SUBMISSION

TO | **Attorney-General's Department**

Via email: LLPSubmissions@sa.gov.au

TOPIC | **Review of consent laws in South Australia**

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Uniting Communities Submission to the review of consent laws in South Australia

We welcome the opportunity to provide a submission to the Attorney-General's Department review of consent laws in South Australia. We understand the importance of consulting with the community about these issues, especially those that may be impacted by any possible changes to legislation and those organisations that provide support to those impacted.

Key recommendations:

1. **There are consistent consent laws across Australia and therefore no amendments to the legislation are made until the Australian Law Reform Commission finalises and makes public the results of their inquiry into the Justice Responses to Sexual Violence.**
2. **Prevention (of the crimes this review examines) is an underlying principle that underpins the Criminal Law Consolidation Act (CLC Act).**
3. **A definition for "sexual activity" is developed and embedded into the CLC Act.**
4. **It is acknowledged in the CLC Act that sexual assault is a gendered issue and evidence-based interventions to address gender inequality and inequity are prioritised.**
5. **The use of the word "instigator" is reconsidered when applying it to the affirmative model of consent due to the instigator not always being the offender.**

About us

Uniting Communities is an inclusive not-for-profit organisation working alongside more than 80,000 South Australians each year and have been creating positive change for South Australian communities for more than 120 years.

We help those in need find the courage to move forward through enriching their lives and uniting the communities in which they live. By tackling the deep-seated challenges that affect people's lives, we are working to create systemic change and brighter futures for all South Australians. We have a bold and unceasing commitment to social justice, advocating for change and improvement in the lives of those who need it most.

We provide support services across a range of different areas including legal services, aged care, family and domestic violence counselling, alcohol and other drugs, disability, homelessness, mental health, and child protection.

We understand that dealing with the legal system can be confusing and daunting and staff in the Uniting Communities Law Centre assist people to work through these challenges. The qualified team provides support with information, advice, representation, or referrals and in most instances these services are free.

We utilise this expertise to advocate for systemic change across diverse social justice issues to shape public and social policy that delivers better outcomes for marginalised communities.

General Comments

* **Appears to be no definition of "sexual activity" in the CLCA** nor is "sexual activity" defined in the *Summary Offences Act*.

* **These offences are based on "sexual activity"** and yet this is not defined other than to say "sexual activity includes sexual intercourse…" [s46 CLCA].

* **Education should be a priority.** The statistics highlighted on page six of the review's Discussion Paper show that the majority of people who are either charged with these offences or are victim-survivors of these offences are young people, many of whom may not even know they have committed an offence. If there is going to be a change in the way consent is defined or obtained then this is an opportunity for the government to educate the population not only about these changes but sexual offences in general. The general community, especially young people, need to understand and be aware of:

- what is acceptable,
- what is not
- what is deemed to be sexual activity
- what is not

Legislation is reactive and so are courts and court processes. To reduce the occurrence of these offences the public needs to be educated about these offences as well as how they are judged. As a service provider with many years of experience supporting people involved in the criminal justice system, we continue to highlight the importance of prevention. We know that our community is better off when criminal acts are prevented.

Once a criminal act has been committed, all the court can do then is to sentence someone as a deterrent to others [a legitimate part of sentencing law]. However, that only helps if those cases are made public and the public hears about them, and the sentence given.

Additional financial resources are required to provide education and awareness campaigns to highlight what a crime is under this legislation. This review provides the South Australian government with the opportunity to genuinely reduce the rates of sexual violence in our community. As stated above, young people are the cohort most affected by these crimes and need to be educated about what is appropriate and not appropriate behaviour. Those responsible for delivering this education and training, must have experience in having these challenging conversations in a respectful and age-appropriate way.

***We object to any increase in penalties.** From our experience, increasing penalties rarely reduces crime and certainly rarely reduces offending in this space.

***It is important that the CLC Act acknowledges that sexual assault is a gendered issue and evidence-based interventions to address gender inequality and inequity are prioritised.** As an organisation committed to addressing gender equality and equity, we acknowledge that the majority of sexual assault victim-survivors are female. We believe that we all have a responsibility to address the causes of gendered violence and that this will ultimately reduce all forms of violence against women.

Response to Discussion Paper Questions

Please note we have not responded to every question.

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

We support this proposed change. There will still be the issue of "he said, she said" that is often the nature of the fact behind these crimes, however putting a positive obligation on the offender to determine if consent is freely given is a positive change. However, this will not work without an education program to go with it.

We are concerned about how the word "instigator" is applied in the proposed changes and how this language may imply that the "instigator" is always the defendant/person charged. This is a complex topic, and this recommendation appears to suggest that only the "instigator" of the sexual activity would be the one to commit an offence.

The "instigator" of the sexual activity could also be the complainant who now reports consent was not freely given or that consent changed along the way [some activity was consented to, and other activity was not].

The word "instigator" is a loaded term and should be reconsidered.

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

The benefits under these provisions is that there is a positive and ongoing obligation to ensure consent is freely given during all of the sexual activity. In theory this is good; how it will work in practice is unclear. The obligation should be mutual, meaning both parties should have an obligation to ensure consent is freely given. Again, education on these changes is essential. Whilst we acknowledge ignorance of the law is not a defence, if we want to stop these offences rather than just prosecute them when they occur then we need to educate our community.

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

There are several potential risks associated with these proposed changes. For example, the provisions could get caught up during prosecutions as to who is assigned the "instigator" and who was not. In addition, the legislation could become complicated, presenting too many nuances for people to understand.

