

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION INQUIRY INTO JUSTICE RESPONSES TO SEXUAL VIOLENCE

May 2024





About ACON

ACON is NSW's leading health organisation specialising in community health, inclusion and HIV responses for people of diverse sexualities and genders. Established in 1985, ACON works to create opportunities for people in our communities to live their healthiest lives.

We are a fiercely proud community organisation, unique in our connection to our community and in our role as an authentic and respected voice.

Members of Australia's sexuality and gender diverse communities experience health disparities when compared to health and wellbeing outcomes experienced by the total population.

We recognise that members of our communities share their sexual and gender identity with other identities and experiences and work to ensure that these are reflected in our work. These can include people who are Aboriginal and Torres Strait Islander; people from culturally, linguistically and ethnically diverse, and migrant and refugee backgrounds; people who use drugs; mature aged people; young adults; and people with disability.

Contact

Nicolas Parkhill

Chief Executive Officer

(T) – (02) 9206 2122

(E) – nparkhill@acon.org.au

ACON acknowledges the Traditional Owners of the lands on which we work. We pay respect to Aboriginal Elders past, present and emerging.

Introduction

ACON welcomes the opportunity to provide a submission to the Australian Law Reform Commission Inquiry into Justice Responses to Sexual Violence.

ACON is NSW's leading health organisation specialising in community health, inclusion, and HIV responses for people of diverse sexualities and genders. We coordinate several national programs, including projects targeting victim/survivors and perpetrators of sexual, domestic and family violence (SDFV).

ACON has a long history of engagement with NSW Police, and a long history of advocating for and supporting victim/survivors of sexual violence. Our organisation regularly meets with NSW police regarding issues affecting our communities, and we have given evidence in multiple inquiries related to police responses to LGBTQ+ communities, and on the issue of SDFV.

For this submission, we seek not to comment in great detail on the specificities of laws and procedures about evidence and court processes but rather to speak more broadly to the impacts of SDFV on LGBTQ+ people and their experiences of sexual violence disclosure, support-seeking and navigating the justice system. We will also use the opportunity to discuss the impact of affirmative consent laws for people living with HIV in NSW, and definitional issues in NSW legislation.

LGBTQ People's Experiences of Sexual Violence and the Justice System

ACON recently released a research summary report on LGBTQ+ People's Experiences and Perceptions of Sexual Violence.¹ This report is based on the findings of two NSW-based surveys on experiences with, and perceptions of, sexual violence within the LGBTQ+ community. This submission draws on the findings of this report, as well as other relevant literature related to justice responses to sexual violence for people of diverse sexualities and genders.

While SDFV disproportionately affects women, there is a perception that sexual violence is only experienced by cisgender, heterosexual women, with reporting pathways and justice system support services primarily targeted towards this demographic. While it is understandable that these services have cisgender women in mind, it is critical that this is not to the exclusion of others who experience sexual violence, including those within LGBTQ+ communities.

The NSW LGBTQ+ community have very low rates of reporting experiences of sexual violence to NSW Police. In ACON's survey of experiences of sexual violence within the LGBTQ+ community, 86% of all respondents did not report their experience of sexual violence to police. For transgender women, the rate of non-reporting to police was 100%. Alongside these low rates of reporting, 52% of participants said their experience of sexual violence had contributed to thoughts of self-harm, and 43% said it had contributed to thoughts of suicide.¹

Reasons for not reporting sexual violence to police included a lack of trust in police, fear they would not be believed or that they would be blamed for what happened to them, fear of gender-based and/or sexuality-based discrimination and judgement from police, and a belief that nothing would come of reporting or that no action would be taken in response to reporting.¹

Of the 78% of respondents who had told someone about their experience of sexual violence, they were most likely to have first told a friend, with disclosure to a counsellor or psychologist being next most likely, followed by a partner, family member, or doctor. Only 11% of respondents had first disclosed their experience of sexual violence to a member of police.

This study shows that, for LGBTQ+ communities, the perception of police responses heavily influences whether LGBTQ+ people will engage with the justice system at all. This directly determines whether victim/survivors are able to receive support and whether or not perpetrators of sexual violence can be held accountable.

