



1 February 2019

NSW Law Reform Commission
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Submitted via email: nsw-lrc@justice.nsw.gov.au

To Whom It Concerns

Re: Consent in relation to sexual offences

ACON is Australia's largest community-based lesbian, gay, bisexual, transgender (LGBT) health and HIV organisation. Incorporated in 1985 as the AIDS Council of NSW, ACON has been widely recognised as an innovative, successful organisation which has adapted to changes in the HIV epidemic and responded early to emerging health issues among our communities.

We greatly appreciate the invitation to contribute to this vital work on reforming laws relating to consent in NSW.

The sex lives and relationships of the LGBTI community are not entirely dissimilar from their heterosexual counterparts, but our submission seeks to highlight not only some general comments about the law, but also how it may impact on our communities. Sexual violence and abuse in same sex relationships can manifest in unique ways, and settings and context of sex in our communities can be overlooked in discussions about consent.

Issues and concerns exist about sex and consent in public discourse about sexual assault, and laws currently reflect and focus on heterosexual contexts. We need to ensure that the needs of the LGBTIQ community, both in terms of protection from rape and sexual violence, and fair outcomes in the judicial system are overtly considered and included in any reforms.

In taking this forward we would recommend a full review of the criminal justice response (not just consent laws), as we understand that very few LGBTI people report sexual violence to police, or go through the judicial system at disproportionately lower rates to the general population.

Language and the LGBT Community in Relation to Consent

The submission paper notes findings of the Australian Institute of Criminology which reference the myth that "women often say no when they mean yes". As problematic as this statement is in itself, it highlights the need for a greater understanding of sexual assault, sexual violence and consent for people of diverse sexualities, genders and who may have variations of sex characteristics, sometimes referred to as intersex.

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The definition of sexual intercourse in s 61HA defines sexual intercourse in a way that is non inclusive to members of our communities. The intrinsic linking of a vagina with a female person is not inclusive of, for example, people who are female and do not have a vagina, people with vaginas who do not identify as female, and people with variations of gender and genitalia. ACON supports a modernisation of the legislation by using more inclusive language such as 'penetration of the genitalia or anus of a person'. Therefore the legislation should read

"sexual connection occasioned by the penetration to any extent of the anus or genitalia (including anus or genitalia which has been surgically constructed) of a person."

This recommendation would also cover acts or oral anal contact, not currently included in legislation.

Alternatives to a Consent Based Approach

The current system requires the prosecution to prove a person did not provide consent. ACON believes that sexual intercourse without affirmed consent should constitute a sexual assault. The seeking of affirmed consent places the responsibility with any parties involved in a sexual act, and ensures clarity, understanding and helps to establish a relationship in which a person may feel safe to withdraw their consent to the sexual act, or to alter the conditions of their consent (for example, agreeing to engage in a sexual act, and then deciding that they no longer feel safe or comfortable engaging in that act).

Affirmed consent allows for greater clarity in sexual situations that some individuals, whether LGBTIQ or not, engage in, which may include elements of dominance and submission, or multiple individuals engaging in sexual acts.

Affirmed consent establishes a greater understanding between parties of what is and is not acceptable. We believe that affirmed consent can only be given by adults of sound mind, who are not inebriated, unconscious or intoxicated to the point they cannot reasonably make decisions in their best interest. We believe that consent is rescinded if a person becomes no longer conscious. We understand that there may be some circumstances in which a person is intoxicated, or under the influence of drugs for example, when consent can be given. In these circumstances, affirmed consent can provide clarity.

Affirmed consent cannot be given by somebody who has experienced, or fears experiencing negative consequences as a result of not providing consent. These consequences and threats can include physical violence, financial or emotional abuse, the sharing of personal information about gender, sexuality or HIV status, and / or the distribution of explicit photos of the individual.

As is well documented, trauma responses and acts of self-protection mean that often victims go quiet, limp, silent or disassociate (especially if there is a history of sexual assault and trauma), meaning that consent laws based on an absence of a 'no' will equate this perceived submission with consent, as opposed to a natural response to a traumatic event. A power imbalance between the perpetrator/s and victim/s may mean that a victim is unable to say no, even if the threat of violence is not obvious and ongoing abusive relationships of intimate partner or family violence means that the threat of violence may not be immediate.

Sexual violence should be defined in relation to a lack of clearly communicated consent, the means of which can be outlined in legislation. Sexual assault should consider the harm, both physical and mental, of a victim - during and after the event.

Furthermore, a person should take steps to find out if a person is consenting or not, shifting the onus from the victim to the actions of both/all parties involved. If a defendant does not attempt to find out if a person consents then they have no grounds for a belief that there was consent. Reforms in both Tasmania (2004) and Victoria (2014) have redefined consent as an act of communication.

The consultation paper highlights the undue influence 'rape myths' can have when determining the facts using the current definition of consent. These 'rape myths' are especially damaging in cases where same-sex sexual violence has occurred. The 'real rape' template that dominates the popular understanding of what rape usually looks like, excludes female perpetrators and male victims leading to lack of belief when a case outside of this dominant norm is presented.

