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Dear Committee Members,

Inquiry into Current and Proposed Sexual Consent Laws in Australia

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Thank you for the opportunity to provide a submission to this important inquiry.

This is a public submission and is not confidential.

ABOUT LIBERTY VICTORIA

Liberty Victoria is the peak civil liberties organisation in Victoria and has worked to defend and extend civil liberties and human rights for more than eighty years. Since 1936 we have sought to influence public debate and government policy on a range

of human rights issues. We are actively involved in the development and revision of Australia's laws and systems of government at both the State and Federal level.

The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who regularly appear in criminal proceedings for both the prosecution and the defence. More information on our organisation and activities can be found at: https://libertyvictoria.org.au.

The focus of this submission reflects our experience and expertise as outlined above. We will consider the history of the relevant laws on consent in Victoria which we hope will assist this Inquiry more broadly. Some of the following is drawn from our work in response to previous inquiries and proposed legislative reforms in Victoria.

TERMS OF REFERENCE

On 29 November 2022, the Senate referred an inquiry into current and proposed sexual consent laws in Australia to the Legal and Constitutional Affairs References Committee for inquiry and report by **30 June 2023.**

The Terms of Reference are as follows:

> Current and proposed sexual consent laws in Australia, with particular reference to
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> a. inconsistencies in consent laws across different jurisdictions;
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> b. the operation of consent laws in each jurisdiction;
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> c. any benefits of national harmonisation;
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> d. how consent laws impact survivor experience of the justice system;
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> e. the efficacy of jury directions about consent;
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> f. impact of consent laws on consent education;
>
> g. the findings of any relevant state or territory law reform commission review or other inquiry; and
>
> h. any other relevant matters.

Much of the following submission is based on Liberty Victoria's comprehensive submission to the Victorian Law Reform Commission (**VLRC**) Inquiry into Improving the Response of the Justice System to Sexual Offences dated 25 January 2021. That submission is available online here.[1]

It should also be noted that in Victoria there have been many changes to the law of consent and related matters over the past two decades, most recently with the enactment of the Justice *Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic). Our comment on that legislation is online here.[2]

I. Introduction

This submission will begin by addressing the importance of reducing the prevalence of sexual violence, and the challenges and limitations of the criminal justice system in achieving that end. It then sets out the extensive changes that have been made in the Victorian criminal justice system to prosecute sexual offending, especially consent-based sexual offences like sexual assault and rape. This submission also deals with recent legislative amendments in Victoria that implement a model of affirmative consent which have been opposed by Liberty Victoria.

Liberty Victoria recognises that State and Federal governments must take measures to address the great harm and lasting trauma caused by sexual violence. Sexual violence violates the bodily integrity of those upon whom it is inflicted and will regularly be a breach of human rights protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), including potentially the rights to freedom from torture and cruel, inhuman or degrading treatment (s 10), to freedom of movement (s 12), to privacy, family and home life (s 13(a)), to protection of families and children (s 17), and to liberty and security (s 21).

As recognised by the VLRC and as we have previously acknowledged:

- Sexual harm is widespread and considerably under-reported;

[1] Internet reference: https://libertyvictoria.org.au/sites/default/files/210125%20-%20Liberty%20Victoria%20-%20VLRC%20submission%20Sexual%20Offences%20-%20Final.pdf

[2] Internet reference: https://libertyvictoria.org.au/sites/default/files/220812%20LV%20Comment%20on%20the%20Sexual%20Offences%20Bill%20%28Rev%201%29.pdf

- Sexual harm is gendered: women are more likely to experience sexual violence. Women and men also experience sexual harm in different contexts;
- There are different patterns of sexual harm. Sexual harm can overlap with other types of violence, such as family violence or child abuse;
- Some people and groups experience sexual harm at much higher rates than others;
- 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
- The historical context of dispossession, removal and trauma is an important part of Aboriginal and Torres Strait Islander people's experience of sexual harm.

This submission draws the following conclusion: whilst it is necessary to address and seek to prevent sexual violence in our society, criminal justice reform cannot be relied upon as the sole or even principal means of doing so. The recent law reform in Victoria is, in part, designed to increase conviction rates of persons accused of sexual offences. But, even if successful, increasing convictions rates will not end sexual violence. As we have previously emphasised, there needs to be significant additional investment in education, including in relation to affirmative models of consent. The criminal justice system is, itself, a poor vehicle to achieve social change.

Further, we must be alive to the dangers caused by removing or eroding fundamental protections of the criminal justice system for a purpose of increasing convictions. Reform to the criminal law in order to increase the rate of conviction, especially with matters of high complexity, in turn increases the prospects of substantial miscarriages of justice.

At this point it should be noted that on occasion Liberty Victoria uses the term 'complainant' in this submission. That means no disrespect to people who are 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 that regard. Further, this is consistent with the language employed by the Victorian Court of Appeal, even in conviction appeals after a person has been convicted of an offence.

