



# Submission

## **Australian Law Reform Commission – Justice Responses to Sexual Violence (Issues Paper 49)** *May 2024*

### **Introduction**

The Youth Affairs Council of South Australia (YACSA) is the peak body representing young people aged 12 to 25 years as well as the non-government services that support them. YACSA is a member-based organisation, our policy positions are independent and not aligned with any political party or movement. We aim to achieve meaningful improvements in the quality of young people's lives. YACSA advocates for the fundamental right of all young people to contribute to aspects of community life, including decision-making processes that impact them, and we recognise the unique challenges young people face when engaging in decision-making processes.

Gendered violence, including the prevalence of sexual violence, is a priority concern for young people and they are significant stakeholders in these matters as young women are the most likely cohort to experience sexual assault and young men the most likely cohort to perpetrate it. YACSA is pleased to provide this contribution focusing on young people in relation to the Australian Law Reform Commission's *Issues Paper 49 – Justice Responses to Sexual Violence*.

While *Issues Paper 49* has a particular focus on legislative reform, the significance of prevention and early intervention must be recognised as integral to the effectiveness of any legislative reform and so, YACSA continues to urge Federal and State/Territory Governments to invest in evidence-based preventative measures targeted at young people across Australia.

### **Young people in context**

Previous assumptions that young people would naturally develop a better understanding of consent and sexual violence have not eventuated, and across Australia, young people continue to hold misinformed beliefs on sexual violence<sup>i</sup>. It is essential that young people be considered a priority cohort in consultations regarding sexual violence legislative reform especially as they are the most likely group to be both victims and perpetrators of sexual violence<sup>ii</sup>. Young people are experiencing a critical period in their lives during which they are influenced by exposure to sexual violence and attitudes that support it. Research indicates that successful efforts to address sexual violence and responses to it must include prevention education that is co-designed with young people, action-oriented, delivered by peers, and provided in various settings such as schools, recreational environments (e.g., sports or community clubs), media, and family settings.

Young people are particularly at risk of being detrimentally impacted by the justice system's response to sexual violence as they are often subject to intimidation, misleading questioning, and even harassment<sup>iii</sup>. To provide greater protection for young people, legislation across Australian jurisdictions should include young people as well as victim-survivors who were a young person at the time of an offense as vulnerable witnesses and complainants in a broader range of cases. Considering the negative effects of common cognitive biases, rape myths, and a culture of victim-blaming that persist in system responses<sup>iv</sup>, the categories of vulnerability could be further revised to include all young people who are victim-survivors of non-historic sexual violence offenses.

## Current responses to sexual violence

Persistent commonly held myths (typically referred to as 'rape myths') continue to affect current system responses to sexual violence across Australia. By propagating stereotypes about what sexual violence is and how it is experienced, these myths operate to separate an individual victim-survivor's experience from a 'real rape' stereotype, impeding a victim-survivor's ability to receive support especially in relation to the justice system's response<sup>v</sup>. By obscuring the reality of sexual violence perpetration and victimisation these myths undermine efforts to address sexual violence at societal, institutional, and individual levels<sup>vi</sup>. Despite increasing understanding of rape myths and the impact of them on victim-survivors, system responses and the wider community, recent legislative reform has been unable to shift the context that justice responses occur within and failed to address the reliance on myths within justice responses. The justice system, which includes police, prosecution, defence and decision-makers like judges and juries, continue to be influenced by rape myths with recent research showing when rape myths are relied upon especially within court proceedings, judges and prosecution rarely challenge them<sup>vii</sup>. The result of rape myths continuing to influence the justice system response to sexual violence is distress, humiliation, and re-traumatisation of victim-survivors<sup>viii</sup>. Attrition rates for sexual violence offences remain high and victim-survivors often report feeling powerless within system responses. While legislative reform can facilitate changes to address some issues concerning system responses to sexual violence, to be effective any reform needs to be considered within a broader context of prevention and early intervention efforts.

