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The Hon. Michael Kirby AC CMG

12 August 2022

### **The Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (Vic)**

1. Liberty Victoria welcomes the opportunity to comment on the Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (Vic) (**the Bill**).

#### **About Liberty Victoria**

2. Liberty Victoria is committed to the defence and advancement of civil liberties and human rights. We seek to promote compliance with the rights recognised by international law and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). We are a frequent contributor to federal and state committees of inquiry.
3. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for both the prosecution and the defence. More information on our organisation and activities can be found on our [web page](#).

## Reforming Sexual Offences

4. At the outset, Liberty Victoria acknowledges the harm caused by sexual violence and the ongoing impact of that harm to victim-survivors.
5. The criminal justice system is, however, a flawed vehicle to try to achieve social change. Liberty Victoria urges the government to further invest in the education of young people in relation to appropriate sexual behaviour and affirmative consent. In terms of achieving social change, this is the single most important thing that can be done in this space.
6. As we noted in our comprehensive [submission](#) to the Victorian Law Reform Commission (VLRC)'s Inquiry into Improving the Response of the Justice System to Sexual Offences, Liberty Victoria strongly supports the introduction of restorative justice mechanisms which have the capacity for victim-survivors to be acknowledged, vindicated and have their wishes respected.
7. When considering reform to sexual offence laws, and as recognised by the VLRC, it is important to acknowledge:
  - (a) Sexual harm is widespread and considerably under-reported;
  - (b) Sexual harm is gendered: women are more likely to experience sexual violence. Women and men also experience sexual harm in different contexts;
  - (c) There are different patterns of sexual harm. Sexual harm can overlap with other types of violence, such as family violence or child abuse;
  - (d) Some people and groups experience sexual harm at much higher rates than others;
  - (e) People's experiences of sexual harm and seeking justice are diverse. They can also be shaped by factors such as their culture, sexuality, gender, age, class, ability, religion and employment, including a combination of these factors; and
  - (f) The historical context of dispossession, removal and trauma is an important part of Aboriginal people's experience of sexual harm.
8. Liberty Victoria has previously supported reforms to directions on the law of consent and in particular consent-negating circumstances.<sup>1</sup> Such directions are now reflected in Part 5, Division

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<sup>1</sup> Liberty Victoria Submission: Review of Sexual Offences ([Web Page](#), 17 January 2014), [26]-[27].

1 of the *Jury Directions Act 2015* (Vic) (*JDA*), together with s 36 of the *Crimes Act 1958* (Vic) (*Crimes Act*).

9. Liberty Victoria has also supported the introduction of intermediaries to ensure that persons with cognitive impairments and children are afforded equal participation in the criminal trial process.<sup>2</sup>
10. However, as we said in our 2014 submission to the Department of Justice Review of Sexual Offences:

[C]are needs to be taken to ensure that the proposals for reform, no matter how well-intentioned, do not increase the risk of injustice. In that context, Liberty Victoria would advocate a very cautious and selective evolution of the criminal law...

The past decades of reform to the law of sexual offences have demonstrated that adding ever greater complexity to an already very difficult jurisdiction can result in great injustice to accused persons, complainants,<sup>3</sup> and less protection to the wider community through adding to the potential for judicial error and miscarriages of justice.<sup>4</sup>

11. As we also noted in our submission to the VLRC:

Often the criminal justice system is ill-equipped, even with the best endeavours of legislators, judicial officers and legal practitioners, to provide just outcomes that are fair to complainants and accused persons. Sexual offences cases are often fraught, regularly considering events having occurred a long time ago, in circumstances where there is often limited if any corroborative evidence, and where there is often a clear conflict in the evidence of the complainant and the accused person in circumstances where the fact-finder needs to be satisfied beyond reasonable doubt of the elements of the offence. In part, that is why other avenues such as restorative justice may provide the best outcome for both complainants and accused persons. for some cases.

### **The Proposed Reforms**

12. In relation to this Bill, we refer to and adopt the analysis by David Hallows SC, President of the Criminal Bar Association ('CBA'), in his [article](#) published in *The Age* on 11 August 2022.
13. The Bill covers a range of topics and we do not deal with all aspects of it. If we have not dealt with a particular provision of the Bill, this should not be taken as either a disagreement with or endorsement of that provision. Rather, we focus on the following key aspects:

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<sup>2</sup> Ibid, [24]-[25].

