

EMBOLDEN SA INC.

SUBMISSION TO THE REVIEW OF SEXUAL CONSENT LAWS IN SOUTH AUSTRALIA

FEBRUARY 2024

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SUMMARY OF RECOMMENDATIONS

Embolden recommends that:

Affirmative consent

- South Australia adopts an affirmative model of sexual consent as soon as practicable and supports national harmonisation of consent laws.

Circumstances in which there is no consent

- The list of circumstances in section 46 of the *Criminal Law Consolidation Act 1935* in which a person is taken not to consent be expanded to encompass any circumstances now included by another Australian jurisdiction.

Directions about sexual offences

- Section 34N of the *Evidence Act 1929* be amended to expand the list of jury directions, in line with Victoria's 2022 amendments to relevant legislation.
- In trials by judge alone, the trial judge be required to give themselves the same directions that must be given to jurors in a jury trial.
- The Evidence Act specifies that directions must be given at the earliest appropriate opportunity in the trial and repeated both at the time that relevant evidence is presented and in the judge's summing up.

Image-based sexual offences

- Image-based sexual offences be brought into the Criminal Law Consolidation Act, in line with the approach of the majority of Australian jurisdictions.
- The approval of the Director of Public Prosecution be required to commence a prosecution of a defendant who was under 16 at the time of the offence.
- The very low proportion of South Australian image-based sexual abuse cases resulting in a finding or admission of guilt be addressed urgently.

Embolden recommends that:

Protection of victim-survivors in sexual offence trials

- The categories of witnesses that may give evidence at pre-trial special hearings be expanded to expressly include witnesses of sexual offences.
- ‘Ground rules’ hearings be extended to trials for victim-survivors of sexual violence who have been offended against as adults.
- The Office of the Director of Public Prosecutions ensures that victim-survivors/witnesses in sexual offence proceedings have access to the Witness Assistance Team.
- The option for police to record interviews be offered to all victim-survivors of sexual offences, regardless of their age, with victim-survivors provided with clear information at the point of interview to support informed decision-making.

Victim-survivors’ right to privacy

- Protected communications under the Evidence Act be expanded to include victim-survivors’ health information, such as records of health services provided to a victim-survivor of a sexual offence.
- There is a legislative requirement that victim-survivors be made aware of applications for disclosure of their protected communications and applications by the defence to ask questions or admit evidence about their prior sexual history.
- Victim-survivors be entitled to be heard in relation to such applications and have access to independent legal representation on these matters, at no cost.

Embolden recommends that:**Effective implementation of changes to sexual consent laws**

- Legislative amendments include monitoring and evaluation mechanisms, to assess whether changes are resulting in intended improvements to justice access and outcomes for victim-survivors.
- Legislative changes are supported by education of the police and judiciary, developed in partnership with a specialist sexual violence service. Content should include socio-cultural drivers and dynamics of sexual violence and link explicitly to policing and judicial processes.
- The South Australian Government considers specialist sexual offence courts/dedicated court sitting days for sexual offences, to strengthen judicial practice and justice outcomes for victim-survivors.

Prevention and early intervention to stop sexual violence

- South Australia strengthens investment in primary prevention initiatives to stop sexual violence before it starts, including broad-reach and targeted community education campaigns.
- Age-appropriate sexual consent and holistic respectful relationships content be delivered to students as early as possible, be ongoing throughout their schooling and reflect a whole-of-school approach to gender equality and respectful relationships. At an age-appropriate juncture, the content should be explicit on the consequences and penalties associated with sexual offences.
- South Australia's Royal Commission into domestic, family and sexual violence considers critical opportunities to improve South Australia's approach to early intervention with people, including young people, at higher risk of/engaging in problematic or harmful sexual behaviours.

About Embolden

Embolden is the statewide peak body of organisations working to respond to and eliminate domestic, family and sexual violence in South Australia. Our members provide services that promote women and their children's safety and wellbeing, and work to prevent and respond to violence against women. We lobby and advocate for women's right to respect, safety and self-determination, and represent providers of specialist services in the domestic, family and sexual violence and related sectors, including services that work with men who use violence against women and Aboriginal specialist services.

