



**Child and Family Focus SA**  
**Submission**  
**on the**  
**Review of consent laws in South Australia**

February 2024

## Acknowledgement

We acknowledge the traditional lands of the Kurna people and acknowledge the Kurna people as the custodians of the Adelaide region and the Greater Adelaide Plains. We pay our respects to Kurna Elders past, present and emerging.

We acknowledge the traditional custodians of land beyond Adelaide and the Adelaide Plains, and pay our respects to all Aboriginal Elders past, present and emerging.

We acknowledge and pay our respects to the cultural authority of our Aboriginal and Torres Strait Islander colleagues and are grateful for the cultural expertise that they represent.

## The role of Child and Family Focus – SA

CAFFSA is the South Australian peak body and industry association for child safety and child protection, representing the needs of South Australian children, young people, families, and the non-government, not-for-profit organizations who support them.

## Background to this submission

CAFFSA is lodging this submission to provide context for the importance of recognising the impacts of trauma and vulnerability when considering the issue of consent.

## The context for this submission

Safe and consensual sexual relationships are recognised as a healthy part of development into adulthood and ongoing wellbeing. Current statistics indicate that sexual assault victimisations may be increasing, with females aged 10-24 indicating a high prevalence of assaults.<sup>1</sup>

**CAFFSA commends the intent of the review, recognizing the recent work by law reform commissions in other states to respond to the ongoing concerns of sexual violence in Australia.**

**CAFFSA is particularly interested in the impact of these possible reforms for adults who have an out-of-home care experience or history of child maltreatment.**

The *National Plan to End Violence Against Women and Children (2022-2032)* highlights Australia's commitment to end all forms of sexual and gender-based violence and highlights sexual violence as a key focus area.<sup>2</sup> The National Plan highlights the importance of recognising the gendered nature of sexual violence and taking action to redress structural barriers that may silence the voices of women. The *National Framework for Protecting Australia's Children (2021-2031)* also identifies the importance of young people transitioning from out-of-home care (OOHC) and identifies them as a

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<sup>1</sup> Australian Bureau of Statistics, Recorded Crime – Victims (reference period 2022, released 29 June 2023)

<sup>2</sup> Commonwealth of Australia (Department of Social Services) (2022). *National Plan to End Violence Against Women and Children (2022-2032)* ISBN: 978-1-921130-37-3.  
[https://www.dss.gov.au/sites/default/files/documents/10\\_2023/national-plan-end-violence-against-women-and-children-2022-2032.pdf](https://www.dss.gov.au/sites/default/files/documents/10_2023/national-plan-end-violence-against-women-and-children-2022-2032.pdf)

priority group.<sup>3</sup> This submission recognises the intersection of these national agendas and provides evidence regarding the impacts to young people and adults with a history of child maltreatment.

### Vulnerability for adults with a history of childhood maltreatment

Children who have experienced maltreatment are particularly vulnerable to further victimisation as adults. Those most likely to be revictimized have experienced sexual abuse in their childhood, may feel responsible for their abuse, show symptoms indicative of Post Traumatic Stress Disorder, engage in high-risk behaviours, use drugs and/or alcohol for self-regulation, experienced more than one type of maltreatment in their childhood, and generally use coping strategies identified as maladaptive.<sup>45</sup> The above listed factors are prevalent for young people who have experienced childhood maltreatment, particularly those leaving out-of-home care (OOHC). Further, the only protective factor identified for revictimization is that of perceived parental care.<sup>6</sup> While many young people in OOHC may maintain close relationships with their caregivers, factors such as placement breakdowns, high rates of residential care staffed by professionals, and the loss of support to young people leaving OOHC, means that some young people have few to no adults to support them.<sup>7</sup> The culmination of these factors highlights the levels of vulnerability for sexual victimisation of the OOHC population.

