

26 November 2019

Our Ref: HK

New South Wales Law Reform Commission

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NSW 2001

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Dear New South Wales Law Reform Commission,

**Re: Consent in Relation to Sexual Offences: Draft Proposals**

Thank you for the opportunity to comment on your Draft Proposals for consent law reform in relation to sexual offences.

The wording and structure of the law has an important effect on the culture of police and courts, which affects how survivors experience the criminal legal system. We welcome the shift towards a communicative consent model and broadly support reform to ensure sexual assault provisions more closely reflect the experiences of sexual assault survivors.

While we do not address the entirety of the proposals in this submission, we do raise some concerns about the scope of some provisions and their implications in practice for trans and gender diverse people and people with HIV. We discuss some cautions and make recommendations for drafting.

**About the ICLC**

The Inner City Legal Centre is a non profit community legal centre located in Kings Cross NSW. We have been providing free legal services to residents in the inner city, surrounding areas, Northern Beaches and LGBTIQ communities since 1980. We run a state-wide Sex Worker Legal Service and a Trans and Gender Diverse Legal Service.

**Communicative consent**

We strongly support the affirmative communication model as the basis for reform, which approaches sex as a mutual interaction. We support the introduction of new interpretive principles that clearly state that every person has a fundamental right to choose whether or not to participate, that a person's consent should not be presumed, and that sexual activity should involve ongoing and mutual communication, decision-making, and free and voluntary consent. We support new provisions to clarify

that a person's lack of verbal resistance (not just physical resistance) does not equal consent, and that consent can be withdrawn at any time by words or conduct.

### **Clarifying the meaning of consent**

We appreciate the introduction of explicit provisions that clarify the meaning of consent. In particular, the clarification that consent to one particular sexual activity does not mean there is consent to other sexual activity; that consent to sexual activity with one person does not mean consent to sexual activity with another person; and that consent at one time does not mean consent at another time. We believe these reflect consent as an ongoing, real-time, iterative process and require communication and checking-in between the parties.

We also recommend a further addition to this section to clarify that payment (in money or in kind) for sex does not equal consent. This is an important and necessary way to recognise that sex workers are not in a perpetual state of consent by virtue of their occupation and can be sexually assaulted in the workplace.

We further note that the criminal law lags behind community standards in its understanding of what kind of practices a person can consent to. People who practice BDSM (bondage/discipline, dominance/submission, sadism/masochism) do so at the risk that they can be prosecuted under the law for actual or grievous bodily harm. We believe that a review of consent should recognise that people can legally participate in BDSM practices in sexual contexts within a framework of communicative consent.

### **Circumstances of non-consent**

We support the move to a single list of circumstances of non-consent, in particular the inclusion of circumstances where a person 'freezes' and where a person participates in situations of family or intimate partner violence.

We support the shift away from consideration of whether a complainant is 'substantially intoxicated'. We note that in communities that practice 'chemsex' or have cultures of 'party and play', it is possible to use recreational drugs whilst still practicing affirmative communication, and the consideration should be whether a person is so affected by alcohol or another drug as to be incapable of consenting.

In terms of the provisions relating to mistake, we understand the rationale for broadening out this provision to cover identity, nature of activity and purpose of activity. However we are also concerned that police may misuse and misunderstand this provision to charge trans and gender diverse individuals or people with HIV. We explain these concerns and make suggestions to address this below.

In terms of the provision relating to participation induced by fraud, we note that it is important that this is available to sex workers whose clients have made a dishonest and deceptive misrepresentation of payment. However, we are concerned that this provision may be misused to charge people with HIV who have not disclosed their status or have given inaccurate information about their serostatus. We explain these concerns and make suggestions to address this below.

## **Sex workers**

There remain systemic barriers to initiating and prosecuting sexual assault for sex workers, including legal, cultural and social myths about the 'rapeability' of sex workers and sex workers capacities to consent. A distinct history of judicial commentary relating to the psychological impact of sexual assault upon sex workers remains steeped in sex workers' collective consciousness. It is important that the law sends a clear signal that sex workers can experience sexual assault at work.