Acknowledgement of Country

We acknowledge and respect Aboriginal peoples as the state's first peoples and nations, and recognise Aboriginal peoples as traditional owners and occupants of land and waters in South Australia. Sovereignty has never been ceded. It always was and always will be Aboriginal land. We recognise that Aboriginal peoples' spiritual, social, cultural and economic practices come from their traditional lands and waters, that they maintain their cultural and heritage beliefs, languages and laws, which are of ongoing importance, and that they have made and continue to make a unique and irreplaceable contribution to the state. We acknowledge that Aboriginal peoples have endured, and continue to endure, injustices and dispossession of their traditional lands and waters. We continue to pay respect to the resilience and strengths of Ancestors and Elders past, present and those emerging.

This submission has been developed in consultation with, and is submitted on behalf of, Embolden's member organisations:

- Bramwell House, The Salvation Army
- Ceduna Regional Domestic Violence and Aboriginal Family Violence Services, Centacare Catholic Country Services
- Coober Pedy Regional Domestic Violence and Aboriginal Family Violence Service, Uniting Country SA
- Cross Border/APY Lands Aboriginal Family Violence Service, NPY Women's Council
- 54 Reasons
- Family Violence Legal Service Aboriginal Corporation
- Fleurieu and KI Domestic Violence Service, Junction SA
- Kornar Winmil Yunti Aboriginal Cooperation
- Mt Gambier and Limestone Coast Domestic Violence Service, Centacare Catholic Family Services
- Murray Mallee and Adelaide Hills Domestic Violence Service, Centacare Catholic Family Services
- No to Violence
- Nunga Mi:Minar
- OARS Community Transitions
- Port Augusta Regional Domestic Violence and Aboriginal Family Violence Service, Uniting Country SA
- Relationships Australia (SA)
- Riverland Domestic Violence Service, Centacare Catholic Family Services
- Whyalla Regional Domestic Violence Service, Centacare Catholic Family Services
- Women's Legal Service SA
- Women's Safety Services SA
- Yarredi Services
- Yarrow Place, SA Health
- Yorke and Mid North Domestic Violence Service, Uniting Country SA
- Zahra Foundation Australia

Introduction

As the peak body for domestic, family and sexual violence services in South Australia, Embolden thanks the Attorney-General's Department for the opportunity to make a submission to the review of sexual consent laws in South Australia.

Sexual violence is prevalent in our community, with one in five South Australian women experiencing sexual violence since the age of 15¹. As noted in the Department's discussion paper, the dynamics of sexual violence are highly gendered. In South Australia in 2022, the number of female victim-survivors of recorded sexual assaults was more than eight times the number of male victim-survivors, and almost all defendants in sexual offence cases are male. It is important to note that many women's experience of sexual violence will be at the hands of an intimate partner, where sexual violence is used as part of a pattern of abuse over time. Younger women are at higher risk of sexual violence, as are women who experience multiple forms of marginalisation and discrimination, in particular Aboriginal and Torres Strait Islander women and women with disability. Embolden commends to the Department submissions to the review made by Aboriginal women and women with disability, and their representative organisations.

The barriers and challenges for women experiencing sexual violence in seeking justice through the criminal legal system are well documented, as are experiences of retraumatisation through the system for many victim-survivors. There are extremely low rates of reporting to police, with fewer than one in 10 Australian women experiencing sexual assault by a male reporting the most recent incident to police². Of the very small proportion of acts of sexual violence that result in a prosecution, a significant majority are withdrawn, not proceeded with or dismissed.³ Embolden commends and supports the recent and current action being taken nationally to strengthen legal frameworks to promote improved justice outcomes and protections for victim-survivors of sexual offences. We note that justice responses to sexual violence will be considered by the Australian Law Reform Commission (ALRC) this year. More broadly, South Australia's Royal Commission into domestic, family and sexual violence will consider how our state can better prevent and respond to sexual violence across a range of systems.

