years if victim under 17 Otherwise, \$5,000 or 1 year	It is a defence to prove that: - the person filmed consented to that particular distribution of the image or distribution of the offence generally; and - that the person had not, at the time of the alleged offence, withdrawn consent to the distribution of the image.



Government
of South Australia

Attorney-General's
Department