<sup>3</sup> The use of the term 'complainant' means no disrespect to people who are victim-survivors. However, it is important to recognise that when a criminal allegation is made against a person, it is for the finder of fact (be it a jury or judicial officer) to determine whether the evidence of a complainant is accepted and whether an alleged offender is guilty of an offence. It is important not to subvert the proper role of the fact-finder in this regard. This is consistent with the language employed by the Court of Appeal, even in conviction appeals after a person has been convicted of an offence.

<sup>4</sup> Liberty Victoria Submission to the Department of Justice Review of Sexual Offences ([Web Page](#), 17 January 2014), [52]-[54].

- a. The ‘affirmative consent’ provisions;
- b. The expanded definition of consent;
- c. The provisions regarding abuse of authority and the overbearing of will;
- d. The requirement there be ground rules hearings for all complainants in sexual offence cases (not only for children and those with cognitive impairments); and
- e. Directions on beyond reasonable doubt (which would be mandated at the outset of all trials, not just those involving sexual offences).

14. It should be noted that we support some of the proposed reforms, including:

- a. The introduction of clear provisions with respect to removing or tampering with a condom (commonly known as ‘stealthing’) (proposed s 36(2)(ka) of the *Crimes Act*);
- b. The proposed direction on personal appearance and irrelevant conduct (proposed s 47G of the *JDA*);
- c. The proposed ‘all sorts of people’ direction (proposed s 47H of the *JDA*);
- d. The proposed additional directions on prohibited statements and suggestions relating to complainants, delay and unreliability (proposed amendments to s 51(1) of the *JDA*);
- e. The improved mechanism for dealing with summary offences in the Supreme and County Courts which will prevent matters needed to be remitted unnecessarily (Division 7 of the Bill, proposing to amend the *Criminal Procedure Act 2009* (Vic) (**CPA**)); and
- f. The provisions dealing with cognitively impaired and mentally ill accused in relation to the ‘affirmative consent’ provisions, should they be enacted (proposed s 36A(3) of the *Crimes Act*).

### ***Affirmative consent***

15. As we noted in our submission to the VLRC, there have been many significant reforms to sexual offence provisions over the past decade, which have in practice resulted in much stronger directions on consent and consent-negating circumstances in criminal trials, including whether an accused person’s belief in consent is reasonable. In that context, the impact of some of these proposed reforms should not be overstated.

16. However, we agree with the CBA that some of these new proposed provisions are problematic. In our view they risk innocent accused people being found guilty of very serious crimes and being exposed to lengthy terms of imprisonment (with rape, for example, having a 10-year standard sentence), registration under the *Sex Offenders Registration Act 2004* (Vic), potential post-sentence detention or supervision orders, and lifelong stigma.
17. Very often those prosecuted for allegedly committing sexual offences are teenagers or young adults. Enforcing a rigid requirement on young people to take active steps to explicitly ascertain consent is problematic given the nuances of sexual behaviour (see proposed s 36A(2) of the *Crimes Act* that would require a person, within a reasonable time, to say or doing something to find out whether there is consent). Young people in the process of exploring their sexuality and relationships are likely to be disproportionately affected by the proposed amendments. It is our view that attempting to use the criminal justice system to drive changes in sexual behaviour is fraught, especially given the potentially punitive penalties for being found to have committed sexual offences.
18. In addition to the matters raised by the CBA, these provisions erode long established protections for accused persons. The Bill, if enacted, will effectively impose an obligation on an accused person to give evidence to demonstrate what steps he or she took to ascertain consent. This risks undermining an accused person's right to the presumption of innocence and their right to silence. The presumption of innocence and right to silence are both enshrined and protected by s 25 of the *Charter*. The provisions, as currently drafted, do not appear to be compatible with s 25 of the *Charter* as they significantly undermine and weaken those rights. This incompatibility has not been adequately justified or explained in the Statement of Compatibility that accompanied the Bill. The justification provided in the Statement of Compatibility argues, amongst other things, that the limitation of the right is necessary to shift the focus from complainants to accused persons. However, that misunderstands the way in which the law currently operates. There is already a focus on the accused contained within ss 36 and 36A of the *Crimes Act*, as a jury will be asked to consider what steps an accused has taken to find out whether a complainant consented, in determining whether the accused held a reasonable belief in consent.
19. The proposed change in the Bill significantly erodes the presumption of innocence and the right to silence. These are fundamental rights that have been vigilantly protected by our criminal justice system. This kind of shift increases the risk of innocent persons being convicted of serious offences. It also risks creating further inequality in the justice system between accused who are well-resourced, educated and articulate and those who are not. It also may see pressure placed

on victim-survivors to do something that can later be relied on to indicate there was an act of affirmative consent.