¹ [Australian Bureau of Statistic Personal Safety Survey 2021-22](#)

² *ibid.*

³ 65% of cases with a most serious charge of either indecent assault or rape in SA between July 2017 and June 2022

Embolden acknowledges the significant input to this submission from Yarrow Place, South Australia's lead service for rape and sexual assault and a member of Embolden. This submission covers the key areas of focus outlined in the discussion paper and also briefly addresses the importance of prevention and early intervention initiatives alongside criminal justice responses.

A note on terminology

Definitions of sexual violence vary. Embolden's use of the term *sexual violence* aligns with the definition preferred by Australia's National Research Organisation for Women's Safety (ANROWS)⁴: the intentional perpetration of sexual acts without consent. This definition captures all forms of sexual assault and sexual harassment, and refers to both criminal and non-criminal sexual activity perpetrated without consent.

Embolden defines *intimate partner sexual violence* as the intentional perpetration of sexual acts without consent in intimate partner relationships, including non-cohabiting partners and people who are dating.

In the context of this submission, *sexual offences* refers to offences in South Australia where the issue of consent is particularly relevant, as identified in the discussion paper: rape, indecent assault, compelled sexual manipulation and image-based sexual offences.

Affirmative consent

Affirmative consent models place a positive obligation on parties involved in sexual activity to take active steps to ensure that the other person is consenting to each sexual act. This obligation applies in particular to the initiator of the sexual act.

Consistent with key national women's safety organisations, including ANROWS and federal domestic and family violence services peak WESNET⁵, Embolden supports the adoption of an

⁴ [ANROWS submission to Senate Legal and Constitutional Affairs Committee Inquiry into current and proposed sexual consent laws in Australia.](#)

⁵ [WESNET submission to Senate Legal and Constitutional Affairs Committee Inquiry into current and proposed sexual consent laws in Australia.](#)

affirmative model of sexual consent by every Australian jurisdiction. Benefits of an affirmative consent model include:

- Responsiveness to the embodied lived experience of gendered dynamics of power that underpin sexual violence, where a non-consenting victim-survivor may exhibit a 'freeze' response due to fear and/or trauma. Under affirmative consent provisions, consent cannot be inferred from an absence of verbal or physical resistance.
- Bringing the criminal law into line with community standards and understandings of consent now informing consent and respectful relationships education for children and young people.

ANROWS' 2021 National Community Attitudes Survey results reveal that broader community attitudes to sexual violence remain out of step with the messaging of contemporary primary prevention approaches. Inaccurate and pernicious myths that serve to protect perpetrators and a lack of understanding about the dynamics of sexual violence are still culturally pervasive. Affirmative consent laws have an important place in driving change in community understandings of consent. Community attitudes and other social-cultural factors are critical determinants in the perpetration of sexual violence, how victim-survivors understand their experience of sexual violence, the responses of those around them, the likelihood that they will report to police and seek support from services, and experiences and outcomes of criminal justice processes.

- Relatedly, a shifting of emphasis in criminal proceedings from the actions of the victim-survivor to those of the alleged perpetrator.

National women's safety organisations have pointed to the benefits of national harmonisation of consent laws, in line with an affirmative model of consent. The [National Plan to End Violence Against Women and their Children 2022-2032](#) has a clear commitment to working towards nationally consistent definitions, understandings and responses to gender-based violence. National consistency in affirmative consent models will strengthen the power of the criminal law to drive change in community attitudes and understandings in relation to sexual consent, including challenging the perception that sexual violence cannot

happen within an intimate relationship. Harmonisation will also inform clear and consistent respectful relationships and consent education through the national curriculum.

Embolden is aware that a potential national standard of affirmative consent may be considered by the ALRC through its Inquiry this year. If the State Government elects to wait to make changes to consent laws until after the ALRC Inquiry Report is delivered in January 2025, we urge the Government to enact changes as soon as possible once the Inquiry outcomes are known.