South Australia as a common law jurisdiction currently allows for a defence of 'honest belief' against a charge under the *Criminal Law Consolidation Act 1935* (SA) related to sexual violence. This belief is not required to be considered reasonable and so, defence only need to demonstrate if the accused defendant believed the other person was providing consent, not whether that belief was reasonable. Victims-survivors in South Australia must show that consent was not given or it was withdrawn and the defendant was either aware or recklessly indifferent to it, often while being subjected to considerable scrutiny. The subjective element of fault allows commonly held rape myths and other misunderstandings on consent to strongly influence the justice system response to sexual violence in the State.

## Legislative reform

### *Affirmative consent*

Adopting an affirmative consent model within legislation on sexual violence aims to shift consent from being understood as one person accepting or rejecting an offer of sexual activity that relies on a subjective inference of another person's actions, to understanding consent as an ongoing active form of communication between all parties utilised to clarify the consent of all parties on a continuous basis<sup>ix</sup>. By constructing the concept of consent as one focused on communication and the exercise of agency, it supports the development of an understanding that consent is unambiguous, informed, actively given and ongoing which is a positive starting point for improving education and awareness among young people. It also facilitates the broader community to accept each individual person's responsibility to affirm consent and is a small step towards shifting the overwhelming power imbalance present, and often relied on, for justice system responses to sexual violence offences<sup>x</sup>. Although both Victoria and New South Wales have incorporated affirmative consent into their legislation in recent years, it is unclear whether these reforms have improved the reporting and conviction rates of sexual violence offences or whether it can better support victim-survivors throughout the justice system response<sup>xi</sup>. In light of the interest in harmonizing justice system responses to sexual violence across Australian jurisdictions, South Australia and other jurisdictions

would benefit from adopting an affirmative consent model similar to that adopted in New South Wales and Victoria.

Improving understandings of consent is important for young people as evidence demonstrates that young women in particular struggle to effectively exercise their agency including within relationships that have not previously involved violence. Evidence indicates that young women may rely on non-verbal communication to communicate their consent (or non-consent) and recent research shows that too often consent was considered to be assumed, alluded to and even expected or inevitable, resulting in young women feeling a lack of control<sup>xii</sup>. However, it is important to acknowledge that legislative reform alone cannot force social change, especially in a short timeframe<sup>xiii</sup>. Reform to legislation while positive, independent of investment in prevention and early intervention, will not facilitate addressing the cultural and social constraints that limit understandings of consent amongst the broader community<sup>xiv</sup>. Heavy legislative reform beginning in the 19<sup>th</sup> century has had limited effect on addressing problematic attitudes and understandings of sexual violence and has not resulted in vast improvements to system responses. Then, reforms were made to remove requirements for evidence of force and physical violence in relation to sexual violence, however even now, system responses to sexual violence when there is no evidence of physical violence are inadequate<sup>xv</sup>. Other reforms focused on the justice system response have fallen short and victim-survivors continue to be experience intense scrutiny over their behaviour, appearance and demeanour primarily in relation to a defendant's claim of an 'honest belief' that consent was given. A victim-survivor may still be cross-examined on sexual history, occupation, clothes, medical history, including whether they take some form of birth control, and more<sup>xvi</sup>. A low threshold for defendants to claim a belief of consent and enduring misunderstandings on sexual violence within the community continue to significantly influence all system responses to sexual violence especially within the justice system<sup>xvii</sup>.

### *Inadmissible evidence*

With the justice system response to sexual violence, victim-survivors often endure attempts to undermine their credibility including during cross-examination and jury direction, which is a highly distressing experience. While various jurisdictions in Australia have made changes to the allowance of evidence regarding a victim-survivor's sexual reputation, further reform may be needed to improve the justice system's response. Current state and territory legislation has not effectively eliminated an ability to introduce evidence concerning a victim-survivor's sexual reputation, particularly during court proceedings<sup>xviii</sup>. There is still room for improvement in this area, and reforms to admissible evidence on sexual experience and reputation should be considered to prevent victim-survivors from being subjected to humiliating and re-traumatising cross-examination during trial.