In Victoria, there have been substantial criminal justice reforms over the last two decades designed to ensure that those who engage in sexual violence are brought to justice. Liberty Victoria has supported many of those reforms, including further directions to juries on the meaning of consent and consent-negativing circumstances, and the use of intermediaries for children and cognitively impaired witnesses to ensure that those people are afforded equal participation in the criminal trial process.[3]

However, many of the recent reforms in Victoria have challenged fundamental protections and principles of the criminal law for accused persons. Further, some of the reforms have been enacted before it can be properly assessed whether previously reforms have been successful. As we said in our 2014 submission to the Department of Justice Review of Sexual Offences:

> Liberty Victoria submits that care 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, and less protection to the wider community through adding to the potential for judicial error and miscarriages of justice.
>
> Liberty Victoria has a particular interest in the development of restorative justice measures that would improve access to just outcomes for complainants, offenders, and the wider community. To that end, we would value being consulted with regard to any proposals for law reform or with regard to any pilot project in that field.[4]

We have noted:

> 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

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3 See, eg, Liberty Victoria submission to the VLRC (n 1), [10]-[11].

4 Liberty Victoria submission to the Department of Justice Review of Sexual Offences (2014), [52]-[54]. Internet reference: https://libertyvictoria.org.au/sites/default/files/LV%20Subm%20Sexual%20Offences%20Jan%202014%20web.pdf

> 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 in some cases.[5]

We welcome the fact that, in 2021, the VLRC recommended the adoption of a restorative justice model for appropriate cases.[6] This has the potential to greatly improve the experience of complainants and survivors in the justice system in appropriate cases.

It is right that governments across Australia continue to consider whether or not the criminal justice system is appropriately responding to the complaints of sexual offending and delivering just outcomes. Research over time has brought to light the many impediments facing a complainant of sexual violence in bringing an alleged offender to justice.

However, the broadening of the scope of the law on sexual assault and in particular rape, combined with changes to the law of evidence, and onerous penalties under statutory sentencing schemes for sexual offences, risk compromising the integrity of the justice system through increasing the prospects of substantial miscarriages of justice.

Any reforms to the law of consent, or to sexual offences more broadly, needs to ensure that the presumption of innocence, the right to silence, and the right to a fair trial are still protected.

II. Prosecuting and defending a complaint of rape

The offence of rape in its various historical iterations has been intended to capture conduct with three defining features:

- There has been sexual penetration (conduct);
- The penetration was without the consent of the other person (circumstance);

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5 Liberty Victoria submission to the VLRC (n 1), [18].

6 VLRC report here: https://www.lawreform.vic.gov.au/publication/improving-the-justice-system-response-to-sexual-offences/

- The person accused was aware or ought to have been aware that the other person was not consenting (mental state of the accused/ mens rea).

As noted above, sexual offending, especially rape, frequently occurs in circumstances where the accused and the complainant are the only two people present, and there is no direct evidence of what occurred other than the accounts of the accused and the complainant. The dispute often lies around what was communicated and what was understood at the time of the sexual encounter and whether it was consensual. In these circumstances, a trial will often focus on the credibility of the complainant. Biases or cultural prejudices may infect a jury's interpretation of the evidence, whether against a complainant or the accused.

Historically the law has had to grapple with social conventions and prejudices; under what circumstances should a person from a minority group and/or experiencing significant socio-economic disadvantage be believed over a person from a majority and/or more affluent background? Is it rape if the two parties were married or in an intimate relationship? Can a woman rape a man? If the complainant gave consent but was a child or cognitively impaired, is it rape or something else? What if the alleged offender was too intoxicated to know what they were doing to turn their mind to issues of consent? Over time the law has evolved to address these kinds of circumstances either by amending the law of rape or by creating alternative offences.

While the limitations of direct evidence that results from the word-on-word nature of many sexual offence cases may work against a complainant, it may also prejudice an accused. If an accused person is of a minority or socially disadvantaged background, a jury may have traditionally been less inclined to believe their version of events. An accused person must still endure the burden and stresses associated with drawn out proceedings before the court (which can stretch on for years), whilst being on bail, incurring what may be considerable cost, and enduring the prolonged uncertainty of the life-changing consequences of a conviction given the likelihood of incarceration and life-long stigma. For a person unjustly accused, the experience may be deeply traumatising.

III. Short summary of the offence of rape and the law on consent in Victoria (between 2004 and 2022)

The 2007 Amendments

In 2004, the VLRC published a report titled *Sexual Offences*, addressing the question of "whether the criminal justice system is sufficiently responsive to the needs of complainants in sexual offence cases". The Report made numerous recommendations for reform to both the substance and procedures of investigation and prosecution of sexual offences.

In its analysis, the VLRC Report explicitly sought to balance two considerations:

> Prosecution for a sexual offence has very serious consequences for the accused, including life-long stigma and the possibility of a lengthy prison sentence if convicted. It is vital to safeguard the presumption of innocence and ensure that the criminal justice system treats people accused of offences fairly. However the Commission does not accept the argument that this is the sole purpose of the criminal justice system. The community has an interest in encouraging people to report sexual crimes and in apprehending and dealing with those who commit them.
>
> The recommendations in this Report are intended to achieve the twin goals of providing decent treatment for complainants, who perform a public service when they report offences and give evidence in court, and ensuring a fair trial for people accused of sexual offences.

The Report addressed a purported shortcoming in the way that the law of rape was drafted under the *Crimes Act 1958* (Vic) (***Crimes Act***). At that time, the offence of rape was as follows:

38. Rape

(1) A person must not commit rape.