Legislative amendments to establish an affirmative consent model must include clear criteria and requirements for monitoring and evaluation, to assess whether the changes are resulting in intended improvements to justice access and outcomes for victim-survivors. It will be important to track whether affirmative consent, should it be introduced, results in a higher rate of convictions for sexual offences. Currently in South Australia, to be found guilty of rape or compelled sexual manipulation, an offender must know or be recklessly indifferent to the fact that the person does not consent or has withdrawn consent. This requirement creates considerable scope for a defence that the alleged offender had a 'reasonable belief' as to the existence of consent, even though the victim-survivor was not in fact consenting – referred to as a 'mistake of fact' defence. An affirmative consent model should raise the bar for such a defence, as it places a positive onus on the initiator of sexual activity to 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. It is hoped that the ALRC Inquiry considers how the mistake of fact defence intersects and interacts with the affirmative consent model, with regard to promoting just outcomes for people experiencing sexual violence.

Circumstances in which there is no consent

Embolden is of the view that while non-exhaustive, the list of circumstances in section 46 of the *Criminal Law Consolidation Act 1935* in which a person is taken not to consent should be expanded to encompass any circumstances now included by another Australian jurisdiction.

As flagged in the discussion paper, an expanded list would more explicitly and comprehensively address continuing misconceptions about the dynamics of sexual violence

and consent that may work against just outcomes for victim-survivors and would reflect evolving community attitudes in this area of criminal law.

Directions about sexual offences

Given the prevalence of problematic attitudes towards and understandings of sexual violence across the community, jury directions are an important mechanism to promote just outcomes for victim-survivors.

Embolden supports amendment of section 34N of the *Evidence Act 1929* to expand the list of jury directions, in line with Victoria's 2022 amendments to relevant legislation. In trials by judge alone, the trial judge should be required to give themselves the same directions that must be given to jurors in a jury trial. Should the State Government elect to wait for the ALRC to develop model jury directions, we advocate that legislative amendments be enacted as soon as possible following the delivery of ALRC guidance.

Legislative changes to directions about sexual offences should be supported by education of the judiciary on the socio-cultural drivers and dynamics of sexual violence. Education content should be co-developed by a judicial body and a specialist rape and sexual assault service, and be conceptually and practically linked to judicial processes. As previously indicated, it is critical that the impacts and outcomes of legislative changes and their implementation are effectively monitored and reported on.

In relation to the **timing of jury/trial judge directions in sexual offence cases**, Embolden's view is that the Evidence Act should specify that directions must be given at the earliest appropriate opportunity in the trial and repeated both at the time that relevant evidence is presented and in the judge's summing up.

Image-based sexual offences

As outlined in the discussion paper, community prevalence of image-based sexual abuse is high and increasing. Image-based sexual abuse is a significant form of gender-based violence with harmful impacts, to which girls and young women are disproportionately subject. We note that technology-facilitated abuse of this kind can form part of a pattern of abusive behaviour in coercive and controlling intimate partnerships. To reflect the seriousness of

image-based sexual abuse offences, Embolden advocates that they be brought into the Criminal Law Consolidation Act, in line with the approach of the majority of Australian jurisdictions. The requirement of Director of Public Prosecution approval to commence a prosecution of a defendant who was under 16 at the time of the offence is an appropriate safeguard against the criminalisation of young people. Explicit content on these offences and associated consequences and penalties must be included in targeted education and broad-reach messaging prior and subsequent to any legislative change.

Embolden is highly concerned that between January 2018 and June 2023, only just over half of finalised image-based sexual abuse cases resulted in a finding or admission of guilt, given these offences are comparatively easy to evidence. The extremely poor justice outcomes for victim-survivors of image-based sexual offences must be addressed urgently.

