



NSW Law Reform Commission
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To Whom It Concerns

The Australian Queer Students Network (AQSN) is the peak national representative body for queer/LGBTQIA+ tertiary students in Australia. We advocate on a national level in conjunction with the various Queer Collectives and student societies in universities across Australia. Our organisation was founded at the annual Queer Collaborations (established 1991) conference of 2011.

AQSN welcomes the draft proposals of NSW Law Reform Commission on 'Consent in relation to sexual offences', dated October 2019.

We welcome the inclusion of gender neutral provisions at:

- Proposal 9.1 (regarding surgically constructed parts of the body),
- Proposal 9.2 (the gender neutral terminology used regarding genitalia, and the mutuality of sexual acts), and
- Proposal 9.4 (gender neutral language, and reference to 'breasts, whether or not the breasts are sexually developed')

We support the restructure to include a single list of negating circumstances at s61HJ in Chapter 6.

However we express concerns regarding the following draft proposals:

Proposal 6.9

Regarding Proposal 6.9 we wish to express concerns regarding how 'fraudulently induced' may be interpreted. While we welcome the term as it covers the situation where a person consents contingent on the belief that they are married to the other person, or contingent on the belief that they will be paid, we are concerned that other situations may be inadvertently covered.

For instance, we are extremely concerned that it may be open to the jury to find that a person consented to a particular sexual act contingent on their belief that the other person was cisgender (i.e. not transgender), and that failure to communicate their status as transgender somehow 'fraudulently induced' them.

To be clear, AQSN asserts that being transgender or intersex, or having genitals that are different to what a sexual partner assumes is not a basis for claiming that sex was non-consensual.

Heterosexual men, being sexually attracted to (or flirting with) transgender women, who then find out or realize that the woman is transgender, is a recognized and repeated motivator for men's subsequent murder of transgender women. There are high rates of murder of trans and gender diverse people by (typically) men who had prior had been sexually attracted to the victim.

Of course, withdrawal of consent on the basis that a person's body is different or functions differently to what one expects, is a valid withdrawal of consent. If a person agrees to vaginal-penile penetrative sex, gets naked with their partner and realizes the configuration of genitals is different to what they expect, and no longer wishes to have sex, than there can clearly be a withdrawal of consent.

However, agreeing to, as an example, penile-oral sex with a woman (who has her clothes on), and then later finding out that that woman has a penis or a surgically constructed vagina, (which was not a part of the oral sex), we, as the [Australian Queer Students Network](#) contend does not, and should not, be considered sex that was 'fraudulently induced'.

That is because consent is to a particular sexual act with a particular person, and that consent to a particular sexual act should not be found to be invalid on the basis of someone's *status* as transgender.

This may impact other status' such as if the person works as a sex worker, or is of a particular background (many of which may be recognized protected grounds in the *Anti-Discrimination Act 1977 NSW*) etc.

For the protection of transgender people, it may be that adding a note that this would not apply to someone's *status* as a transgender or intersex person would be sufficient.

Proposal 5.6

We welcome the consideration of SWOP's submissions regarding 'stealthing' in the proposal to define consent to sexual activity performed in a particular manner. However, we express concern to the proposed Note regarding the use of a device that prevents STIs.

While we agree that consent to a sexual activity contingent on the use of PrEP or a condom etc. should be a part of the definition of consent, we are concerned that specifically highlighting the potential of BBV or STI transmission through sex will further stigma. We are particular concerned that evidence of BBV or STI transmission (or not) may be used as the basis for pursuing a sexual assault matter through the police and court system.

We do not support the criminalization of transmission of BBVs or STIs specifically and separately to other forms of harm.

Criminalization of STIs and BBVs increases stigma and anxiety around STIs and BBVs, making people reluctant to address their sexual health concerns, and results in poorer public health outcomes.

We suggest that instead of saying “a device that prevents transmission of sexually transmitted infections” to instead be “a condom”.

This will still keep stealthing in the provision, but move the focus away from further stigmatizing people living with BBVs and STIs.

Proposal 5.2

We note that Proposal 5.2 regarding withdrawal of consent by a person who withdraws consent during sex or after the initial communication of consent. This creates an onus on that person to communicate (by words or conduct) the non-consent to some degree. There is insufficient guidance as to, for instance, what degree or extent that withdrawal must be communicated. It may be difficult for poorly or passively communicated withdrawal of consent to be ‘known’ to the degree required in Proposal 7.1 - s61HK(1)(c).

Secondly we suggest it may be helpful to clarify (by way of a Note) the relationship between this provision and Proposal 5.4 (a particular sexual activity). For instance if a person verbally consented to one act (e.g. oral) and then did not communicate consent to a different act (e.g. penetration).

Proposal 8.3

In the jury directions at Proposal 8.3 – s292(10), concerning ‘behavior and appearance of complainant’, we refer to our initial submissions on the stereotypes and hateful motivators for sexual assault against the LGBTQIA+ community. We express concern that stereotypes etc. within the jury needs to be able to be addressed via jury directions.

AQSN’s initial submissions referred to assumptions of consent on the basis of someone’s perceived or actual sexuality (e.g. as a bisexual or asexual or as a sex worker). We also expressed concern about the high rates of sexual assault in the LGBTQIA+ community, and this being based on both/either perceived sexual availability of transgender people or people of a particular sexual orientation (and other stereotypes) and/or hateful rhetoric , or sexual assault as a hate crime targeted towards the LGBTQIA+ community, in particular transgender people and bisexual people.

Therefore, we suggest that specific mention that perceived or actual status as a sex worker, transgender or gender diverse person, a person’s sexuality and sexual history are not reliable indicators that a person consents to a sexual activity, should be in the explicitly in the jury directions

We would like to thanks the Commission for the opportunity to comment on the draft proposals, and for listening to us regarding some of the above matters so far.

If you would like to discuss these submissions further please contact AQSN

Kind regards,

Niamh Joyce,

On behalf of AQSN,

Andie Moore, AQSN.