Penalty: Level 2 imprisonment (25 years maximum).

(2) A person commits rape if—

(a) he or she intentionally sexually penetrates another person without that person's consent while being aware that the person is not consenting or might not be consenting; or

(b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

The *Crimes Act* at that time also provided for a definition of consent[7] to mean "free agreement", and a non-exhaustive list of seven circumstances in which consent was deemed to have been withheld. The seven circumstances capture situations where the complainant was subject to force or the threat of harm; where they are forcibly detained, asleep or unconscious or so intoxicated as to be unable to consent; if they are unable to understand the sexual nature of the act, if they are mistaken about the identity of the person, or mistakenly believe that the act is for medical purposes.

The *Crimes Act* also provided for directions on consent that the trial judge was to give to the jury before their deliberations.[8] The jury directions required the jury to consider whether consent was explicitly obtained or not, although that was not determinative of the charge. In particular, the court was to direct the jury:

(a) That the complainant did not explicitly express free agreement is not normally sufficient to prove lack of consent; and

(b) A person is not taken to have agreed just because they did not resist or protest; or sustain any injury; or because they had agreed to another sexual act at the same or earlier time.

Further, the reasonableness of the accused's belief in consent was also to be considered by the jury, but was not an element of the offence (the mens rea of the offence was purely subjective). The direction[9] required the jury to consider whether it would be reasonable for the accused to have a belief in consent when deciding whether or not the accused did in fact have a belief in consent. However, the jury was required to acquit in circumstances where it could not be excluded that the belief was honestly held, even if objectively unreasonable.

One major complaint towards the offence provision at the time was that the subjectivity of the mental element in s 38(2)(a) of the *Crimes Act* – "while being aware that the person is not consenting or might not be consenting" – justified acquittals in circumstances where the accused failed to consider the attitude of the complainant towards the sexual act.

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7 *Crimes Act 1958* (Vic) as at 13 October 2004, s 36.
8 *Crimes Act 1958* (Vic) as at 13 October 2004, s 37(1).
9 *Crimes Act 1958* (Vic) as at 13 October 2004, s 37(1)(b)(iii).

As quoted in the 2004 VLRC Report, "[i]t has been argued that the subjective approach means that 'the more drunk, insensitive, boorish, or self-delusional the male, the more likely that an acquittal will ensue'.[10] The social implication of such drafting was that:

> It supports the attitude that a person is entitled to have sex, unless the other person actively indicates they do not wish to do so. This places the onus on a person approached for sex to indicate lack of consent, instead of requiring the initiator to ascertain whether the other person is consenting.[11]

In 2007, the rape provision in the *Crimes Act* was amended[12] to include a sub-section, s 38(2)(a)(ii), that explicitly dealt with circumstances where an accused failed to consider whether or not the other person consented:

38 Rape

(1) A person must not commit rape.

Penalty: Level 2 imprisonment (25 years maximum).

(2) A person commits rape if—

(a) he or she intentionally sexually penetrates another person without that person's consent—

(i) while being aware that the person is not consenting or might not be consenting; or

(ii) while not giving any thought to whether the person is not consenting or might not be consenting; or

(b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

The 2007 amending legislation also replaced the s 37 jury directions with two separate provisions detailing directions specific to consent (s 37AAA);[13] and on the accused's state of awareness (s 37AA).[14]

The 2014 Amendments

In 2013, the Department of Justice issued a consultation paper titled *Review of Sexual Offences*. That report detailed the appellate case law that had evolved through 2010-

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10 Victorian Law Reform Commission, *Sexual Offences: Final Report* (July 2004), 410.
11 Ibid, 409.
12 *Crimes Amendment (Rape) Act 2007*.
13 *Crimes Act 1958* (Vic) as at 1 Dec 2008, s 37AAA, "Jury directions on consent".
14 *Crimes Act 1958* (Vic) as at 1 Dec 2008, s 37AA, "Jury directions on the accused's awareness".

2012 on the proper construction of the fault elements of the offence of rape and the requisite state of knowledge, following the case of *Worsnop v The Queen* [2010] VSCA 188; (2010) 28 VR 187 (***Worsnop***).

The case of *Worsnop* considered the distinction between an accused person holding a subjective belief that the complainant was consenting (and thereby being not guilty of rape) and whether they could still be aware of a possibility that the complainant was not consenting (and thereby being guilty of rape if the other two elements were met). In *Worsnop*, the Court of Appeal held that the two states of mind were mutually exclusive – a person who held a positive, subjective belief that the complainant was consenting could not be guilty of rape. *Worsnop* supported an interpretation of the law that meant that the prosecution was required to prove beyond reasonable doubt that the accused did not in fact believe that the complainant was consenting, even in circumstances where such a belief would be unreasonable according to any objective standard.

This was purported to have led to cases where accused people were being acquitted in circumstances where the complainant was asleep, intoxicated or otherwise unable to consent because of the subjective belief of the accused (or at least that the requisite subjective belief of the accused could not be established by the prosecution beyond reasonable doubt).

There was also an issue about juries as fact finders having to be satisfied of an accused person's awareness of non-consent even in circumstances where the defence was that the complainant was consenting at the relevant time (and so awareness of non-consent was not in issue at the trial).