20. Further, if enacted the reforms will not prevent a significant focus of any criminal trial still being on the conduct of the complainant, given that, in many cases, there will still be an inquiry as to whether there was conduct by the complainant that conveyed consent to the accused person (see proposed s 36AA of the *Crimes Act*, which requires consideration of whether a person said or did anything to indicate consent to the act).
21. An emphasis on affirmative consent is already reflected in the current law. Circumstances in which a person does not consent to a sexual act already includes when they are asleep or unconscious, so affected by alcohol as to be incapable of consenting, or do not say or do anything to indicate consent.<sup>5</sup> Currently, juries are directed that there are many different circumstances in which people do not consent to a sexual act, and that people who do not consent to a sexual act may not protest or resist.<sup>6</sup> A failure to consider whether or not a person is consenting is not a defence under the current law. There are statutory provisions that prevent the consideration of self-induced intoxication as a relevant factor bearing upon reasonable belief in consent.<sup>7</sup> These reforms have, in essence, made it clear that consent requires free agreement.
22. In our view the impact of the previous and significant reforms made in relation to sexual offences need to be properly considered and evaluated before adding these additional layers of complexity to an already highly complex area of the law, which may have unintended consequences.
23. As outlined above, there should be a focus on implementing restorative justice models and improving community education as opposed to adding greater complexity to the criminal law.

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<sup>5</sup> *Crimes Act*, s 36.

<sup>6</sup> *JDA*, s 46.

<sup>7</sup> *Crimes Act*, s 36B(1).

### ***Expanded definition of consent***

24. In our view the expanded definition of consent is unnecessary (the proposed amended to s 36(1) of the *Crimes Act*). It does not strengthen the definition to include the word ‘voluntary’ in addition to ‘free’.

### ***Abuse of a relationship of authority or trust***

25. The proposed new s 36AA(1)(e) of the *Crimes Act* provides that a person does not consent to an act where the person submits to the act because they are overborne by the abuse of a relationship of authority or trust.

26. This provision is again unnecessary given the other matters set out in the *Crimes Act* and *JDA* which deal with consent, and existing offences relevant to alleged offenders in positions of care, supervision and authority, including in relation to children above the age of consent. It is difficult to see how the proposed provisions add anything to the current law on the question of whether or not a person – in a given situation – consented to the relevant sexual act, or whether there was a reasonable belief in consent. If a person has submitted to the sexual act due to coercion, fear or threats then the sexual act was not consented to — that is already law. Adding this provision does nothing other than add complexity.

### ***Ground Rules Hearings***

27. It is unclear why ground rules hearings should be expanded to include all matters where a witness is a complainant in relation to a charge for sexual offence (proposed amendment to s 389A(4) of the *CPA*). Ground rules hearings have particular importance in relation to determining the parameters of cross-examination of children and cognitively impaired witnesses who may not be able to understand questions and puttage.<sup>8</sup>

28. As we submitted to the VLRC, Liberty Victoria:

...strongly supports the view that victims of crime should be treated with courtesy, respect and dignity throughout the criminal trial process. We similarly support the governing principles set out in the *Victims’ Charter Act 2006* in relation to treatment of persons adversely affected by crime.<sup>9</sup>

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<sup>8</sup> The rule in *Browne v Dunn* (1893) 6 R 67 requires a party to ‘put’ material or essential factual contentions to the witness if that party will later suggest to the tribunal of fact that the witness’ evidence is not to be accepted. It is a rule of procedural fairness intended to give the witness an opportunity to answer any proposition that their evidence should not be accepted.

<sup>9</sup> Liberty Victoria Submission to VLRC Inquiry into the Role of Victims in the Criminal Trial Process ([Web Page](#), 26 April 2016), [15].