The current NSW definition also lacks clarity in cases where sex may involve more than one person, or may involve elements of submissive or dominant sex acts. As noted in the submission paper, the specificity of consent is also of concern. In situations where the type of sex, or type of sex act will potentially change, it can be difficult to ascertain the scope of the original intent of consent.

The application of this could also carry through to sex which is procured through online apps, for example. While consent may be given via online messaging, this consent may change when individuals meet, or during sex they are having. Similar situations may occur in specific sexual environments, such as sex on premises venues, where entering a venue could be construed as consent to a number of sexual acts, when in fact, the sex that happens in this venue should be agreed upon by all parties involved at each occasion.

Affirmative Consent Models

An affirmative consent standard is reflective of contemporary views around sex and would work towards developing a culture of communication around sex. Affirmative consent means consent is overtly sought and communicated.

Affirmative consent needs to be sought and given before the sexual act and if the act changes. Sexual consent can be removed at any time. Although we argue for an affirmative consent model, it is important to note that there are circumstances in which consent may be given freely, but the law should be able to negate this consent. These limited conditions should be expressly noted in the legislation.

We commend the consultation paper for noting that individuals in our community can face increased barriers in reporting sexual assaults. The consultation paper also speaks about the barriers faced by people during the trial process. The issues of cross examining the history and character of a member of our community can be especially challenging. A person's sexual history, sexuality, medical history, gender identity or gender history may all be open to interrogation. Some of these may be topics that the victim has not shared with others for fear of discrimination or personal safety or out of concerns related to family or a person's career or place of work. These issues may also be traumatic to speak about and can negatively

sway opinions or influence decisions due to conscious or unconscious discrimination and bias. It is worth noting that the consultation paper quotes the Police Association of NSW observation that uses gendered language in regards to victims, a consistent issue for victims in our community who do not identify as female (including male victims and victims who are transgender or non-binary). This language exacerbates the 'real rape' template which pervasively scrutinizes victims and minimizes violence outside of this perceived norm.

There does exist some limitations to affirmative consent, especially in relation to a person changing their mind before or during a sexual encounter. It may be cumbersome to affirm consent when the nature of a sexual act changes, however it is our belief that if the nature of the act changes, then affirming consent should again occur. For example, in a situation in which two people are engaged in a sexual activity and a third person is to become involved in the activity, all parties should be required to affirm consent

If a person agrees to a sexual act conditionally, any change to those conditions should invalidate consent. For example if a person wilfully or deceitfully removes a barrier protection method during sex (where the use of said barrier was a condition of sex) consent would no longer exist. This law would not apply to accidental breakages of barrier methods.

We strongly believe that sexual assault and consent laws should not reference transmission of sexually transmitted infections, as there exists legislation around this in the NSW Public Health Act. Separate treatment of STIs and HIV in legislation can create community stigma, which may reduce testing.

The withdrawal or modification of consent is an important issue and should be addressed in legislation. A person who may have consented to vaginal sex, for example may not be comfortable engaging in anal penetrative sex, yet through coercion may feel that they are obliged to take part in these acts because they gave clear consent to 'have sex'. If an affirmative consent model is put into place, it should be clear about how withdrawal or modification of that consent can occur.

Conditional consent has significant impacts for people in the LGBT community. Given recent advances in biomedical protection and scientific evidence about HIV+ people with undetectable viral loads being unable to pass on the virus, questions about conditional consent and pre-exposure prophylaxis (PrEP) and reporting an undetectable viral load come into play. If a person engages in sex through wilful deceit about their adherence to PrEP or their viral load, consent should be considered invalid.

We do not support the use of the term 'contraceptive device' in the language of the legislation, as within the parameters of same sex relationships there may be some argument that barrier methods of protection are not contraception.

Negotiation of Consent

We support the authors of submissions who argue that threats of force as a negating factor should be expanded to 'implied threats of force'.

Intimate partner violence in the LGBT community manifests in some ways which are unique, and these can often relate to nonviolent threats such as the disclosure of a person's sexuality, gender or health status. We believe that sex procured through these threats is sexual assault and as such this should be a negating factor in obtaining consent. We support the submission from the Australian Queer Student's Network that a history of threats or coercive behaviour should also negate consent (or at least that it may negate consent).

The legislation states that a person who consents to sex because they mistakenly believe they are married to someone will have their consent negated by the law. The inclusion of the word marriage in the legislation is problematic. No relationship, including marriage, is a precursor to consent, and a person in a legal marriage may refuse consent to any or all sexual activity. It is unclear what this condition aims to achieve.

Any laws regarding consent should make it explicit that consent can be withdrawn at any time.