### *Jury directions*

Evidence shows that jurors can struggle to understand and apply directions and that when jurors are unclear, they rely more heavily on assumptions that reinforce rape myths<sup>xix</sup>. Therefore, the effectiveness of jury directions on addressing rape myths is debatable especially as directions simply allow for a trial judge to address the myth-based narrative being employed<sup>xx</sup>.

A requirement for a judge to provide jury direction on matters relating to rape myths features in both Victorian and South Australian legislation, with the Victorian Act stating that direction must be given as soon as possible mid-trial<sup>xxi</sup>. Jury direction in Victoria covered under the *Jury Directions Act 2015* (Vic) places a requirement on a judge to provide direction to the jury on the common occurrence of delayed reporting for sexual violence as well as that there is no 'typical or normal' response to experiencing sexual violence (see Part 5, Div 2, S. 52). A recent review found that defence continue to

utilise these narratives and mid-trial jury directions were not consistently given by judges despite legislative requirements<sup>xxii</sup>. While there are issues identified in the practice of jury direction under Victoria's legislation, South Australia and other jurisdictions may still benefit from a similar approach allowing direction to be given earlier in proceedings.

### *Vulnerable persons*

Individuals who experience sexual violence as a young person are particularly susceptible to being re-traumatised by the justice system's response<sup>xxiii</sup>. With the aim of providing more protection for vulnerable individuals, current legislation on vulnerable persons could be expanded to include young people as witnesses and complainants in a wider range of cases, as well as victim-survivors who were a young person at the time of the offence but who are now adults. Further, given the enduring prevalence of cognitive biases and victim-blaming present in the justice system's response<sup>xxiv</sup>, the categories of vulnerability could be further amended to include all young people who are victim-survivors of non-historical sexual violence offenses.

### *Publication of self-identifying information*

Allowing for the publication of self-identifying information can enable victim-survivors of sexual violence to share their experience if they choose to. This is recognised as an important step for some individuals and could facilitate an improved justice system response to sexual violence. This approach can also help to acknowledge the known barriers to accessing justice and enhance understanding of sexual violence within the broader community by allowing the community to learn from other's lived experience. However, in allowing for the publication of self-identifying information it is essential that victim-survivors are comprehensively supported to make an informed decision about whether or not they wish to disclose their experiences. While changes like these will have an immediate impact on system responses, striking an appropriate balance between addressing the negative effects of system responses experienced by victim-survivors and safeguarding the right to a fair trial could improve the justice system response to sexual violence. Most importantly, it is crucial that the effectiveness of any reform in this area is carefully evaluated to determine its impact.

## **Meeting young people where they are**

Survey results of young people from the 2023 National Community Attitudes Towards Violence Against Women Survey (NCAS) were analysed and compared to previous findings, demonstrating no notable progress in the understanding of consent and sexual violence among young people<sup>xxv</sup>. Recent evidence on prevention, education and early intervention demonstrates the need to implement initiatives to progress young people's understanding of consent and sexual violence, including increasing understanding, skills and confidence to facilitate young people to act as prosocial bystanders<sup>xxvi</sup>.

Legislative reform can aid progress in improved system responses to sexual violence, but any reform must include extensive consultation and recognition of the risks posed to already marginalised communities including young people, migrants and refugees, Aboriginal and Torres Strait Islander people and LGBTIQ+ people by an adversarial justice system.

## **Beyond legislative reform**

National and international reforms have demonstrated that legislative changes alone are insufficient to address the issue of sexual violence and system responses to it. Addressing sexual violence and the justice system's response to it requires more than mere legislative reforms. Despite significant changes aimed at improving system responses in recent years, there has been little effect on offending rates, reporting rates, and attrition rates within justice systems across Australian jurisdictions.

To successfully improve reporting, attrition, and conviction rates for sexual violence, governments must consider prevention, community education, reporting processes and the application of police discretion, as well as understand that gaps in prevention focused on young people will only allow harmful rape myths and misunderstandings to persist within the community, ultimately hindering system responses to sexual violence.

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