

18 November 2019

New South Wales Law Reform Commission
GPO Box 31
Sydney NSW 2001



Sent by email: nsw-lrc@justice.nsw.gov.au

To Whom It Concerns

Re: Consent in Relation to Sexual Offences

ACON thanks you for the opportunity to comment on the Draft Proposals regarding consent in relation to sexual offences. The opportunity to provide both written feedback and speak at a consultation roundtable in the development of these draft proposals was of great importance to our communities. The proposals seem to reflect that some of the concerns of our communities have been understood. Overall, we feel that more could be done to ensure that laws about consent reflect the needs of our communities.

We were encouraged to see the changes made to the definition of sexual intercourse including more inclusive sections about annullingus.

Some concern exists around the terminology used in relation to surgically constructed body parts. This language implies that body parts or physical characteristics that a trans or gender diverse individual has acquired during the process of affirming their gender are substantially different, and therefore less valid, to that of cisgender individuals.

We feel that the move to an affirmative model of consent is positive, as long as it remains contextualised within the idea that consent, or withdrawal of consent can be expressed by "words or conduct". Clarity regarding the misconceptions around passivity and consent is also important in community understanding of the law.

Our earlier submission noted the importance of affirmed consent being an ongoing process during sex, especially if new sexual activities are introduced during the time people are engaging in sex. We therefore commend the recommendation to clarify in the law that a person who consents to a particular sexual activity does not consent to other activities. Even in highly sexualised environments, it is our belief it is incumbent on people to seek consent through verbal or nonverbal means to ensure that people are not threatened into sexual situations that they are not comfortable with.

The proposed reforms are in line with several of our initial recommendations, and we are pleased to see the Australian Law Reform Commission considering the importance of consent, negotiation of consent and withdrawal of consent in a manner which is fair and reflects reality.

ACON supports the idea that sex performed without a device used to prevent a sexually transmitted disease when the agreement was made to use one negates consent. This issue, commonly known as 'stealthing' has received some community attention amongst gay and bisexual men and other communities ACON works with and for.

We also appreciate the consideration that willful and deceitful attempts to engage in sex outside negotiated agreements negates consent. The complex recommendations around this issue are welcome. We would however caution that these laws must not criminalise people living with HIV. Applications of such laws must consider the fact that oftentimes disclosure of HIV status can be difficult if not impossible in order to remain safe from violence and

SYDNEY

414 Elizabeth Street,
Surry Hills NSW 2010
+61 2 9206 2000
acon@acon.org.au

NORTHERN RIVERS

27 Uralba St,
Lismore NSW 2480
+61 2 6622 1555
northernrivers@acon.org.au

HUNTER

129 Maitland Rd,
Islington NSW 2296
+61 2 4962 7700
hunter@acon.org.au

**REGIONAL OUTREACH,
SOUTHERN & FAR WEST**

+61 2 9206 2114
regionalloutreach@acon.org.au

ACON.ORG.AU

ABN 38 136 883 915
Authority to Fundraise
CFN/21473

discrimination. The legislation must also consider the technical applications of modern prevention methods in relation to HIV and the difference between statements such as "HIV-negative" and "unable to transmit HIV" (or variations thereof) in determining if a deceitful statement has been made.

A focus on capacity to consent is important in such legislation. Levels of intoxication vary greatly, and perceptions of these can differ from person to person. This issue is of particular importance to individuals who participate in 'chemsex' environments, or engage in sex under the effects of alcohol or other drugs. In these situations, it is again important not to stigmatise or stereotype people who engage in the use of drugs and alcohol with sex. An affirmed consent model is especially useful in these contexts, as seeking and affirmation of consent can be indicative of capacity.

Often sex occurs in environments in which affirmed consent occurs in novel ways, such as sex on premises venues, beats and public spaces. In these circumstances, we believe it is the prerogative of all involved in sexual activity to seek and affirm consent. This seeking and affirmation has been occurring in these spaces as long as sex has been occurring there, and it is our belief that the application of affirmative consent in these spaces will not be problematic, provided arbiters and juries are able to leave value judgments about the type and location of sex being had aside.

ACON wishes to express some concern around proposed section 61HJ(1)(f), especially in relation to a person participating in the sexual activity because the person is mistaken about the identity of the other person. We strongly support the idea that this section not relate to attributes or characteristics of the person. It is our assertion that the gender marker registered on an individual's first birth certificate is an attribute or characteristic rather than an identity. The gender identity of an individual at the time of sexual activity is their gender, regardless of medical or legal affirmation processes that may or may not have occurred.

Under no circumstance should a person be required or compelled to reveal their gender history or gender experience in order to ensure consent.

ACON does believe that more could have been done in the space of jury directions, especially in being explicit on biases related to gender roles and sexual assault, and dispelling rape myths. In situations where people are sexually assaulted by members of the same gender, significant barriers exist in accessing fair legal recourse. We believe access would be greatly improved if people felt that a jury would be instructed to eliminate from their mind biases that exist around sexual assault and gender.

Once again, we commend you on a considered response to the reform process with strong recommendations. We would encourage you to carefully consider the needs of people who engage in sex outside the perceived norms and how potential criminalisation of their sex lives has extremely negative consequences. We are willing to further discuss our initial submission or this feedback with you at your convenience. Please feel free to contact Brandon Bear, Manager of Policy, Strategy and Research on [REDACTED] or at [REDACTED] to arrange a discussion.

Thank you again for the opportunity to contribute to this important work and highlight the voice of our communities.

Kind regards



Nic Parkhill
Chief Executive Officer