



25 June 2018

The Executive Director
NSW Law Reform Commission
GPO Box 31 Sydney NSW 2001
By email: nsw-lrc@justice.nsw.gov.au

AQSN Submission on the Reform of the Law of Consent in NSW

Dear Panel Members,

The Australian Queer Students Network (AQSN) would like to take the opportunity to make this submission to the review of the laws surrounding consent in relation to sexual assault.

Who we are

The Australian Queer Students Network (AQSN) is the peak national representative body for all queer students in Australia. It was founded at the annual Queer Collaborations (established 1991) conference of 2011.

As such, we represent the voices of many queer students across Australia. It's essential that our experiences and voices are heard as part of the NSW Law Reform Commission's review in sexual assault. The specific experience of queer people is crucial to a nuanced understanding of consent and sexual assault in the Australian community.

AQSN is a network for queer students to organise and collaborate, gain and distribute resources, and make contacts and connections that will activate their education experience, and increase accessibility and acceptance for students of diverse sexuality and gender across Australia.

We proudly use the term 'queer' as an umbrella term for transgender, bisexual, lesbian, non-binary, asexual, gay, homosexual, gender diverse, questioning, pansexual, intersex, and much more.

We are particularly interested in, and have published previously on the *National University Student Survey on Sexual Assault and Sexual Harassment* report, the need for the specific inclusion of people of colour and culturally and linguistically diverse people within queer spaces. Within our organisation, and at the annual Queer Collaborations conference, we host workshops and exchange ideas specific to our communities.

We aim to represent the LGBTQTIA+ student community, and write this submission in order to make sure a queer voice is heard in the reform of the law on consent.

Context

LGBTQTIA+ or queer students are particularly vulnerable to sexual assault, and factors relating to homophobia, transphobia and queerphobia exacerbate these experiences.

The *National University Student Survey on Sexual Assault and Sexual Harassment* (1) report released in 2017 revealed shocking statistics for the Australian queer student community, and more importantly, for AQSN. These statistics identified that the largest demographic of survivors are queer students with the following:

- 44% of students who identified as bisexual and 38% of students who identified as gay, lesbian or homosexual were sexually harassed in a university setting in 2016, compared with 23% of students who identified as heterosexual.
- Trans and gender diverse students (45%) were more likely to have been sexually harassed in a university setting in 2016 than women and men.
- Students who identified as bisexual (3.8%) were also more likely than those who identified as heterosexual (1.5%) or gay/lesbian/homosexual (1.4%) to have been sexually assaulted in a university setting in 2015 or 2016.
- Students who identified as bisexual (18%) or asexual (15%) were more likely than students who identified as gay/lesbian/ homosexual (8%) or heterosexual (6%) to have been sexually assaulted in 2015 and/or 2016.

The 2008 Coming Forward (2) report researched sexual assault as one type (of many) of heterosexist violence. The report found that,

“nearly 12 per cent of the LGBTQ respondents reported having been sexually assaulted while alone at some point in their lives (n=45), while approximately 5 per cent reported being sexually assaulted while alone in the past two years (n=18). Sexual assault accounted for 5.2 per cent of all heterosexist abuse reported by women in the past two years and 4.8 per cent by men.”

As queer people, are statistically more likely to experience sexual assault and abuse. Additionally, our experiences are exacerbated and in some ways are different to the experiences of people outside of our community. For these reasons, specific attention must be had to aspects of sexual assault and abuse laws that impact queer people.

Discussion of the Current Law and Recommendations

AQSN wishes to highlight particular issues with:

‘Sexual Intercourse’

s 61HA defines ‘sexual intercourse’ as

“sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus”.

This fails to include:

- people who are not female and have a vagina,
- people who have vaginas and are not female,
- and the penetration of the variety of genitalia that people have, including people with intersex variations.

It also doesn't cover the specific instance of penetration of a penis.

AQSN recommends the simple solution that modernises the legislation, of using the term ‘penetration of the genitalia or anus of a person’, and removal of any mention specifically of vagina or ‘female person’.

Therefore, the definition under s61HA 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."

It is unnecessary to specify 'vagina' or 'female person', and this language unnecessarily excludes, or complicates the situation where a transgender, gender diverse or intersex person is the victim of sexual assault.

Transgender, gender diverse or intersex people are more likely to suffer sexual assault or abuse, and are also less likely to report it. The current legislation further discourages such people to report sexual assault, and the wording does not appropriately cover their situation. To not define sexual assault in a way that is inclusive of transgender, gender diverse or intersex people, is to leave us without redress.

AQSN submits that this is unjust and against the expectations of the Australia community.