That last point was remedied by the judgment of the High Court of Australia in *R v Getachew* [2012] HCA 1; (2012) 248 CLR 22 (***Getachew***). Following the High Court judgment, complicated directions about belief in consent and awareness of non-consent would not arise unless there was a foundation in evidence or assertion for such directions to be given. As emphasised by the High Court in *Getachew, per curiam,* at 35 [30], "[i]n a case where s 37AA is engaged, the directions required by that section must be given, In a case where s 37AA is not engaged, those directions must *not* be given".

Nevertheless, the 2013 Department of Justice consultation paper refers to *Worsnop* as a turning point. Following *Worsnop*, the consultation paper cites several examples of judicial comment on the state of the law of consent. At issue was the lack of clarity in the law that led to numerous appeals after conviction, on the basis that the judge misdirected the jury as to the nature of consent. There was continuing dissatisfaction with the subjective nature of the mental element.

The purpose of the 2013 consultation paper was to make recommendations for law reform that would clarify the law.[15] It was understood that clarification on the law would improve the overall quality of justice for all, including complainants:

> Our aim is to make sexual offences as clear, simple, consistent and effective as possible. Simpler and clearer offences will assist judges to direct juries, and juries to understand and apply the law. This will help to reduce successful appeals against conviction for a sexual offence. A better functioning criminal justice system will help to improve the experience of victims/survivors who report a sexual offence to the police.

Following the publication of the 2013 consultation paper, the Victorian Parliament enacted the comprehensive *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic). This Act made substantial changes to the definition of rape and consent in the *Crimes Act*, as well as the directions on consent to be given at trial.[16] As noted above, Liberty Victoria supported many of these changes, particularly the directions on consent and consent-negativing circumstances.

Importantly, the 2014 amendments changed the mental element of rape. Rather than having to prove that the accused did not believe that the complainant was consenting, it now had to be proven by the prosecution that the accused did not have a *reasonable* belief in consent:

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15 See also Criminal Law Review, Department of Justice, *Victoria's New Sexual Offence Laws: an Introduction* (June 2015), Part 2.3 Problems with old rape laws.

16 It is to be noted that 2013 saw the passage of the *Jury Directions Act 2013*, which sought to compile jury directions otherwise derived from other legislation, Judicial College Criminal Charge Book, and in case law. The *Jury Directions Act* was re-issued in 2015.

38 Rape

(1) A person (A) commits an offence if—

(a) A intentionally sexually penetrates another person (B); and

(b) B does not consent to the penetration; and

(c) A does not reasonably believe that B consents to the penetration.

The second reading speech to the relevant Bill explains that the third element was a semi-objective one. It must be proven either that the accused did not subjectively believe that the other person was consenting; or that the belief maintained by the accused was not objectively reasonable:

> This means that the accused will come within the fault element if they did not believe that the complainant was consenting or, if they did have such a belief, it was not a reasonable one. …
>
> The new fault element requires a person to have objectively reasonable grounds for their belief that another person consents to sexual activity with them. It will not be a matter of what the accused thinks it is reasonable to believe. Instead, the courts will apply a more objective standard that reflects community standards of what is a reasonable belief. The bill provides that whether or not an accused reasonably believes that the other person is consenting to an act depends on the circumstances. This includes any steps that the accused has taken to find out whether the other person consents.[17]

Further, the amending Act clarified a number of terms, including consent, sexual penetration, reasonable belief, and the effect of intoxication on reasonable belief. Whereas previously the definition of consent set out a non-exhaustive list of seven circumstances in which there could be no consent, the list was expanded to ten.[18] Notably, one of the three new circumstances listed was the circumstance that "the person does not say or do anything to indicate consent to the act",[19] which was plainly intended to move towards an affirmative model of consent.

Another important reform was that, in instances of self-induced intoxication, determining whether or not the alleged offender held a reasonable belief in consent is to be assessed by reference to the reasonable, sober person in the same circumstances.[20] This in substance removed the viability of any prospective defence

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17 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 August 2014, 2933-4 (Robert Clark, Attorney-General).

18 *Crimes Act 1958* (Vic) as at 1 December 2015, s 34C.

19 *Crimes Act 1958* (Vic) as at 1 December 2015, s 34C(2)(k).

20 *Crimes Act 1958* (Vic), s 36B.

that, due to self-induced intoxication, the alleged offender mistakenly but reasonably believed that the complainant was consenting.

Further, whilst not stated explicitly in the legislation, the second reading speech indicates that in the circumstances articulated in s 34C (where consent is deemed to be withheld), a person cannot hold a reasonable belief in consent:

> The bill contains a list of circumstances in which a person is taken not to have consented to a sexual act. This reflects the current law and includes when a person is asleep or unconscious, and when they submit to an act because of force or fear of force. The bill provides that when an accused has knowledge that one of these circumstances exists, this is enough to show that he or she did not have a reasonable belief in consent.[21]

The statutory definition of "reasonable belief" provides that reasonable belief depends on the circumstances, and one of the circumstances that the legislation expressly provided for is whether or not the accused took any steps to ascertain the complainant's attitude:

37G Reasonable belief

(1) For the purposes of this Subdivision, whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.