Young people living in residential care present with particular vulnerability. Young people in residential care are likely to have fewer positive adults in their lives, engage in more high-risk behaviours, use less adaptive coping strategies, and lack the support needed to transition to independent adult living. Further, some young people may experience sexual abuse while in residential care. Young people are particularly at risk of sexual exploitation, defined as “adult-perpetrated sexual abuse that involves a child receiving goods, drugs and alcohol, money, or attention in exchange for sexual activity”.<sup>8</sup> Data released in Victoria showed that 423 incidents of sexual exploitation in residential care were reported to the Commission for Children and Young People, involving a total of 165 children from July 2021 until the end of March 2023.<sup>9</sup> These factors

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<sup>3</sup> Commonwealth of Australia (2021). *National Framework for Protecting Australia's Children (2021-2031)*. ISBN: 978-1-921130-13-7. [https://www.dss.gov.au/sites/default/files/documents/12\\_2021/dess5016-national-framework-protecting-childrenaccessible.pdf](https://www.dss.gov.au/sites/default/files/documents/12_2021/dess5016-national-framework-protecting-childrenaccessible.pdf)

<sup>4</sup> Filipas, H. H., & Ullman, S. E. (2006). Child Sexual Abuse, Coping Responses, Self-Blame, Posttraumatic Stress Disorder, and Adult Sexual Revictimization. *Journal of Interpersonal Violence*, 21(5), 652-672. <https://doi.org/10.1177/0886260506286879>

<sup>5</sup> Scoglio, A. A. J., Kraus, S. W., Saczynski, J., Jooma, S., & Molnar, B. E. (2021). Systematic Review of Risk and Protective Factors for Revictimization After Child Sexual Abuse. *Trauma, Violence, & Abuse*, 22(1), 41-53. <https://doi.org/10.1177/1524838018823274>

<sup>6</sup> Ibid.

<sup>7</sup> McDowall, J. J. (2020). *Transitioning to Adulthood from Out-of-Home Care: Independence or Interdependence*. CREATE Foundation. <https://create.org.au/wp-content/uploads/2021/05/CREATE-Post-Care-Report-2021-LR.pdf>

<sup>8</sup> McKibbin, G., Halfpenny, N., & Humphreys, C. (2022) Respecting Sexual Safety: A Program to Prevent Sexual Exploitation and Harmful Sexual Behaviour in Out-of-Home Care, *Australian Social Work*, 75:1, 111-121, <https://doi.org/10.1080/0312407X.2019.1597910>

<sup>9</sup> Commission for Children and Young People. (5 April, 2023). *Statewide action overdue amid new data showing continuing sexual exploitation of children in residential care*. <https://ccyp.vic.gov.au/news/statewide-action-overdue-amid-new-data-showing-continuing-sexual-exploitation-of-children-in-residential-care/>

may result in complex forms of sexual victimisation as young people reach the age of legal consent to sexual relations and transition into adulthood.

### The effects of trauma on consent, disclosure, and the provision of evidence

The significance of trauma and its impacts across the lifespan is now well recognised. The Australian Childhood Maltreatment Study found that 39.4% of all Australians had experienced more than one type of childhood maltreatment and that girls were twice as likely to experience four-five types of maltreatment.<sup>10</sup> Further, 37.9% of women reported experiencing child sexual abuse.<sup>11</sup> This demonstrates that a significant portion of women in Australia have increased vulnerability to future sexual victimisation.

The effects of childhood trauma create further risk factors in adulthood. Adults with a history of childhood maltreatment are more likely to develop Post Traumatic Stress Disorder, Major Depressive Disorder, Generalised Anxiety Disorder, and Alcohol Use Disorder,<sup>12</sup> and to engage in self-harm or suicide attempts, binge drink, and be cannabis dependent.<sup>13</sup> As discussed above, these disorders may increase vulnerability and maladaptive coping strategies, as well as reduce the likelihood of reaching out for support in the event of sexual victimization.

Sexual assault is a particularly deleterious form of trauma, resulting in effects that require a response grounded in significant expertise. One common response to sexual assault is that of tonic immobility, often referred to as a ‘freeze’ response, which can occur in 70% of cases.<sup>14</sup> This response is also correlated to the later development of PTSD symptoms. Another important trauma response is dissociation. Dissociation is defined as “the tendency to move outside one’s body and feel detached from reality is usually experienced as outside one’s control and has been conceptualized as a defense mechanism to protect oneself from emotional distress”.<sup>15</sup> Dissociation is more likely for adults who have experienced childhood or relational trauma.<sup>16</sup> Both dissociation and tonic immobility have implications for an individual’s capacity to consent and testify.

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<sup>10</sup> Mathews B., Pacella R. E., Scott J. G., Finkelhor D., Meinck F., Higgins D. J., Erskine H. E., Thomas H. J., Lawrence D., Haslam D. M., Malacova E., Dunne M. P. (2023). The prevalence of child maltreatment in Australia: findings from a national survey. *Med J Aust* 218 (6 Suppl): S13-S18. <https://doi.org/10.5694/mja2.51873>.