29. In respect of all witnesses, including adult complainants, there are already important safeguards in place in relation to cross-examination. Section 41 of the *Evidence Act 2008* (Vic) provides that a court must disallow questioning that is misleading or confusing; unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; belittling, insulting or otherwise inappropriate; or has no basis other than a stereotype. Our experience is that the courts take the duty to protect witnesses very seriously. There are other important restrictions, such as in relation to sexual history evidence,<sup>10</sup> and a complete prohibition in relation to asking questions about the general reputation of the complainant with respect to chastity.<sup>11</sup>
30. There is likely to be significant disagreement between judicial officers about what, if any, additional limitations should be placed on cross-examination of an adult complainant at a trial for a sexual offence, or whether certain additional limitations may result in an unfair trial of the accused person. The danger of expanding ground rules hearings to cover all sexual offence matters is that there may be significant inconsistency as to how the rules are applied in different trials and with respect to different accused persons.

***Beyond Reasonable Doubt Directions at the Outset of All Criminal Trials***

31. Clause 57 of the Bill proposes to amend s 63 of the *JDA* so that, before the adducing of any evidence at trial, the jury must be directed as to the meaning of ‘beyond reasonable doubt’, unless there are good reasons not to do so. This would be a foundational change to the criminal law in Victoria. It should be very carefully considered. The proposed reform would apply to all trials, and not only those in relation to sexual offences.
32. The VLRC’s Report on [Improving the Justice System Response to Sexual Offences](#) (September 2021) (**VLRC Report**) recommended that the *JDA* be amended so that jurors are provided with an

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<sup>10</sup> *CPA*, ss 342 and 343.

<sup>11</sup> *CPA*, s 341.



explanation of 'beyond reasonable doubt'. However, Liberty Victoria cautions against such a fundamental change to the criminal justice system.

33. In *R v Dookheea*,<sup>12</sup> the High Court said that '...it is generally speaking unwise for a trial judge to attempt an explication of the concept of reasonable doubt beyond observing that the expression means what it says and it is for the jury to decide whether they are left with a reasonable doubt'.<sup>13</sup>
34. There is a real question as to why there should be a direction given in every trial, usually at the outset and before any evidence is adduced, about the meaning of 'beyond reasonable doubt'. The criminal law has functioned, for a very long time, without additional directions on the criminal standard of proof being regarded as necessary or desirable.<sup>14</sup>
35. Further, Liberty Victoria is very concerned about the directions as they stand under the *JDA* (which at present can be given in response to a jury question), including most concerningly that a reasonable doubt is not an 'unrealistic possibility'.<sup>15</sup> That immediately raises the question as to what that latter expression means in practice, and what is regarded as 'unrealistic' – is an unrealistic possibility something that can happen 10 or 20 per cent of the time? There may be events that are unlikely, or even 'unrealistic', that could properly be considered to give rise to a reasonable doubt in a given case. This further definition of 'beyond reasonable doubt' does not add clarity when seeking to understand the criminal standard of proof, it provides a problematic definition that itself is potentially confusing to a jury. The risk is that the proposed direction significantly dilutes the strength of the criminal standard of proof.
36. Any such reform would be foundational, affecting every criminal trial in Victoria. The potential impact of such a wide-ranging reform should be properly considered without it being included as part of a suite of reforms specifically proposed in relation to sexual offences.

## Conclusion

37. Liberty Victoria supports some aspects of the Bill. However, in our view many other aspects of the Bill are unnecessary and add complexity to an already difficult area of the law. As we said in our submission to the VLRC, the focus of the Government should be on introducing a restorative justice model for appropriate sexual offence cases:

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<sup>12</sup> *R v Dookheea* (2017) 262 CLR 402.

<sup>13</sup> *Ibid*, 426 [41] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ).

<sup>14</sup> *Green v The Queen* (1971) 126 CLR 28

<sup>15</sup> *JDA*, s 64(1)(e).

A restorative justice model has the potential to have a long-lasting and wide-reaching impact on criminal justice in Victoria, and improving outcomes for victim-survivors. However, we would again submit that a cautious approach needs to be taken to ensure that the appropriate referral and assessment framework coupled with therapeutic treatment programs and appropriate legislative frameworks are implemented.

38. Thank you for the opportunity to make this comment, and please do not hesitate to contact me if I can provide any further information through the Liberty Victoria Office on (03) 9670 6422 or [info@libertyvictoria.org.au](mailto:info@libertyvictoria.org.au). Thanks to Julia Kretzenbacher, Sam Norton and Hugo Moodie for their assistance in the preparation of this comment.

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