Within the current structure, police act as ‘gatekeepers’ in the process of accessing the justice system, and this is particularly true in cases of sexual violence, where reported offences are rarely investigated, and charges rarely laid.^{2,3}

Considering the historically complex relationship between LGBTQ+ communities and the NSW Police, and particularly in light of the recent outcome of the Special Commission of Inquiry into LGBTIQ Hate Crimes, this structure of gatekeeping by police within the justice system acts as a significant barrier in accessing justice and holding perpetrators of sexual violence accountable.^{4,5}

Perpetrator accountability can only be achieved when the systems in place to respond to reports of sexual violence are also made accountable. This would require mechanisms for greater oversight over police, including a review of the unacceptably low rates of investigation and high attrition rates of reported sexual offence cases across Australia.^{6,7,8}

Accountability measures to significantly improve data reporting should include the reporting of the complainant’s gender and sexuality, the reason for complaints being withdrawn by victim/survivors and the reasoning for a case being marked as ‘unfounded’ or as containing ‘insufficient evidence’ and consequently being closed by police. Routine collection and reporting of this information would dramatically improve oversight and accountability within the justice system.

These measures would also enable the justice system to better respond to the many and varied groups of people affected by sexual violence, including LGBTQ+ people. It would enable our communities to present meaningful evidence of need and also the scale of the problem for LGBTQ+ people.⁹ These improvements would also require better understanding of, and stronger legal frameworks around, the issue of consent and the role of coercive control in cases of sexual violence.^{10,11,12,13}

There are inherent challenges in the process of reporting sexual violence to police. The nature of questioning and the need to explain the event in detail requires the person to relive the experience, which is both triggering and retraumatising. Similarly, even when LGBTQ+ people are well supported through the reporting process by police, court processes and procedures can be incredibly traumatising for victim/survivors. While the Australian legal system necessarily has a focus on protecting the rights of defendants, it’s important that there is an equivalent focus on protecting the human rights of victims.

These challenges, alongside universally low rates of reporting of sexual violence to police, have led to discussion and development of alternative reporting pathways for victim/survivors of sexual assault. Anonymous and confidential alternative reporting options allow the victim/survivor to give their version of events, and to work through their responses to what are often difficult and triggering questions, in writing, in their own time.

Expanding sexual violence support services, and linking community-led organisations to these, and other legal support services, would also improve experiences for LGBTQ+ people when engaging with police reporting, and the justice system more broadly. ACON's Sexual Violence Consult Service is an effective example of this form of service linkage. The expansion of these partnerships alongside increased promotion of alternative reporting pathways would increase the likelihood that a victim/survivor will be linked into the support services that best suit their needs, especially if alternative reporting pathways collect information on a person's sexuality and gender.

While such reporting cannot constitute an official police statement, it can support evidence gathering for police, connect victim/survivors to appropriate support services, and help improve data collection practices.¹⁴ Currently NSW uses the Sexual Assault Reporting Option (SARO) system of alternative reporting, however the questions in this system have been described as difficult to complete, and in need of review.¹⁵

It is equally important that alternative reporting pathways, and all reforms across the justice system which are designed to improve justice responses to sexual violence, be developed using a trauma informed approach. Reporting systems underscored by a trauma-informed approach are better able to accommodate the complex responses to questioning and psychological distress victim/survivors experience when giving their account of events.

ACON also supports investment in alternatives to, or transformative approaches to, justice. There are many reasons LGBTQ+ people and other victim/survivors of sexual violence may choose not to report their experience. As explored above, many people are concerned that they will be traumatised through the process or that there is 'no point' to proceeding, and for these people, it is important that the legal system is improved. However, for some, even if the justice system was 'perfect', they would not choose a carceral approach. LGBTQ+ people may wish for the person who used sexual violence against them to seek help, or to change their behaviour, but they do not want the person to be criminalised. Victim survivors of sexual violence should have choice and options about the systems they engage in.

Resourcing the expansion of education initiatives that take a trauma informed approach to sensitivity training for police, as well as judges and legal practitioners, would also improve understanding of the fear the community has of reporting sexual violence offences to police, and engaging with the legal system. Training must include up-to-date research on the challenges victim/survivors face when they are required to recall traumatic events – a task made particularly difficult for the LGBTQ+ community, who already have a history of traumatic interactions with NSW police, as outlined in the Special Commission of Inquiry into LGBTIQ Hate Crimes Report.¹⁶

Consent Laws and People Living with HIV

In NSW, the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* was an important step in updating NSW consent laws by introducing affirmative consent provisions, whereby a person must take active steps to establish that their sexual partner is consenting.

Certain provisions introduced in the Act will also have an impact on the lives of people living with HIV. If a person living with HIV lies to a sexual partner about their HIV status, this may mean that the sex is no longer consensual.