Penetration

Secondly, we recommend changing the definition of 'sexual assault' in s 61HA 'penetration' to touching. The current definition of sexual assault does not include the circumstance of someone grabbing, holding or touching a penis with their hands or other body part. It does not include the non-penetrative touching on the vagina or other genitalia, or the anus. Those actions should be considered as sexual assault.

See further discussion below.

Uniform consent definition

We support the recommendation made in 2014 by Women's Legal Service NSW and others to the NSW Department of Attorney General and Justice based on the Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900 that the section 61HA definition of consent should be applied to other sexual offences in the Crimes Act 1900 for which a lack of consent must be proved.

'Queerphobic opinions'

LGBTQIA+ people are overrepresented as victims of sexual assault. This is the largely the result of deeply misogynistic, sexist, homophobic, transphobic, biphobic, acephobic and queerphobic attitudes.

In order to do so, we recommend that if:

a subjective element of knowledge or recklessness as to consent is adopted,
OR
that 'reasonable grounds' to believe that someone consented is adapted,

then in determining that element there must be in the legislation specific mention that the

"personal opinions, values and general social and educational development of the person"

are NOT included in formulating the relevant mental element. This means that outdated or hateful views about sexuality, sex and gender are not a defence to sexual assault.

An example would include an accused person stating that due to their misogynistic views of women and expectations of how women behave during sex (such as the normalisation of non-enjoyment), they genuinely misunderstood the victim's non-communication of consent. In such a case, a misogynistic view, opinion or education should not be taken into account.

Another example would include a situation where the accused states that due to their opinion or queerphobic view that all gay men, or bisexual people are open to sex at all times, or at least in the particular circumstances of the case, that the victim would have agreed to have sex, or would agree to have a particular type of sex (such as anal intercourse) because of their status as a gay man, or bisexual, or as LGBTQIA+.

In cases where there is an LGBTQIA+ victim, it would be advisable that the jury is informed that such queerphobic views, attitudes or education are not a part of a defence to the subjective element on knowledge (or recklessness to) consent.

This is in agreement with the 'Discussion paper on the law of consent and sexual assault' (2007) by HREOC (3).

Uniform definitions of consent in sexual offences

The specific exclusion of queerphobic views or opinion in ascertaining the relevant mental element for consent (whether it be formulated as positive ascertainment, recklessness, actual knowledge etc.) is particularly important in the case of indecent assault.

Sexual activity without consent that falls short of the currently very narrow definition of 'sexual intercourse' represents a wide variety of sexual activity, and sexual abuse that LGBTQIA+ people are particularly vulnerable to.

Currently, a different definition of consent is used for different sexual offences. As recommended in the 2014 WLS Submissions on consent (4), the same standard for consent - that in s61HA - should be used for all sexual offences, including both sexual assault and indecent assault. As the law currently stands, in the not uncommon case where both indecent and sexual assaults are being tried, different directions must be given to the jury as to the different standards of consent.

Currently consent in the case of indecent assault uses the common law definition. The *Criminal Trial Courts Bench Book* recommends the suggested direction:

“if [the accused] honestly, though wrongly, believed [the complainant] was consenting to the act amounting to the assault, then [he/she] is not guilty.”(5)

This definition, along with the potential for more than one direction to the jury as to the nature of consent for different offences is confusing. The common law standard for consent allows for honest, though wrong belief in consent. This standard is too low, and too vague.

It could potentially mean that if an accused person honestly, though wrongly believed or assumed consent based on a sexist, queerphobic, homophobic or transphobic view of the victim, they may not be guilty of indecent assault.

Similar problems, as outlined in the examples provided above in relation to the proposed 'aggravating circumstances', could occur.

Again, in the example that an accused person states that due to their misogynistic views of women and expectations of how women behave in regards to sexual activity (such as the normalisation of non-enjoyment), they honestly, though mistakenly misunderstood the victim's non-communication of consent.

In such a case the common law definition of consent used in indecent assault is not sufficient. It must be brought into line with s61HA, and expanded to require a more positive consent model.

In the alternative - 'Queerphobic opinions' in indecent assault

AQSN recommends that if the same formulation of the mental element of consent is not adopted for both indecent and sexual assault, as stated above, then in the alternative the formulation of consent in the case of indecent assault be specifically amended to NOT include:

“personal opinions, values and general social and educational development of the person”

Especially if those views are sexist, queerphobic, homophobic or transphobic.

Additionally, AQSN recommends further guidance as to what counts as indecent assault, and what is 'contrary to the ordinary standards of respectable people in this community'.

Indecent assault should be further defined to specifically include sexist, queerphobic, homophobic or transphobic mistreatment that is a form of non-consensual sexual activity.

'Take steps to ascertain consent'

AQSN strongly supports the 'positive consent' model. As such, a two-step model for determining whether or not a person was aware of consent in the case of sexual assault could follow something similar to:

Step 1: Was there positive consent?

