

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 Consent in Relation to Sexual Offences Draft Proposals

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) consent in relation to sexual offences draft proposals.

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 May 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). Positive Life responded to the NSWLRC Consultation Paper in February 2019 and attended the roundtable consultation held by NSWLRC on 31 May 2019.

At Positive Life, we believe that s 61HA of the Crimes Act has not effectively translated to achieved policy outcomes and objectives of improving effectiveness of the NSW law in responding to occurrences of sexual assault. The NSWLRC review of consent in relation to sexual offences is an apt opportunity to reform s 61HA, and the draft proposals provide a positive step towards this aim, with many vast improvements on the current law, such as: that a person does not consent to sexual activity if they do not do or say anything to communicate consent; and clarifying that in circumstances of family or domestic violence, actual threats or coercive behaviour need not be immediately present, for example. We note some limitations to the proposals, which are discussed below.

The meaning of “consent”:

Positive Life has advocated for changing the definition of consent in the legislation to clearly endorse a positive or communicative standard; remove the undue focus on the conduct of the complainant, rather than the accused; and remove the possibility of being influenced by “rape myths” in its application.

We believe that the proposed section 61HI (1) should more explicitly include the affirmative and communicative aspects in the model of consent, 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 it.”¹ As such, we recommend that the wording include the positive act of communicating ‘yes’ and coming to a mutual agreement through words or other actions. An example of this amended wording could be: “(1) A person consents to a sexual activity if, at the time of sexual activity, the person freely and voluntarily agrees, **by words or conduct**, to the sexual activity.”

Positive Life agrees with the additions to the definition of consent in section 61HI (2) that a person can withdraw their consent at any time during sexual activity.

We recommend amendment to section 61HI (6) where the note specifically proposes to exemplify sexually transmitted infections (STIs). We maintain agreement 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.² Indeed, definitionally, consent to sexual intercourse or activities protected by contraception is not consent to unprotected sexual intercourse.

We agree that 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.³ However, we assert that the wording of the Note included, if any, should refrain from highlighting STIs as the example. Rather, we recommend wording along the lines of that suggested by Sex Workers Outreach Project (SWOP) that: a factor that negates consent is the non-consensual removal or deliberate damage of a condom⁴ or other contraceptive device, as well as when a person explicitly lies about using contraception (including alternative protection methods such as having an undetectable viral load, Pre-Exposure Prophylaxis (PrEP) etc.). We believe it is particularly important to highlight “stealthing” (non-consensual removal or deliberate damage of a condom), as it is a currently under-recognised form of violence and especially of concern for sex workers.

Negation of consent:

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. As such, we hope that section 61HR (6) (d) “A person who consents to a sexual activity with or from another person under any of the following mistaken beliefs does not consent to the sexual activity – any other mistaken belief about the nature of the activity induced by fraudulent means”, will require a positive action (e.g. a deliberate lie) rather than just an omission to disclose HIV-positive status. We advocate for the law to be interpreted in consideration of non-disclosure of HIV in the context of reasonable precautions against the onward transmission of HIV (such as treatment as prevention rendering an undetectable viral load, and PrEP).

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”.⁵ Positive Life is of the opinion that HIV transmission should not be criminalised and should be removed from the Crimes Act entirely and dealt with under the Public Health Act. We support the exclusion of any mention of HIV/AIDS within the list of circumstances outlining negation of consent/fraudulent misrepresentation in the proposed section 61HE. Section 79 of the NSW Public Health Act 2010 already requires a person who knows

¹ Victoria Department of Justice and Regulation, *Victoria’s New Sexual Offence Laws: An Introduction*, Criminal Law Review (June 2015), 12.

² NSW Law Reform Commission, *Consultation Paper 21, Consent in Relation to Sexual Offences*, 45.

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

⁴ Sex Workers Outreach Project, *Preliminary Submission PCO103*, 10.

⁵ Crimes Act 1900 (NSW) s 4 definition of “grievous bodily harm”, inserted by Crimes Amendment Act 2007 (NSW) sch 1 [1].

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.⁶

We suggest there be detail added in section 292 (6) relating to circumstances in which non-consensual sexual activity occurs, where it is explicitly stated that non-consensual sexual activity can occur “between people who are or have been in a romantic or sexual relationship”, to encompass domestically violent relationships as well as LGBTQIA+ relationships.

We also suggest there be detail added in section 292 (10) relating to behaviour and appearance of complainant, where a person’s status as LGBTQIA+ or as a sex worker do not indicate that a person consents to sexual activity.

We advocated in our previous submission, along with the Australian Queer Students Network that the law should cover: the threat of “outing” someone as an LGBTQIA+ person, as someone of HIV+ status or as a sex worker; and the threat of limiting access to specific medications or medical assistance (such as hormones for gender affirmation or treatment for HIV).⁷ We perceive this to have been addressed in section 61HJ (1) (e) (ii) “a person does not consent to sexual activity if – the person participates in the sexual activity – because of coercion, blackmail or intimidation occurring at any time” under the concepts of coercion and blackmail, however the addition of specific jury directions relating to these circumstances are recommended.

Summary

Positive Life believes that the proposed legislation by the NSWLRC provides a more robust framework for the implementation of a communicative and affirmative model of consent, though there are areas for further improvement. 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] or at [REDACTED]

Yours respectfully,

[REDACTED]

*Jane Costello
Chief Executive Officer*

18 November 2019

⁶ NSW Law Reform Commission, Consultation Paper 21, Consent in Relation to Sexual Offences, 60.

⁷ Australian Queer Students Network, Preliminary Submission PCO56, 7–8.