Recent cases in other jurisdictions have used fraud provisions in criminal law to convict clients who have fraudulently induced sex workers to participate in a session by pretending to pay them. We have seen sex workers at the ICLC whose clients have deliberately reversed payments following their session or have provided falsified proof of payment in advance of the session. While there are some avenues to recover such debts, the availability of criminal law as a means of redress recognises the serious psychological impact for sex workers of this kind of behaviour. This is particularly so given that stigma and lack of resources can be significant barriers to sex workers accessing civil remedies.

In addition to the issue of non-payment, another serious problem for sex workers is police and council investigators who dishonestly and deceptively misrepresent themselves by posing as clients, in order to then entrap sex workers or collect evidence for their compliance investigations. Peer organisations, SWOP (the Sex Workers Outreach Project) and Scarlet Alliance, Australian Sex Workers Association, describe this misrepresentation as vitiating consent for sex workers. We believe that these kinds of activities should be able to be prosecuted under the fraud provision in addition to the provision related to mistake of identity.

We further support the clarification that practices of 'stealthing' should be captured by the criminal law, where people have mutually negotiated a risk reduction strategy and one of those people has unilaterally removed the barrier unbeknownst to the other. Sex workers have reported clients stealthily removing condoms but have had insufficient means of redress.

## **Trans and Gender Diverse People**

We appreciate the need to move to gender-neutral language in the Act that reflects sex, gender and sexuality diversity. This is an important step in ensuring that a variety of sexual acts and practices are captured by the provisions. While we appreciate that the proposal seeks to be more inclusive, we note that making a distinction between 'surgically constructed' and other genitals suggests that 'surgically constructed' genitals are different, and is not consistent with trans and gender diverse people's language around body parts.

It is important for the law to recognise that trans and gender diverse people can be victims of sexual assault. Research now demonstrates that extremely high proportions of trans and gender diverse people have experienced sexual coercion and violence. The criminal law has been slow to recognise the situations in which LGBTIQ people face risk of violence, particularly at the time of sexual activity, with 'homosexual advance defence' only removed in NSW in 2014.

Harmful cultural scripts about trans and gender diverse people misrepresenting their gender (pictured in the cisgender heteronormative cultural imaginary and media narratives as ‘deception’) have been used to excuse violent and sometimes lethal responses to non-violent sexual advances. We are concerned that the provisions of mistake of identity and fraud, while important, are susceptible to misuse by police (who receive insufficient training in gender diversity) and potentially by former sexual partners who are struggling with their own transphobia, to criminalise trans and gender diverse people.

It is crucial that any updates to this legislation (in both the substantive provisions and the jury directions) explicitly recognise that trans and gender diverse people and people with variations in their sex characteristics, through their gender expression, are not making mistaken, incorrect or dishonest representations about their gender history or experience.<sup>1</sup> It is imperative that the law recognises that a person’s gender experience and history is not a misrepresentation, regardless of whether their gender has been legally or medically affirmed. The provisions on fraud and mistaken identity should be redrafted to clarify that under no circumstance should a person be compelled by law to disclose their sex or gender history or experience in order to consent to sex.

### **People with HIV**

A similar concern arises for people living with HIV (PLHIV) in terms of the application of both the fraud provision and the provision on mistake relating to identity. We want to ensure that a person cannot charge a PLHIV because of mistake or misrepresentation about their serostatus (positive or negative). Serostatus should not be considered an identity.

Despite long-term consensus in public health space that HIV should be treated as a health issue, not a criminal issue, PLHIV remain vulnerable under criminal law. In some states PLHIV have been prosecuted (and imprisoned) for being a sex worker whilst HIV positive despite no risk of transmission, and in others, PLHIV have been prosecuted for infliction of a grievous bodily disease, despite substantial biomedical developments that mean HIV can now be managed and PLHIV can live long and healthy lives. In NSW, it remains possible that a person could be charged with grievous bodily harm for HIV transmission. We believe that a corollary consequence of our proposed amendment would be to amend s 4 of the *Crimes Act 1900* to expressly state that HIV does not constitute a ‘grievous bodily disease.’