Circumstances that Negate Consent

We support the ACT's inclusion of 'threats to publically humiliate or disgrace, or to physically or mentally harass the person or another person'. This is particularly relevant to LGBTIQ people as threats to 'out' someone publically or to shame them for their gender or sexual diversity is a unique form of coercion used against the LGBTIQ community, as is homo/bi/transphobic ridicule and harassment. We also argue that 'threats of force' need not be imminent, but that a history of threats and force (such as an abusive relationship or a current act of sexual violence) is enough to warrant the negation of consent.

Consideration should be given to the inclusion of words such as those found in ACT legislation that state 'A fraudulent misrepresentation of any fact made by the other person negates consent. This could be problematic when considering sexual violence carried out upon a transgender or non binary person, or a person whose clothing and mannerisms do not reflect societal expectations of their sex. It is imperative that these situations not be considered fraudulent representations.

We would encourage any legislation to explicitly state that sexual violence which occurs under the belief that sex can 'fix', 'cure' or change a person's sexuality or gender identity be considered rape.

Reasonable Grounds

We strongly support the opinion from the Consultation Paper that "the law should recognise the complainant's style of dress; consumption of alcohol or drugs; silence or lack of physical resistance are insufficient to amount to reasonable grounds"

Defining Steps

We support an affirmative consent model which can be defined in two steps for ascertaining consent. Firstly, that there was positive consent, and secondly that the accused person knew there was consent. This

takes into account the ability of the victim to consent (in lieu of threats, violence, manipulation etc.) and also requires that physical or verbal indicators of consent (not simply the absence of these) were present.

Exclusions

We support the implementation of a definition similar to that in Victoria which states that intoxication is regarded as self-induced if the accused “knew, or had reason to believe, ... that the drug would significantly impair the person's judgment or control”. We believe a statement such as this can be applied to the recreational use of alcohol and other drugs, which are well understood by community to impair judgement, even in moderation.

It is our belief that the personal opinions and prejudices held by the accused should be excluded from consideration by a fact finder. This includes views regarding sexuality, gender and societal values. Such a direction would ensure that the accused and a fact finder in the case must uphold the reasonable standards of society when deciding on the facts, and not allow a personal prejudice or outdated belief to influence the decision on whether consent was sought or given. For victims of sexual violence in our community, it is essential that archaic and harmful views about gender roles do not influence decision making processes, for example in cases where a transgendered person is a victim of sexual violence, or a male is a victim of sexual violence at the hands of a male or transgendered partner.

Jury Directions

Jury directions must be clear and concise around what the meaning of consent and knowledge are under the current law. We support the inclusion of jury directions which attempt to dispel ‘rape myths’, including that a defendant's clothing, level of intoxication, history with sex work or previous sexual encounters are indicative of a desire to have sex, or a particular type of sex.

We would also support that jury directions be made sensitive to cases involving defendants and accused persons who are members of the LGBTI community, including instructions to ignore personal biases or preconceptions about how sex and sexual violence occurs in these communities.

Jurors in NSW are not required to provide rationale or reasoning related to their decisions regarding the matters of fact in a court case. In our contemporary society, we must be cognizant of the fact that jurors can hold views that are inherently misogynistic, homophobic or transphobic. This presents issues, as significant bias may exist in the deliberation over facts. That jurors could interpret evidence using a lens that a victim ‘asked for it’ or ‘deserved it’ due to their sexuality or gender is concerning in itself, and is compounded by the fact that jurors could lack understanding or rationality in a sexual violence case concerning a same sex encounter, or someone who was transgendered. The application of judge only trials to sexual violence cases does not remove the potential for bias or misunderstanding, but does ensure that reasoning about decisions is a matter of public record.

Expert advice should expressly provide evidence on the behavioural responses of men who are victims, women who are victims to other women, the already higher rates of trauma, mental health issues and minority stress of LGBTIQ people and how it affects trauma responses.

Recommendations

Recommendation 1: A review of legislation that ensures the definition of sexual assault and sexual intercourse is inclusive of LGBTQI people, relationships and experiences

Recommendation 2: NSW should adopt an affirmed consent model

Recommendation 3: Legislation should explicitly state that wilful and deceitful attempts to engage in sex outside negotiated agreements negates consent

Recommendation 4: Any laws regarding consent should make it explicit that consent can be withdrawn at any time.

Recommendation 5: The law should recognise dress, intoxication, and lack of verbal or physical resistance as insufficient to amount to reasonable grounds for consent

Recommendation 6: That personal views on gender roles, or prejudice regarding sexuality, gender identity or health status should not be excluded from consideration by fact finders

Recommendation 7: Jury directions should include explicit references which attempt to dispel 'rape myths'

Recommendation 8: Jury directions should include explicit references which aim to remove biased thinking in relation to sexuality, gender identity or health status

Recommendation 9: Legislation should be clear that legal marriage, or any other relationship does not negate the need to seek consent for sexual activity

We once again would like to thank the commission for the opportunity to provide feedback on these important laws. If you would like to discuss this submission further, please do not hesitate to contact me on (02) 9206 2034 or kprice@acon.org.au.

Kind Regards,

Karen Price

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