

The Hon Acting Justice Carolyn Simpson
Lead Commissioner
NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001
nsw-lrc@justice.nsw.gov.au

Re: Submission into the NSW Law Reform Commission Consultation Paper regarding Consent in Relation to Sexual Offences

Dear The Honourable Acting Justice Carolyn Simpson,

Positive Life NSW (Positive Life) welcomes the opportunity to provide a submission into the NSW Law Reform Commission (NSWLRC) Consultation Paper regarding consent in relation to sexual offences.

Positive Life is the state-wide peer based non-profit organisation that speaks for and on behalf of people living with and affected by HIV (PLHIV) in NSW. We provide leadership and advocacy in advancing the human rights and quality of life of all PLHIV, and to change systems and practices that discriminate against PLHIV, our friends, family and carers in NSW.

Background:

In 2018, the NSWLRC was asked to review and report on consent and knowledge of consent in relation to sexual assault offences, as dealt with in s 61HA of the Crimes Act 1900 (NSW) (the Crimes Act).

At Positive Life, we believe that the introduction of s 61HA into the Crimes Act in the 2007 reform was a positive step forwards in achieving improved effectiveness of the NSW law in responding to occurrences of sexual assault. However, in subsequent years it has become apparent that the changes made to the legislation do not effectively translate to achieved policy outcomes and objectives. This inability to meet the objectives of the legislation may be due to a variety of factors, including broad social and community-based influences. Notwithstanding, the NSWLRC review of consent in relation to sexual offences is an apt opportunity to reform the model of consent outlined in s 61HA to a more communicative, affirmative-based model.

Question 3.1: Alternatives to a consent-based approach:

We agree with the criticisms of the current NSW definition of consent (“a person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse”¹), in that it: is unclear and insufficient; does not clearly endorse a positive or communicative standard; places an undue focus on the conduct of the complainant, rather than the accused; and is influenced by “rape myths” in its application.²

We believe that NSW should adopt an affirmative standard of consent in its legislation, similar to that of Tasmanian and Victorian legislation: “under the communicative model, consent is understood as not merely an internal state of mind or attitude (like willingness or acceptance) but also as permission that is given by one person to another. Therefore, it is something that needs to be communicated (by words or other conduct) by the person giving the consent to the person receiving

¹ Crimes Act 1900 (NSW) s 61I.

² NSW Law Reform Commission, Consultation Paper 21, Consent in Relation to Sexual Offences, 31.

it.”³ Similarly, Rape & Domestic Violence Services Australia (R&DVSA) stated in their Preliminary Submission that under the affirmative model: “consent is characterised in the affirmative rather than the negative – as the positive act of communicating ‘yes’ rather than the mere absence of a communicated ‘no’. The goal of this model is to displace the former legal standard that equated submission with consent, instituting in its place an affirmative model which obligates each party to communicate in order to reach a mutual agreement before engaging in sexual contact”.⁴

Positive Life asserts that in addition to the definition of consent being an affirmative-based model, that the law should also explicitly state that a person can withdraw their consent at any time during sexual activity.

Question 3.2: The meaning of consent:

We agree with the NSWLRC’s assertion that the use of contraception is one of the “essential elements” of consent for many people, due to the role of contraception in preventing sexually transmitted infections and unwanted pregnancies.⁵ Indeed, definitionally, consent to sexual intercourse or activities protected by contraception is not consent to unprotected sexual intercourse.

As such, the law must be reinforced to protect sexual autonomy – the right to participate in a sexual act or not, and the right to determine the nature of the sexual act.⁶ We agree with the Sex Workers Outreach Project (SWOP) statement that: “s 61HA should specifically include as a factor that negates consent the non-consensual removal or deliberate damage of a condom”⁷ or other contraceptive device, as well as when a person lies about using contraception.