(2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents or, in the case of an offence against section 42(1), would consent to the act.

Again, this reflected the adoption of an affirmative model of consent.

The amending legislation also clarified the judicial direction on consent and consent-negating circumstances for the jury.[22]

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21 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 August 2014, 2934 (Robert Clark, Attorney-General).

22 *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) Part 5.

IV. 2021 report and 2022 amendments – affirmative consent laws and further expansion of the definition of consent

In September 2021, the VLRC published a 600-page report, entitled *Improving the Justice System Response to Sexual Offences*, which made a large number of recommendations. In response to that report, the Victorian Parliament enacted a further suite of reforms to the relevant criminal justice legislation dealing with sexual offences.[23]

The recommendations made by the VLRC include a wide range of suggestions on how to change a culture that enables sexual violence. These include, amongst other things, public education about what constitutes consent; more support for victims to encourage reporting and follow-through throughout the criminal justice process; assistance in bringing civil claims; and enhancing restorative justice pathways instead of relying entirely on the adversarial model. The report recommends strengthening the communicative or affirmative consent model in order to shift the focus of any trial from of the complainant and onto the actions of the accused.

This resulted in the enactment of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic). The Victorian Government has promoted the amending legislation as indicative of the strong measures they are taking to protect the interests of complainants by adopting an affirmative consent model:

> The *Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022* includes amendments that will adopt an affirmative consent model and provide better protections for victim-survivors of sexual offences, shifting the scrutiny from victim-survivors onto their perpetrators.[24]

In her Second Reading Speech, the Minister for Corrections and Victim Support introduced the amendments in the following terms:

> By requiring participants in sexual acts to take active steps to confirm the other party is consenting, and by focusing on the actions of the accused, rather than the victim-survivor, the reforms will promote victim-survivor's rights, and aim to reduce the prevalence of sexual offending through improved community understanding about consent in this context and the risk of traumatising victim-survivors through the

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23 *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic).

24 Premier of Victoria, *Affirmative Consent Model Now Law in Victoria* (31 August 2022) at: https://www.premier.vic.gov.au/affirmative-consent-model-now-law-victoria.

criminal process. It is hoped that this will lead to fairer and more effective sexual offence prosecutions.[25]

The most significant change to the *Crimes Act* was the insertion of s 36A(2); this means that the requirement for the prosecution to prove that an accused person held no reasonable belief in consent (as an element of the offence of rape) will be made out in any situation where the accused has failed to say or do anything to actively affirm consent within a reasonable time:

> (2) A's belief that B consents to an act is not reasonable if, within a reasonable time before or at the time the act takes place, A does not say or do anything to find out whether B consents to the act.

New consent-vitiating circumstances

The new legislation also adds two new circumstances where consent is deemed to be withheld in light of misleading representations or conduct. One (which Liberty Victoria supported) is where the accused intentionally failed to use a condom in circumstances where there was an understanding that a condom would be used (commonly known as 'stealthing'): The other new circumstance is when consent was given in circumstances of an agreement to be paid in exchange, and payment is not made.

Liberty Victoria's opposition to some of the reforms

Liberty Victoria opposed some aspects the reforms, including the new affirmative consent provision, making the following comment:[26]

> 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-negativing 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.
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> 16. However, we agree with the CBA [Criminal Bar Association] 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

[25] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 August 2022, 2885 (Sonya Kilkenny).

[26] Internet reference: https://libertyvictoria.org.au/sites/default/files/220812%20LV%20Comment%20on%20the%20Sexual%20Offences%20Bill%20%28Rev%201%29.pdf

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.[27] 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.[28] 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.[29] 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.

Liberty Victoria maintains that position despite the enactment of the Bill. There were other significant problems with the legislation, including perhaps most troublingly the diminution of the criminal standard of proof. On that issues we made the following comment:[30]

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

33. In *R v Dookheea*,[31] 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'.[32]

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

27 *Crimes Act*, s 36.
28 *JDA*, s 46.
29 *Crimes Act*, s 36B(1).
30 Internet reference: https://libertyvictoria.org.au/sites/default/files/220812%20LV%20Comment%20on%20the%20Sexual%20Offences%20Bill%20%28Rev%201%29.pdf
31 *R v Dookhea* (2017) 262 CLR 402.
32 Ibid, 426 [41] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ).

very long time, without additional directions on the criminal standard of proof being regarded as necessary or desirable.[33]

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'.[34] 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.

Nevertheless, with the enactment of the Bill that is now the law in Victoria. It remains to be seen how the appellate courts consider these provisions, and whether they are seen to impede the right to a fair trial.

V. Other changes in the law

In addition to the above reforms, over the past decade the Victorian Government has also made significant legislative reforms – both substantive and procedural – to sex offence laws.

i. New offence provisions

Over the last ten years a number of new offences have been created to capture a broader range of sexual misconduct.[35] New summary offences deal with the distribution of intimate images,[36] sexual exposure,[37] and indecent or offensive behaviour;[38] and new indictable offences deal with grooming,[39] administering an intoxicating substance for a sexual purpose;[40] abduction or detention for a sexual

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33 *Green v The Queen* (1971) 126 CLR 28

34 *JDA*, s 64(1)(e).