Protection of victim-survivors in sexual offence trials

Embolden is of the view that improvements can be made to protections for victim-survivors in sexual offence trials, to reduce the trauma and distress they may experience through the process. In addition to benefits for individual complainants, such improvements would reduce systemic barriers for victim-survivors, many of whom may be reluctant to engage with the criminal justice system due to fear of retraumatisation.

Trauma and distress for victim-survivors/witnesses of sexual offences could be reduced by expanding the categories of witnesses that may give evidence at pre-trial special hearings to expressly include witnesses of sexual offences. For the same reason, 'ground rules' hearings should be extended to trials for victim-survivors of sexual violence who have been offended against as adults. Recent national consultation processes in relation to criminal justice responses to sexual violence have highlighted the importance of witness intermediary schemes to support victim-survivors/witnesses in sexual offences. It is important that South Australia ensures that victim-survivors/witnesses in sexual offence proceedings have access to the Office of the Director of Public Prosecutions Witness Assistance Team.

The option for police to record interviews should be offered to all victim-survivors of sexual offences, regardless of their age. Victim-survivors should be provided with clear information at the point of interview about the processes for witness testimony should the matter ultimately proceed to trial, to ensure informed decision-making in relation to police interview recording.

Victim-survivors' right to privacy

It is critical that legislative settings in relation to victim-survivors' right to privacy do not work to dissuade victim-survivors from seeking health or therapeutic services, or from pursuing criminal charges, for fear of disclosure of their private records and communication through court proceedings.

Embolden advocates that protected communications under the Evidence Act should be expanded to include victim-survivors' health information, such as records of health services provided to a victim-survivor of a sexual offence.

There should also be a legislative requirement that victim-survivors be made aware of applications for disclosure of their protected communications and applications by the defence to ask questions or admit evidence about their prior sexual history. Additionally, a victim-survivor should be entitled to be heard in relation to such applications. To promote fairness and ensure that complainants are not inadvertently disempowered and disadvantaged, victim-survivors must have access to independent legal representation on these matters, at no cost.

Effective implementation of changes to sexual consent laws

It is important to emphasise that the myths and misunderstandings about sexual consent and sexual violence that persist in the Australian community can also inform the perception and practice of the police and judiciary. As raised earlier in this paper, legislative changes in this area must be accompanied by updated guidance and education that challenges inaccurate and prejudicial assumptions, and links clearly and practically to policing and judicial processes. Accountability mechanisms, ideally embedded in legislation, must be established to monitor and evaluate policing/prosecution practice and judicial decision-

making. Additionally, Embolden suggests that there would be value in specialist sexual offence courts/dedicated court sitting days for sexual offences to strengthen judicial practice and justice outcomes for victim-survivors.

Prevention and early intervention to stop sexual violence

Changes to sexual consent laws alone will not reduce the prevalence of sexual violence in our communities. We must invest in primary prevention initiatives to stop sexual violence before it starts and to intervene early in circumstances of elevated risk.

National primary prevention organisation Our Watch⁶ advocates for information on sexual consent to be embedded in holistic content that builds students' understanding of bodily autonomy, mutual respect, and the importance of enthusiasm and willingness. Age-appropriate content should be delivered to students as early as possible, be ongoing throughout their schooling and reflect a whole-of-school approach to gender equality and respectful relationships. The experience of specialist sexual assault services is clear that most offenders are completely aware that they do not have consent when perpetrating sexual violence. It is important that education targeted to children and young people is also explicit about the consequences of offending, at age-appropriate junctures. In addition to education within schools, we must invest in both broad-reach and targeted community education campaigns.

South Australia's Royal Commission into domestic, family and sexual violence will be an important forum to consider critical opportunities to improve South Australia's approach to early intervention with people, including young people, at higher risk of/engaging in problematic or harmful sexual behaviours.

⁶ https://media-cdn.ourwatch.org.au/wp-content/uploads/sites/2/2023/03/27114220/Our-Watch_-_Submission-into-sexual-consent-laws_FINAL.pdf