<sup>11</sup> Ibid

<sup>12</sup> Scott J. G., Malacova E., Mathews B., et al. (2023). The association between child maltreatment and mental disorders in the Australian Child Maltreatment Study. *Med J Aust*. 218 (6 Suppl): S26-S33. <https://www.acms.au/findings/>

<sup>13</sup> Lawrence D, et al. (2023). The association between child maltreatment and health risk behaviours and conditions throughout life: The Australian Child Maltreatment Study. *Med J Aust*. 218 (6). <https://www.acms.au/findings/>

<sup>14</sup> Möller A, Söndergaard HP, Helström L. (2017). Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression. *Acta Obstet Gynecol Scand*. 96: 932–938.

<sup>15</sup> Bird, E. R., Seehuus, M., Clifton, J., & Rellini, A. H. (2014). Dissociation during sex and sexual arousal in women with and without a history of childhood sexual abuse. *Archives of Sexual Behavior*, 43, 953-964.

<sup>16</sup> Jowett, S., Karatzias, T., & Shevlin, M. (2021). Psychological trauma at different developmental stages and icd-11 CPTSD: the role of dissociation. *Journal of Trauma & Dissociation*, 23(1), 52-67. <https://doi.org/10.1080/15299732.2021.1934936>

Trauma also significantly affects memory. Research has shown that highly traumatic memories of sexual victimisation are not impaired and retain vividness and detail over time.<sup>17</sup> However, PTSD and depression affect memory, resulting in an overall decrease in recalling specific details of negative memories.<sup>18</sup> Therefore, people with PTSD and depression may be less likely to be able to provide an accurate account of being sexually assaulted. In fact, some people may be more likely to experience memories and new details while intoxicated, especially if they were intoxicated during the sexual assault.<sup>19</sup> Given that the OOH population typically show high rates of PTSD and depressive symptoms, as well as alcohol use, special consideration needs to be given regarding disclosures of the assault and later testimony if the system is to respond in an evidence-based manner to their experience.

### CAFFSA position on the introduction of affirmative consent

CAFFSA supports the introduction of an affirmative consent model, noting the impacts of affirmative consent on improving support for people who have experienced trauma. The affirmative consent model recognises that it is the obligation of both parties to actively seek consent and that there should be no passive recipients during a sexual act. Introducing this positive obligation recognises the trauma responses of tonic immobility and dissociation, allowing for these self-protective behaviours to be interpreted as survival mechanisms rather than passive acceptance. CAFFSA notes the importance of affirmative consent being an ongoing obligation, recognising that both parties have the right to withdraw consent at any time even if prior verbal and non-verbal behaviour indicated consent.

### CAFFSA position on the circumstances of consent

CAFFSA supports a broadened list of circumstances recognised as not representing consent. This would include matching legislation to that in other states:

- (a) there is a failure to offer physical and verbal resistance (QLD14, NSW, Victoria and ACT)
- (b) the person does not say or do anything to communicate/indicate consent (NSW, Victoria, QLD and Tasmania)
- (c) because the person consented to another act or the same act at a different time or place, or the same act with a different person, or a different act with a different person (ACT)
- (d) because of the fraud of the accused (Tasmania and ACT)
- (e) the person submits to the act because the person is overborne by the abuse of a relationship of authority or trust (Victoria, ACT and Tasmania)

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<sup>17</sup> Peace, K. A., Porter, S., & ten Brinke, L. (2008). Are memories for sexually traumatic events "special"? A within-subjects investigation of trauma and memory in a clinical sample. *Memory*, 16(1), 10–21.

<https://doi.org/10.1080/09658210701363583>

<sup>18</sup> Ono, M., Devilly, G. J., & Shum, D. H. K. (2016). A meta-analytic review of overgeneral memory: The role of trauma history, mood, and the presence of posttraumatic stress disorder. *Psychological Trauma: Theory, Research, Practice, and Policy*, 8(2), 157–164. <https://doi.org/10.1037/tra0000027>

<sup>19</sup> Anna E. Jaffe, Jessica A. Blayney, Michele Bedard-Gilligan & Debra Kaysen (2019) Are trauma memories state-dependent? Intrusive memories following alcohol involved sexual assault, *European Journal of Psychotraumatology*, 10:1, 1634939, <https://doi.org/10.1080/20008198.2019.1634939>

- (f) the act occurs in the provision of commercial sexual services and the person engages in the act because of false or misleading representations that they will get paid (Victoria)
- (g) having given consent, the person later withdraws consent to the act taking place or continuing (Victoria, QLD, ACT).