35 The cited amendments to the substantive law were enacted largely in 2014 and 2016: *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic); *Crimes Amendment (Sexual Offences) Act 2016* (Vic).

36 *Summary Offences Act,* Div 4A. ('*SOA*')

37 *SOA*, s 19.

38 *SOA*, s 17.

39 *Crimes Act 1958* (Vic), s 49M.

40 *Crimes Act 1958* (Vic), s 46.

purpose;[41] sexual activity directed at another person;[42] procuring a sexual act by fraud;[43] and new offences specifying particular conduct or circumstances in relation to offences sexual against children,[44] including incest[45] and child abuse material.[46] New offences for sexual violence against persons with cognitive impairment and mental illness were also created.[47]

In addition, statutory definitions were further amended from 2014 – including sexual penetration;[48] touching;[49] taking part in a sexual act,[50] sexual activity,[51] consent,[52] "care, supervision and authority",[53] and child abuse material.[54]

ii. Jury directions

A significant issue raised in the 2013 Depart of Justice consultation paper was the purported confusion surrounding jury directions, leading to substantial numbers of appeals and sometimes retrials. Concern had been raised that the appeal process and in some cases retrial extended the trauma of the victim. In 2013 and 2015, the Victorian Government introduced and then revised the *Jury Directions Act*.[55] The purpose of this statute was to clarify the law on jury directions.

iii. Criminal procedure

There have been significant procedural changes in cases involving complainants or other witnesses who are children or who have a cognitive impairment. The *Criminal Procedure Act 2009* (Vic) provides for a process of Special Hearings requiring evidence to be given out of court and recorded before the trial;[56] committals have been abolished completely for cases where the complainant was a child or had a cognitive

41 *Crimes Act 1958* (Vic), s 47.
42 *Crimes Act 1958* (Vic), s 28
43 *Crimes Act 1958* (Vic), s 45.
44 *Crimes Act 1958* (Vic), Part 1, Div 8B.
45 *Crimes Act 1958* (Vic), Part 1, Div 8C.
46 *Crimes Act 1958* (Vic), Part 1, Div 8D.
47 *Crimes Act 1958* (Vic), Part 1, Div 8E.
48 *Crimes Act 1958* (Vic), s 35A.
49 *Crimes Act 1958* (Vic), s 35B.
50 *Crimes Act 1958* (Vic), s 35C.
51 *Crimes Act 1958* (Vic), s 35D.
52 *Crimes Act 1958* (Vic), s 36.
53 *Crimes Act 1958* (Vic), s 37.
54 *Crimes Act 1958* (Vic), s 51A.
55 *Jury Directions Act 2013* (Vic); *Jury Directions Act 2015* (Vic).
56 *Criminal Procedure Act 2009* (Vic), Part 8.2, Div 6. ('*CPA*')

impairment at the time the proceedings commenced;[57] ground rules limit and control the manner and extent of cross-examination of child and cognitively impaired complainants at trial;[58] and, in appropriate cases, an intermediary can be appointed to mediate between the defence barrister and the witness.[59] Recognising the impact on complainants of any second or subsequent hearing after an initial trial, the *Criminal Procedure Act 2009* (Vic) allows a recording of evidence given by a complainant at court to be admissible in any retrial, appeal or civil proceeding.[60]

iv. Practices in the courtroom

In recent years, more protections have become routine in the courtroom to support a complainant. Complainants give evidence from remote locations outside of the courtroom, or behind screens, and are often accompanied by support people who are seen by the jury to provide support and comfort during the giving of evidence.[61] The court can require lawyers not to robe or to remain seated while cross-examining a witness.[62] The courtroom is closed to the public at the time of their evidence.[63] They are offered support dogs by the Prosecution. They are given breaks as required.

v. Evidence

Legislation and case law governing admissibility of evidence has also evolved. Several High Court decisions have in effect lowered the bar for the prosecution to admit hearsay evidence[64] and tendency and coincidence evidence.[65] There are provisions in the *Criminal Procedure Act* that tightly control the admissibility of evidence of sexual history,[66] and defendant's access to the complainant's "confidential communications" (most typically communications with counsellors, doctors and psychologists).[67]

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57 *CPA*, s 123.
58 *CPA*, Part 8.2A, Div 2.
59 *CPA*, Part 8.2A, Div 1.
60 *CPA*, Part 8.2, Div 7.
61 *CPA*, Part 8.2, Div 4.
62 *CPA*, s 360(e) and (f).
63 *CPA*, s 133 (committal)
64 *IMM v the Queen* (2016) 257 CLR 300; *The Queen v Bauer* (2018) 266 CLR 56.
65 *Hughes v the Queen* (2017) 263 CLR 338; *The Queen v Bauer* (2018) 266 CLR 56.
66 *CPA*, Part 8.2, Div 2, esp s 342.
67 "Confidential communication is defined as communication, whether oral or written, made in confidence by a person against whom a sexual offence has been, or is alleged to have been committed to a registered medical practitioner or counsellor in the course of the relationship or medical practitioner and patient or counsellor and client, as the case requires, whether before or after the acts constituting the offence occurred or are alleged to have occurred": s 32B(1)

vi. Sentencing and other post-sentence orders

In 2016, the *Sentencing Act 1991* (Vic) was amended to restrict the options available to a court when sentencing for certain offences, including some sexual offences.[68] Parliament created two categories of offences for adult offenders (Category 1 and Category 2 offences),[69] and two categories of offences for offenders between the age of 16 and 18 (Category A and Category B serious youth offences).[70]