Consent provisions under the NSW Crimes Act 1900 must not require people with HIV to disclose their status before sex. The requirement to disclose HIV status was removed from s79 of the *Public Health Act 2010* in 2017, with broad support from community health organisations including the HIV/AIDS Legal Centre, National Association of People with HIV Australia and ACON, because of the serious risks of stigma, discrimination and violence facing PLHIV upon disclosure.

If the new consent provisions were to require PLHIV to disclose their status this would be out of step with recent reforms to the *Public Health Act*. New developments in biomedical prevention mean that PLHIV can engage in safer sex using a range of risk reduction strategies, including by maintaining undetectable viral load. Research consensus now indicates that “undetectable = untransmissible”. Recognising that safer sex is considered a matter of shared and mutual responsibility, and that public health approaches seek to encourage testing, treatment and knowing one’s status, HIV should not be dealt with under criminal law.

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<sup>1</sup> This includes how a person has been assigned a sex at birth.

## Jury Directions

We recognise the importance of appropriate directions to juries in sexual assault trials and see value in explicit directions that address common myths and stereotypes about the behaviour and responses of sexual assault survivors.

We understand that some of the assumptions described above may be captured in the requirement for juries to examine their thoughts about the circumstances in which non-consensual activity can occur. However we believe there should be more specific directions available that require jury members to examine their particular assumptions about sex work, sexuality, gender and STIs/HIV in order to adequately address the unique cultural and social stigmas that act as barriers to justice.

Below we suggest some additional directions in addition to the proposed directions.

## Recommendations

- The meaning of consent should be updated with the following provisions:
  - 'A person who accepts payment or trade for sexual activity is not, only by reason of that fact, to be taken to consent to that activity.'
- In the list of circumstances in which there is no consent, the provision on fraud should go beyond misrepresentation and expressly include both 'deception' and 'dishonesty' as elements. This is consistent with fraud offences elsewhere in the *Crimes Act 1900*.
- In the list of circumstances in which there is no consent, the provision on fraud should contain the following qualifying statement:
  - 'For the purposes of this section, a person is not required to disclose their STI/HIV status before sex.'
  - 'For the purposes of this section, a person is not required to disclose their sex or gender identity, history or experience before sex.'
- In the list of circumstances in which there is no consent, the provision on mistake should qualify:
  - 'For the purposes of this section, a person cannot be mistaken about a person's gender identity, sex characteristics or sexual health status.'
- In the jury directions on specific misconceptions, insert the following provisions:
  - In s 6 regarding circumstances in which non-consensual sexual activity occurs, include '(c) in circumstances in which sexual services are transactional.'
  - Draft a new section with directions on Gender and Sexuality that provide: '(a) people of all gender identities, histories and experiences, people of all variations in sex characteristics, and people of all sexualities experience sexual assault, and (b) a person's representations about their gender identity, expression, history and experience are their own, regardless of whether they have been legally or medically affirmed.'
  - Draft a new section with directions on Sexually Transmissible Infections that provides: '(a) safer sex is a mutual and shared responsibility, and (b) new biomedical prevention technologies have changed the meanings of what constitutes safer sex.'
  - Draft a new section with directions on Sex Work that provide: '(a) sex workers can experience sexual assault, both within and outside the workplace, and (b) the fact that a person has accepted payment or trade for sexual activity is not, only by reason of that fact, to be taken as consent to that activity.'

We recommend that the NSW Law Reform Commission consult directly with peer-led sex worker and HIV organisations in drafting the wording of these sections.

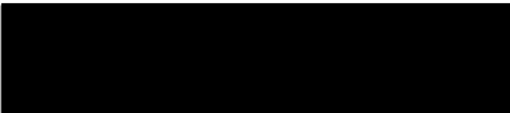
We submit that these clarifications should be built into the act rather than appearing as examples or notes.

Thank you for the opportunity to comment on the Law Reform Commission's Draft Proposals. Please do not hesitate to contact me on (02) 9332 1966 if you would like to discuss further.

Yours sincerely,

**INNER CITY LEGAL CENTRE**

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Hilary Kincaid  
Principal Solicitor