It is additionally recommended that coercive control be considered more explicitly. Although (e) above identifies “the person is overborne by the abuse of a relationship of authority or trust”, it would be beneficial to specifically recognise the effects of coercive control. The Government has drafted the *Criminal Law Consolidation (Coercive Control) Amendment Bill 2023*, which creates a new criminal offence of coercive control. The effects of this type of domestic violence should be recognised in relation to consent actions that may appear to represent consent. An important component of coercive control is forcing the victim/survivor to say and do things to ensure their own safety from further abuse. All situations where an indication is given by the defendant that consent was provided should be examined within the context of power differentials. In situations with highly unequal power, coercive control should be considered as a factor impacting the capacity of the person to provide consent. This power may be practical, such as where one person in the relationship may be able to negatively affect the circumstances of another, or emotional, where the level of psychological control held by one person impacts the freedom of the other.

### CAFFSA position on jury directions about sexual offences

CAFFSA supports the expansion of jury directions in section 34N of the Evidence Act to include:

- a direction to address misconceptions about behaviour which is perceived to be flirtatious or sexual.
- expanding the list of circumstances where non-consensual activity may take place to include: a consumer of sexual content or services and the worker providing the content or services (i.e. the sex industry); and people of the same or different sexual orientations and gender identities.
- a direction to address misconceptions about counterintuitive behaviours, such as maintaining a relationship or communication with the perpetrator after non-consensual activity.

Particular attention should be given to counterintuitive behaviours, especially regarding the prevalence of myths about sexual assault.<sup>20</sup> People who have experienced trauma, especially within the context of a relationship, may take action to remain in that relationship, receive gifts or favours from the person who victimised them, defend the person who victimised them, take actions that may appear to encourage sexual relations, or seek out situations where they are at high risk of

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<sup>20</sup> Coumarelos, C., Roberts, N., Weeks, N., & Rasmussen, V. (2023). *Attitudes matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS), Findings for young Australians* (Research report, 08/2023). ANROWS.

sexual victimisation. These behaviours are frequent trauma symptoms for young people who have experienced childhood maltreatment.<sup>21</sup>

It is additionally recommended that jury directions include a focus on addressing misconceptions about sexual assault being a culturally bound activity. There remain societal myths that sexual assault only occurs within certain cultural communities or is normal for certain cultures, often fuelled by public media.<sup>22</sup> These misconceptions may bias the jury against Aboriginal and Torres Strait Islander peoples and Culturally and Linguistically Diverse peoples. It is important that the jury receive direction to recognise that sexual victimisation is always considered abuse regardless of the culture of the parties. It is important to also direct the jury to recognise that the over-representation of some cultural groups in sexual assault statistics is not representative of that culture and does not diminish the victim/survivor's right to consent.

A further consideration is the use of 'good character' as a defence in sexual assault cases. Anecdotal data identifies that women, particularly those from the OOHC population, are often presented as disreputable while the defendant calls on witnesses as to their good character. Domestic and family violence research identifies that men may often appear to be upstanding members of the community while simultaneously using violence in private. Further, international research shows that many men, especially when believing there would be no negative consequences, endorse actions associated with sexual violence, such as sexual harassment (60%), sexual assault (48%), or using arguments to coerce sexual activity (35%).<sup>23</sup> This evidence highlights that the choice to sexually victimise someone is associated with internal belief systems and may occur despite someone otherwise demonstrating prosocial behaviours or socially normative achievements. However, the legal system often frames male perpetrators as 'good guys who made a bad choice'.<sup>24</sup> This type of defence is even more concerning for victim/survivors from the OOHC population who are more likely to have a criminal record, have poor educational outcomes, and few healthy relationships.<sup>25</sup>

A final consideration is direction to the jury regarding a victim/survivor's story changing over time. Anecdotal evidence identifies that victim/survivors may take time to fully recollect details or feel confident enough to report the facts of a sexual assault. Given the impacts of trauma on memory, as

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<sup>21</sup> James, S., Montgomery, S., Leslie, L., & Zhang, J. (2009). Sexual risk behaviors among youth in the child welfare system. *Children and Youth Services Review*, 31(9), 990-1000.  
<https://doi.org/10.1016/j.childyouth.2009.04.014>