Category 2 offences include rape and some other sexual offences, and require the court to impose a term of imprisonment unless the court is satisfied of an extremely narrow set of circumstances (including a residual category that the Court of Appeal has described as "almost impossible to satisfy").[71] Rape is also a Category B Serious Youth Offence. This carries significant procedural implications, including a presumption that the matter be heard in the indictable stream of the adult court and not in the Children's Court. It also limits the availability of a Youth Justice Centre Order by way of sanction.[72]

Further, in 2018, the *Sentencing Act 1991* (Vic) was amended to create a scheme of 'standard sentences'.[73] The sentencing scheme directed the Court in sentencing for rape and a number of child sex offences. The standard sentence for the charge of rape is 10 years' imprisonment.[74]

Evidence (Miscellaneous Provisions) Act 1958 (Vic). See also Exclusion of evidence of confidential communications, *Evidence (Miscellaneous Provisions) Act 1958* (Vic). s 32C

68 See Sentencing act 1991 (Vic) ss 5(3), (4), (4B) and (5C).

69 *Sentencing (Community Corrections Order) and Other Acts Amendment Act 2016* (Vic). This amending legislation inserted the Category 1 and 2 scheme into the sentencing act, including definitional provisions, s 5(2G), (2H), (2I) which create the sentencing limitations on each category, and establish the narrow set of exceptions for avoiding a straight term of imprisonment for a Category 2 offence. The exceptions available for Category 2 offences were further narrowed in the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic).

70 *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic).

71 *Sentencing Act* 1991 (Vic), s 5(2GB), (2GC), (2H), (2HA), (2HB), (2HC), (2I); *DPP v Bowen* [2021] VSCA 355 ('Bowen'), [11] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA).

72 *Sentencing Act* 1991 (Vic) s 32(2D)

73 *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic). See also, *Brown v R* (2019) 59 VR 462 (guideline judgment).

74 The standard sentence is calculated at 40 per cent of the maximum penalty for the relevant standard sentence offence. A 'standard sentence' is a mandatory consideration: *Sentencing Act*, s 5B(2)(a). It is a 'legislative guidepost' when determining a sentence for certain offences, although not permitting two-stage sentencing or interfering with the instinctive synthesis: *Brown v The Queen* (2019) 59 VR 462, 464–5 [4]–[8] (Maxwell P, Priest, Kaye, T Forrest and Emerton JJA).

For more detail on these reforms, see the article written by the co-author of this submission: Michael D Stanton, 'Instruments of Injustice: The Emergence of Mandatory Sentencing in Victoria' (2022) 48(2) Monash University Law Review (advance).[75]

In addition to more onerous sentencing outcomes for certain offences, there exists a comprehensive regime of post-sentence orders including detention and supervision orders for serious sexual offenders[76] and mandatory or discretionary orders that a person be placed on the Sex Offence Register.[77] Certain breaches of Supervision Orders carry presumptive sentences of 12 months in prison.[78]

Finally, other statutory measures designed to enable rehabilitation and reintegration are not available for sexual offences. Diversion is, as a matter of general Victoria Police policy, not available for sexual offences. The Spent Convictions Scheme does not allow for sexual offences to be automatically spent, even when no conviction is recorded after a finding of guilt or after a period of ten years. A conviction for a sexual offence can only become spent after ten years if no term of imprisonment was ordered, and a successful application was made to the court.[79] And therapeutic courts such as the Koori Court[80] and the Drug Court[81] are not available in cases where a sexual offence is charged.

VI. Liberty Victoria's contribution to the national dialogue on criminal justice reform and sexual violence

As can been seen from the above, there have been significant reforms to the law of consent over the past two decades in Victoria, together with many related reforms. Changes in the *Crimes Act* have been accompanied by changes in jury directions, criminal procedure, courtroom practice and sentencing. The way complaints of sexual

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75 Internet reference: https://bridges.monash.edu/articles/journal_contribution/Instruments_of_Injustice_The_Emergence_of_Mandatory_Sentencing_in_Victoria/22121348.

76 *Serious Offenders Act 2018* (Vic).

77 *Sex Offender's Registration Act 2004* (Vic).

78 Sentencing Act 1991 (Vic) s 10AB.

79 *Spent Convictions Act 2021* (Vic), s 3 Definitions, *serious conviction*; s 11.

80 *Magistrates' Court Act* s 4F(1)(b)(i), *County Court Act 1958* (Vic), s 4E(b)(i).

81 *Magistrates' Court Act 1958* (Vic) s 4B(1)(a), *County Court Act 1958* (Vic), s 4AAB(1)(a) combined with *Sentencing Act 1991* (Vic), s 18Z(1)(a)(i).

assault are handled through the criminal justice process is dramatically different now than it was twenty years ago.