Question 4.1: Negation of consent:

A subcategory of fraudulent misrepresentation within the list of circumstances outlining negation of consent relates to a person’s failure to disclose their HIV/AIDS positive status. Most of the Taskforce asserted that: “sexual assault law is an inappropriate vehicle to deal with this type of fraudulent conduct”.⁸ In 2007, the Crimes Act was amended so that the offence of inflicting grievous bodily harm now includes “causing a person to contract a grievous bodily disease”.⁹ Positive Life is of the opinion that HIV transmission should not be criminalised and should be removed from the Crimes Act entirely. Section 79 of the NSW Public Health Act 2010 already requires a person who knows they have HIV to take reasonable precautions against the onward transmission of HIV. Failure to disclose HIV-positive status is not a specific negating circumstance in the consent laws of any Australian state or territory.¹⁰

Positive Life strongly believes that criminalisation and the inclusion of failure to disclose HIV-positive status in consent laws will discourage people from testing for HIV; be a step backwards in the gains the community has made towards acceptance of mutual responsibility for sexual health; and may create confusion around application in circumstances where the person may be unaware of their HIV status.

We also agree with the Australian Queer Students Network in submitting that the law should cover: the threat of “outing” someone as an LGBTQIA+ person, as someone of HIV+ status or as a sex

³ Victoria Department of Justice and Regulation, *Victoria’s New Sexual Offence Laws: An Introduction*, Criminal Law Review (June 2015), 12.

⁴ Rape and Domestic Violence Services Australia, *Preliminary Submission PCO88*, 5.

⁵ NSW Law Reform Commission, *Consultation Paper 21, Consent in Relation to Sexual Offences*, 45.

⁶ R Burgin, *Preliminary Submission PCO72*, 3 (citations omitted).

⁷ Sex Workers Outreach Project, *Preliminary Submission PCO103*, 10.

⁸ NSW Law Reform Commission, *Consultation Paper 21, Consent in Relation to Sexual Offences*, 60.

⁹ Crimes Act 1900 (NSW) s 4 definition of “grievous bodily harm”, inserted by Crimes Amendment Act 2007 (NSW) sch 1 [1].

¹⁰ NSW Law Reform Commission, *Consultation Paper 21, Consent in Relation to Sexual Offences*, 60.

worker; and the threat of limiting access to specific medications or medical assistance (such as hormones for gender affirmation or treatment for HIV).¹¹

We agree with R&DVSA that: Section 61HA should be amended to better capture sexual violence within the context of family and domestic violence. This should be achieved by:

a) Amending s 61HA(6)(b) to state that consent may be vitiated “if the person has sexual intercourse because of fear of harm of any type against the complainant, another person, an animal, or damage to property”; and

b) Inserting a new provision to clarify that in circumstances of family or domestic violence, actual threats or coercive behaviour need not be immediately present in order for s 61HA(6)(b) to apply).¹²

Criminal Justice System Changes:

We believe that adopting an affirmative standard of consent may encourage and help facilitate a broad community shift towards mutual responsibility around giving and attaining consent in relation to sexual activities. Legislative change alone, however, will not effectively change community attitudes towards sex and consent, and must be paired with thorough community education and changes to the criminal justice system.

For the NSW criminal justice system to continue to and improve in supporting people who have experienced sexual violence, Positive Life supports R&DVSA’s assertion that “statutory reform must also be accompanied by more fundamental changes to the criminal justice system. This is because the implementation of consent law is significantly affected by factors beyond the drafting of legislation – most notably: the personal attitudes, knowledge and expertise of legal actors; and the availability of support services to assist people who have experienced sexual violence to access the criminal justice system”.¹³ This is particularly important for those individuals who are part of marginalised or intersectionally oppressed populations within NSW, such as people living with HIV, Aboriginal and/or Torres Strait Islander people, people from culturally and linguistically diverse cultures, people who identify as LGBTQIA+, sex workers, and people who inject drugs, among others.

Positive Life believes that s 61HA of the Crimes Act legislation as it currently stands is not entirely sufficient in providing a robust framework for the implementation of a communicative, or affirmative, model of consent, applicable all the way from policy into practice. Positive Life would like to commend the NSWLRC in their dedicated and thorough research and consultation process with the aim of reforming the Crimes Act to make it as strong as possible for all people living with HIV, people who have experienced sexual violence, and other stakeholders.

If this submission requires additional information or clarification, I can be contacted on [REDACTED]

Yours respectfully,

[REDACTED]

Craig Cooper
Chief Executive Officer

1 February 2019

¹¹ Australian Queer Students Network, Preliminary Submission PC056, 7–8.

¹² Rape and Domestic Violence Services Australia, Preliminary Submission PC088, 7.

¹³ Rape and Domestic Violence Services Australia, Preliminary Submission PC088, 6.