Was the victim able to consent - including under implied threats, in context of family violence, other types of manipulation, etc.

Step 2: Did the accused person know there was consent?

What steps were taken to ascertain consent? Absence of a 'no' is not an indication of consent.

's61HA(6) Circumstances that may negate consent'

AQSN recommends that s61HA(6)(b) should be amended to state

"because of intimidatory, manipulative or coercive conduct, or other threat, or history of such coercion or threats".

This assists in reflecting the ongoing nature of abusive relationships or family violence. This should include the coercion of sexual acts in exchange for access to money, freedom, children, space, affection, medication etc. This better reflects the reality of domestic and family violence.

LGBTQIA+ people can be particularly vulnerable to manipulative and coercive forms of domestic and family violence. As LGBTQIA+ people are more likely to experience disrupted or reduced family and social network support, they can be more vulnerable to relying on an abusive or coercive domestic partnership. Additionally, reliance on queerphobic, abusive or manipulative family can be more common.

Intimidating or coercive conduct must be expanded to include the 'outing' of someone as an LGBTQIA+ person, or of HIV+ status, as a sex worker, and the access to specific medications or medical assistance (such as hormones for gender

affirmation or treatment for HIV). This better reflects the reality of domestic violence and sexual assault in LGBTQIA+ relationships (6).

(See Royal Commission into Family Violence Volume V - Ch 5 p145)

The Victorian *Crimes Act 1958*

Further, AQSN recommends adopting definitions similar to those in the Victorian *Crimes Act* s36, which states that “circumstances in which a person does not consent to an act include, but are not limited to:

(b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;

(l) the person does not say or do anything to indicate consent to the act”

‘Aggravating circumstances’

AQSN recommends an addition to the list of ‘aggravating circumstances’ in s61J(2) for sexual assault and in s61M(3) for indecent assault. This addition should be one that covers ‘corrective rape’ or queerphobic/misogynistic motivated sexual violence.

Homophobic rape or ‘corrective rape’ refers to the instance where sexual assault, sexual harassment and/or indecent assault is specifically, deliberately motivated by transphobia, biphobia, acephobia, general queerphobia or sexism/misogyny.

It specifically includes examples such as:

- sexually assaulting someone who refuses to have sex with you because they are LGBTQIA+, or
- because they refuse to marry you or be in a relationship with you,
- to ‘correct’ their sexuality or gender expression (especially if they do not conform to certain beliefs about gender expression or sexual orientation. Other reasons can include being ‘promiscuous’, or not in-line with particular religious/cultural beliefs) or
- to punish them for being transgender or queer etc.
- sexually assaulting someone, and being specifically motivated by a hatred of women/misogyny or as punishment for not conforming with specific understanding of the role of women in society, or of LGBTQIA+ people
- sexually or non-sexually assaulting someone in response to their bisexual/homosexual sexual advances, or making sexual advances as a transgender or gender diverse person.

AQSN asserts that part of the contributing factor to the high rates of sexual assault and harassment committed against LGBTQIA+ people is queerphobic or

heterosexist motivations. This is particularly acute in circumstances involving bisexual and asexual people, trans and gender diverse people, and LGBTQTIA+ women. (See the higher rates of sexual violence experienced - (1).

Our community experiences high rates of sexual assault and a contributing factor to this is specific hatred or queerphobia. This needs to be highlighted in the criminal law, as reflected in community expectations, as a particularly awful aggravating circumstance.

'Indecent assault'

Indecent assault is what is contrary to the ordinary standards of respectable people in the community, and can range from anything that is not captured within the definition of sexual assault to the mere touching of a person in a non-sexual way for sexual gratification.

We need to make sure that what society considers indecent takes into consideration LGBTQTIA+ people and sexuality, and the particular vulnerabilities of queer bodies.

Things that are considered indecent assault and not sexual assault can include:

1. Penis touching breasts. Penis touching the chest area of a person who identifies as female (or people who have boobs/breast tissue but do not identify as female)
2. Grabbing, holding or touching of a penis
3. Non-penetrative touching of genitalia
4. Hands touching breasts or buttocks
5. Putting a hand, mouth, tongue or an object (other than a penis) into a person's mouth
6. Anilingus
7. Making a person naked, or exposing them - particular in cases of transgender or gender diverse people who may have specific areas they don't want exposed, and this may need to be explained to the jury.

AQSN recommends one of three pathways:

First, the definition of sexual intercourse in s61H(1), to be expanded to include 'non-penetrative', non-consensual sexual activity. There is no real logic to why a sexual act must include penetration of the genitalia, as opposed to **touching** in order to be described as sexual assault. This is out of touch with community standards, and it is certainly out of touch with the experiences of LGBTQTIA+ people. The touching of genitalia, the anus, the mouth and the chest area in a non-consensual, sexual way is a significant violation against a person. It should be recognised as sexual assault, and carry the maximum sentence of 14 years, rather than be counted as indecent assault, with a lighter maximum sentence.