Affirmative consent and the right to a fair trial

Liberty Victoria supports government interventions to reduce the prevalence of sexual offending. It is of critical importance, though, that in the effort to reduce sexual violence, such measures do not erode fundamental protections of accused persons and the very processes that are essential for obtaining justice. It is concerning that in the recent legislative reforms, the Minister for Corrections and Victim Support suggested that her motivation for moving the amendments was to increase conviction rates.[82] Unfortunately, false complaints are made. Accused persons are sometimes overcharged. Some matters are proceeded with by prosecuting authorities when there is no reasonable prospect of a conviction. Disclosure is often late and inadequate. Whilst a trial can be a difficult experience for a complainant, it is also a difficult experience for an accused person, including a person with a well-founded defence who faces an inevitable prison sentence if found guilty.

Liberty Victoria considers that the affirmative consent model now enshrined in Victorian law is inherently problematic when considered in light the requirements of a fair trial, including the presumption of innocence and the right to silence.

In practice, the relevant provision now reverses the onus of proof, requiring the accused to prove that they said or did something to find out whether the other person consented. In effectively compels an accused person to either give a record of interview to police and set out their defence, or to give evidence at trial.

Other adverse consequences of the affirmative consent provision

It is unclear how this new requirement to prove positive conduct will simplify the trial process or alleviate cross-examination of the complainant. A dispute between the two parties is likely to remain is many cases (such as whether consent was communicated), there will still often be disagreement over what was said or done, and

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82 "Conviction rates for sexual offences remain unacceptably low. Only 1 in 23 rape cases that are reported result in a conviction": Victoria, *Parliamentary Debates*, Legislative Assembly, 4 August 2022, 2899 (Sonya Kilkenny).

whether what was done was sufficient to convey consent. That will still require cross-examination in many cases.

Secondly, given the heavy penalties and the stigma of a rape conviction, the reforms are unlikely to influence people to plead guilty in many cases. It is most unlikely that people who, at the time of sexual acts were firmly of the view that there was consent but did not take proactive measures to obtain consent, will plead guilty.

Thirdly, there is a real danger that the affirmative model of consent over-criminalises and thus loses its moral force. Many sexual encounters between people who love and trust each other do not rely on explicit and proactive measures to ensure that the other person consents. As noted above, these reforms are most likely to impact upon young people who are in the early stages of learning how to navigate sexual relationships.

It is also unhelpful to legislate the principle that "there should be 'no requirement on a person to demonstrate non-consent at any time'".[83] Reducing the prevalence of sexual violence must be premised on the empowerment of women and vulnerable people. A national dialogue that aims to reduce the expectation that women or vulnerable people can speak reinforces a presumption that they cannot or ought not be active and equally contributing participants in a sexual relationship. Dismissing as victim-blaming any endeavours to empower women and vulnerable people to articulate their interests and desires, and communicate about sexual activity with their partners, is unfair to them.

Restorative justice

A significant concern raised by many complainants in the investigation and prosecution of sexual offences is the feeling of being on trial themselves given the adversarial process.[84]

Liberty Victoria strongly supports the view that complainants should be treated with courtesy, respect and dignity throughout the criminal trial process. 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 – and the vast

83 Ibid, 298 [14.35].
84 Ibid, 304 [14.68].

majority of legal practitioners – take their ethical obligations very seriously and the stereotype of the barrister challenging a complainant through confusing and/or belittling cross-examination is very much the exception and not the rule. Such an approach is also likely to be very poor advocacy in front of modern juries.

The 2021 VLRC report recommends the investment in restorative, or non-adversarial, means of justice in appropriate cases.[85] This recommendation is no doubt being considered at present by the Victorian Parliament and is strongly supported by Liberty Victoria. As we submitted to the VLRC inquiry:

> A restorative justice model has the potential to have a long-lasting and widereaching 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. The importance of uptake within the profession and wider community cannot be emphasised enough, and again this is something that can only be achieved with time.[86]

We would add that a restorative justice model in appropriate cases has great potential in other jurisdictions throughout Australia. It provides an important alternative pathway to the adversarial criminal justice system.

VII. Conclusion

Reducing the prevalence of sexual violence in society is an urgent priority. Educational campaigns on affirmative communication and sexuality are indispensable elements of a public campaign to promote healthy and respectful sexual relationships.

Liberty Victoria is concerned that the current national discussion of the laws of consent and the need for criminal justice reform focusses disproportionately on adversarial and carceral means of reducing sexual violence. The capacity of the criminal justice system to affect social change is limited. Education must remain a priority and receive greater funding, especially with regard to young people who are learning about affirmative consent, boundaries, and healthy and respectful sexual relationships. In responding to sexual violence, any changes to the law should careful and evolutionary,

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85 Ibid, Chap 9.

86 [105], Internet reference: https://libertyvictoria.org.au/sites/default/files/210125%20-%20Liberty%20Victoria%20-%20VLRC%20submission%20Sexual%20Offences%20-%20Final.pdf

and must not undermine fundamental safeguards for accused persons, including the presumption of innocence, the right to silence and the right to a fair trial.

Thank you for the opportunity to make this submission. If you have any questions regarding this submission, please do not hesitate to contact Michael Stanton, President of Liberty Victoria, or Isabelle Skaburskis, Chair of our Criminal Justice Workgroup, through the Liberty Victoria office at info@libertyvictoria.org.au.

Liberty Victoria

16 March 2023