There are concerns that, as part of the new affirmative consent legislation, section 61HJ(k) of the *Crimes Act 1900* (NSW) may needlessly criminalise people who lie about their HIV status. As this law is currently untested with regard to HIV, we are unaware what impact, if any, having an undetectable viral load, being on PrEP or using condoms, will have if someone lies about their HIV status to their sexual partner.

This law stigmatises people living with HIV and has an inhibiting effect on testing, as it incentivises people to remain unaware of their status. This is antithetical to our public health goals of ending HIV, because if a person with HIV is undiagnosed, they are unable to access lifesaving treatment, and may unwittingly transmit the virus to others. The National HIV Taskforce report warns against legislation such as this, that may be seen to criminalise HIV status.¹⁷

Consent Laws and Definitions of Sexual Acts

ACON recommends that reviews of sexual assault and consent laws include a review of the language and definitions in the law to ensure that they are inclusive and applicable for people of all genders, and all sexual acts, and that laws do not unnecessarily gender body parts.

For example, the NSW *Crimes Act 1900* currently defines sexual intercourse as including ‘the application of the mouth or tongue to the female genitalia’ but should be expanded to ‘the application of the mouth or tongue to genitalia or anus’. Any reference to breasts in legislation should also apply to the breasts of any person.

References

- ¹ Layard, E., Parker, J., Cook, T., Murray, J., Asquith, N., Fileborn, B., Mason, R., Barnes, A., Dwyer, A., & Mortimer, S. (2022). LGBTQ+ People's Experiences and Perceptions of Sexual Violence. ACON Research Summary Report.
- ² Burgin, R., & Tassone, J. (2024). Beyond reasonable doubt? Understanding police attrition of reported sexual offences in the ACT. <https://researchbank.swinburne.edu.au/file/3faae18e-b608-4f7b-9f14-ed70aa90ab79/1/2024-burgin-beyond-reasonable-doubt.pdf>
- ³ Ting, I., Scott, N., & Palmer, A. (2020). Rough justice: How police are failing survivors of sexual assault. ABC News. <https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364>
- ⁴ NSW Government. (2023). Special Commission of Inquiry into LGBTIQ hate crimes. <https://www.nsw.gov.au/the-cabinet-office/special-commissions-of-inquiry/lgbtiq-hate-crimes>
- ⁵ Gleeson, H. (2024, March 7). Australian police forces have a festering domestic violence problem. Will a double homicide force NSW police to finally face the truth? ABC News. <https://www.abc.net.au/news/2024-03-07/police-force-domestic-violence-serving-officers-homicide-truth/103526170>
- ⁶ Hill, J., & Slater, M. (2024). Rethinking Primary Prevention. <https://jesshill.substack.com/p/rethinking-primary-prevention>
- ⁷ Ting, I., Scott, N., & Palmer, A. (2020). Rough justice: How police are failing survivors of sexual assault. ABC News. <https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364>
- ⁸ Burgin, R., & Tassone, J. (2024). Beyond reasonable doubt? Understanding police attrition of reported sexual offences in the ACT.
- ⁹ Lusby, S., Lim, G., Carman, M., Fraser, S., Parsons, M., Fairchild, J., & Bourne, A. (2022). Opening Doors: Ensuring LGBTIQ-inclusive family, domestic and sexual violence services.
- ¹⁰ Legal, S., & Constitutional Affairs References Committee. (2023). *Current and proposed sexual consent laws in Australia*. Parliament of Australia.
- ¹¹ Stark, E. (2007). *Coercive control: How men entrap women in personal life*. Oxford University Press.
- ¹² Douglas, H. (2018). Legal systems abuse and coercive control. *Criminology & Criminal Justice*, 18(1), 84–99.
- ¹³ Hill, J. (2023 Documentary series). *Asking For It*. SBS. <https://www.sbs.com.au/ondemand/tv-series/asking-for-it>
- ¹⁴ Heydon, G., Henry, N., Loney-Howes, R., & Hindes, S. (2023). Alternative reporting options for sexual assault: investigating their use, purpose and potential. Australian Institute of Criminology.
- ¹⁵ Heydon, G., Henry, N., Loney-Howes, R., & Hindes, S. (2023). Alternative reporting options for sexual assault: investigating their use, purpose and potential. Australian Institute of Criminology.
- ¹⁶ NSW Government. (2023). Special Commission of Inquiry into LGBTIQ hate crimes. <https://www.nsw.gov.au/the-cabinet-office/special-commissions-of-inquiry/lgbtiq-hate-crimes>
- ¹⁷ Australian Government. (2023). HIV Taskforce Report. Available at: <https://www.health.gov.au/sites/default/files/2024-05/hiv-taskforce-report.pdf>