<sup>22</sup> Multicultural Centre for Women's Health (2020). Challenging myths about culture and violence. Melbourne. ISBN: 978-0-6451608-1-9. <https://www.mcwh.com.au/wp-content/uploads/Challenging-Myths-210617-FINAL.pdf>

<sup>23</sup> Flood, M., Brown, C., Dembele, L., and Mills, K. (2022) *Who uses domestic, family, and sexual violence, how, and why? The State of Knowledge Report on Violence Perpetration*. Brisbane: Queensland University of Technology. <https://research.qut.edu.au/centre-for-justice/wp-content/uploads/sites/304/2023/01/Who-uses-domestic-family-and-sexual-violence-how-and-why-The-State-of-Knowledge-Report-on-Violence-Perpetration-2023.pdf>

<sup>24</sup> Hall, G. Whittle, M. & Field, C. (2016) Themes in Judges' Sentencing Remarks for Male and Female Domestic Murderers, *Psychiatry, Psychology and Law*, 23:3, 395-412, <https://doi.org/10.1080/13218719.2015.1080142>

<sup>25</sup> McDowall, J. J. (2020). *Transitioning to Adulthood from Out-of-Home Care: Independence or Interdependence*. CREATE Foundation. <https://create.org.au/wp-content/uploads/2021/05/CREATE-Post-Care-Report-2021-LR.pdf>



discussed above, many victim/survivors may present differing accounts over time. This changing narrative is not associated with fabrication but part of a trauma response.

### CAFFSA position on image-based offences and associated penalties

Image based offences is an emerging and important area of consideration. Given the prevalence of sexual images shared amongst young people, and the risk of over-criminalisation, consideration should be given to pre-trial diversionary options. This would provide opportunity for intervention to remedy behaviour.

### CAFFSA position on the protection of victims in sexual offence trials

CAFFSA supports the categories of witness who can give evidence at pre-trial special hearings be expanded to expressly include all witnesses of sexual abuse. CAFFSA also supports 'ground rules' hearings be available in trials for victim/survivors of sexual assault who have been offended against as adults.

One of the proposals is to consider the mandatory recording of all disclosure of sexual victimisation. While it is recognised that this could reduce the need for a victim/survivor to retell their story, there is also concern that any changes to the narrative could result in the victim/survivor being discredited. Therefore, there is significant risk in this proposal, without proper support and recognition of the effects of trauma on memory and disclosures of sexual assault.

### CAFFSA position on the victims/survivor's right to privacy

CAFFSA supports that protected communications be expanded to include all health information, that victim/survivors be made aware of applications for disclosure of their protected communications or prior sexual history, and that victim/survivors be entitled to be heard in relation to such applications.

Anecdotal evidence shows that victim/survivors from the OOHC population often have their health information, especially mental health information, used to discredit them in court. This includes both attempts to present the victim/survivor as 'delusional' and to frame them as 'vengeful' or 'compulsive liars'. Many women who have experienced childhood maltreatment are diagnosed with Borderline Personality Disorder, which is often associated with challenging personality traits.<sup>26</sup> These include emotional instability, unstable relationships, impulsivity, and cognitive disturbances.<sup>27</sup> These characteristics may be used to discredit the victim/survivor.

Anecdotal evidence also shows that victim/survivors who experienced childhood sexual abuse have had their history used in an attempt to discredit their narrative. This includes the implication that a history of childhood sexual abuse increases the likelihood of false reports as an adult, or that high risk sexual behaviour indicates intent to falsely accuse the defendant via entrapment. Therefore, the

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<sup>26</sup> Bierer, L., Yehuda, R., Schmeidler, J., Mitropoulou, V., New, A., Silverman, J., ... & Siever, L. (2003). Abuse and neglect in childhood: relationship to personality disorder diagnoses. *CNS Spectrums*, 8(10), 737-754. <https://doi.org/10.1017/s1092852900019118>

<sup>27</sup> Berlin, H., Rolls, E., & Iversen, S. (2005). Borderline personality disorder, impulsivity, and the orbitofrontal cortex. *American Journal of Psychiatry*, 162(12), 2360-2373. <https://doi.org/10.1176/appi.ajp.162.12.2360>



use of a victim/survivor's history is not only a risk to their privacy but may perpetuate misconceptions about sexual assault.

In closing, CAFFSA supports the intent of the review to address the ongoing sexual violence in Australia. There are specific considerations for the OOHC population that increase their vulnerability regarding sexual revictimization. Legislation should seek to increase protections and avoid further traumatisation within the legal system.

SUBMISSION ENDS.