The reliance on the idea of ‘penetration’ stems from a heterosexist understanding of sexual assault (and sex in general) as essentially, or relating to, the penetration of the vagina by a penis. LGBTQTIA+ people’s experiences of non-consensual and consensual sex differ from this. Common-sense understanding of what counts as ‘legitimate’ sexual activities differ. The focus on penetration of the vagina stems from an essentialist understanding of sex, of women, and of reproduction as the legitimating purpose of sex. AQSN rejects these implications, and strongly recommend a change to the definition of ‘sexual intercourse’ from its current focus on vaginal penetration.

A **second** alternative pathway is to make explicit certain aspects of indecent assault that will better include the experiences of non-consensual sexual or indecent activity perpetuated against LGBTQTIA+ people. AQSN recommends that examples 1 through 7 listed above should be specified as within the definition of indecent assault.

A **third** alternative pathway is to specifically add anilingus, non-penetrative touching of all genitalia and ‘penis touching breasts’ as ‘sexual intercourse’ for the purposes of s61H(1).

Conclusion

The AQSN recommends that the law on sexual assault and consent be modified to include the experiences of LGBTQTIA+ people. This aligns with the expectations of sex and sexual violence in the broader community, the specific vulnerabilities of LGBTQTIA+ people to sexual violence, and sends a clear message that all forms of sexual violence against anyone will not be tolerated.

Making the definition of sexual intercourse simpler to understand serves the dual purpose of increasing usability and inclusivity of LGBTQTIA+ people.

Moving away from a focus on penetration of the vagina as the ‘main’ type of sexual violence is a step in the right direction to a more feminist and queer understanding of sex and sexual violence.

Making a clear stance against sexual violence that is motivated or fuelled by misogyny, transphobia or queerphobia, and requiring a model of positive consent that accounts for histories of coercion and domestic violence reflects contemporary understandings of sex and sexual relations.

As LGBTQTIA+ people are more vulnerable to sexual violence, our opinions and experiences must be taken into account in formulating law.

These recommendations not only seek to redress gaps and injustice for us, but will benefit all victim-survivors of all kinds of sexual violence.

If you would like to discuss any aspect of this submission, please contact Niamh Joyce, Rural and Regional Officer 2017-2018.

Yours faithfully,

Niamh Joyce,
on behalf of the Australian Queer Students Network

We can be contacted at:

Our website: <https://www.australianqueerstudentsnetwork.org/>

Or on Facebook: <https://www.facebook.com/AQSNetwork/>

Previous AQSN Statements relating to sexual violence

AQSN's Recommendations for Action after AHRC's Report Release,
<https://drive.google.com/file/d/0B0DtTsjuf3CBSm8yOG41NWxVN1k/view>

Unique barriers that impact queer students when reporting cases of sexual assault and sexual harassment,
<https://drive.google.com/file/d/0B0DtTsjuf3CBd0F2SnA2WU1RUVk/view>

AQSN RESPONSE TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION REPORT ON NATIONAL SEXUAL ASSAULT & SEXUAL HARASSMENT SURVEY RESULTS, August 2017 <https://mailchi.mp/5b9e8997e92a/aqsn-response-to-sexual-assault-and-sexual-harassment-report>

References

- (1) *Change the Course: National University Student Survey on Sexual Assault and Sexual Harassment*, AHRC, 2017
https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_2017_ChangeTheCourse_UniversityReport.pdf
- (2) Leonard, W., Mitchell, A., Pitts, M., Patel, S., & Fox, C. (2008) *Coming forward: The underreporting of heterosexist violence and same-sex partner abuse in Victoria*. Melbourne: Australia Research Centre in Sex, Health and Society.)
<https://www.glhv.org.au/sites/default/files/ComingForwardReport.pdf>
- (3) 'Discussion paper on the law of consent and sexual assault' (2007) by HREOC (3). Accessed online 13/06/18
<https://www.humanrights.gov.au/discussion-paper-law-consent-and-sexual-assault-2007>
- (4) Women's Legal Service NSW. *Consent Provisions of the Crimes Act 1900*. 16 April 2014. <http://www.wlsnsw.org.au/wp-content/uploads/WLS-Submission-DAGJ-consent-a.pdf>
- (5) Judicial Commission of NSW. '[5-660] Suggested direction — s 61L (no aggravating circumstances alleged)' *Criminal Trial Courts Bench Book*. Published 25 October 2017.
- (6) Royal Commission into Family Violence, *Report and Recommendations Volume V*, p145.