Another aspect to carefully consider is that a victim-survivor may verbally and/or physically indicate consent throughout the activity, however this may have been given under duress or as a result of an intellectual disability. They may not have given "genuine" consent as they may be currently experiencing coercive control in the relationship or have experienced significant and debilitating trauma in the past. They may justifiably fear that additional physical and/or sexual violence could occur if they do not provide "consent" to the defendant's immediate request to engage in sexual activity. Additional allowances, provisions and definitions are required to ensure that this aspect of sexual violence is addressed.

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

We support the extension of this list. However, we believe education is pivotal here. We recognise the benefits in expanding the list to reflect a change in community attitudes. Given jury directions are not widely publicised it could be beneficial for community education to highlight the common misconceptions around consent.

However, these changes will not be effective if the general public are not informed and educated on these matters. Education is the key to prevention as it can stop these offences occurring rather than the prosecution process only dealing with these matters after they have occurred.

5. What other circumstances could be included?

No comment.

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

We are supportive of the jury directions being expanded; however, this may reduce the Judge's discretion in each case.

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

As highlighted in the recent ANROWS "National Community Attitudes towards Violence against Women Survey (NCAS)", it can take many months and/or years for a victim-survivor/survivor of sexual violence to report the abuse. It is crucial that Jurors understand that this is a common experience for many victim-survivor/survivors, it does not diminish the impact that the violence has had on them, does not affect the credibility of their report, or suggest that they are lying about the assault.

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?

We do not think parties should be obliged to indicate before the trial the likelihood that evidence will be presented that would provide good reason for giving a jury direction as this may have the unfortunate consequence of removing a Judge's discretion to give a Jury direction, especially if there is no application on foot.

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

The Evidence Act should specify the frequency of directions if there are concerns that Jury directions should be made and are not being made. Possibly early on, prior to the victim-survivor and /or Defendant being examined in chief and cross-examined and at summing up before the Jury is released for deliberation.

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

We do not think this recommendation could be easily regulated if it was to be introduced and detailed in the Evidence Act.

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?

As noted in the discussion paper, 'young people are more commonly perpetrators' of image-based sexual offences. This offence is becoming increasingly more common amongst young people.

We are concerned about the consideration in the discussion paper to move these offences into the CLC Act and increase the penalties where aggravating circumstances exist. Although this would emphasise 'the serious nature of these offences,' we believe this could lead to the overcriminalisation of young people. Wherever possible, psychoeducational processes for diversional intervention in low-risk circumstances should be implemented. In addition, educating young people on this legislation is a crucial preventative measure.

12. Should there be any increase in the current penalties?

We strongly oppose any increase in current penalties. As outlined above, increasing penalties rarely works to decrease the occurrence of the crime. Education is far more effective at preventing these crimes from occurring in the first place.

13. Would the offences be better placed in the CLC Act?

Refer to question 11's answer above.

14. Should prosecutions of minors require the approval of the Director of Public Prosecutions (DPP) or some other person or body?

The prosecutions of minors should require the approval of the DPP or some other person/body as this may safeguard minors from prosecutions that should not be progressed. It may also encourage diversion programs rather than prosecution of the young person. From our experience we have witnessed criminal convictions cripple a person's future livelihood and their future prospects for employment, career, and where they reside.

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?

This suggested change requires far more detailed consideration than this review process affords. It is essential that the rights of the victim-survivor, the rights of a defendant (who has been charged by the State with a crime against the State), and the State (having a lot of power) are issues that are finely balanced and deeply considered.

16. Should 'ground rules' hearings be available in trials for victim-survivors of sexual abuse who have been offended against as adults?

"Ground rules" hearings should be available in trials for victim-survivors of sexual abuse who have been offended against as adults.

17. Should police be required to record interviews with all sexual abuse victim-survivors regardless of their age?

No comment.

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

No comment.

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

No comment.

20. Should a victim-survivor be made aware of applications for disclosure of their protected communications?

Yes, victim-survivors should be made aware of any application for disclosure of their protected communications. Victim-survivors should also be made aware of these sorts of applications very early on and before the application is on foot so that the victim-survivor is physically and mentally prepared if this occurs.

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

Yes, the victim-survivor should be made aware of applications by the defence to ask questions or admit evidence about the prior sexual history of the victim-survivor so that the victim-survivor is physically and mentally prepared if this occurs.

22. Should a victim-survivor be entitled to be heard in relation to such applications?

We are concerned how this recommended change would work in practice. What would "the victim-survivor being heard…" look like in reality? Would this mean that the victim-survivor could "lawyer-up" and have their own lawyer argue at these applications. We suggest that many victim-survivors may want to be heard but would not want to address the court directly. If they were entitled to engage a lawyer, it is unclear who would pay for this response to the defence's application. Would victim-survivors be eligible to apply for Legal Aid? If not, this would mean that only financially secure victim-survivors would be able to have a lawyer acting for them and providing the court with their stance. We view the DPP's role is to prosecute a crime and not to run arguments for the victim-survivor.

Conclusion

We are grateful for the opportunity to provide input into the Attorney-General's Department review of the consent laws in South Australia and are pleased to see this critical issue being addressed. As a result of this review, and in line with any adopted changes, it is hoped that evidence-based preventative strategies are well-resourced and implemented across the state.

We look forward to supporting the Attorney-General's Department to progress these essential changes as we believe that they will inevitably reduce violence against women and assist with addressing gender equality in our community.