

23 December 2020

To: [law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)

To whom it may concern,

**Re: Improving the response of the justice system to sexual offences**

The Victorian Pride Lobby makes the following submission to the inquiry into improving the response of the justice system to sexual offences.

The Lobby is a community based advocacy group that works towards equality, social justice and advancing human rights for lesbian, gay, queer, bisexual and same sex attracted Victorians. We work constructively, cooperatively and respectfully with transgender, intersex and other organisations that support our organisation's mission and vision.

Our submission explores queer sexual practices - cruising, chemsex, beats, sexting, sadomasochism and pozzing - that may fall foul of sexual offences legislation, the complex issues that these practices raise, and how they are best dealt with under the law. We encourage the Commission to take into account the diverse views and opinions of queer communities during this inquiry.

Please contact us if you would like us to expand on any of the following.

Yours faithfully,

Nevena Spirovska and Niki Giokas  
Co-Convenors, Victorian Pride Lobby

## Introduction

This submission is in response to the Commission's issues paper, 'Defining sexual offences.'

As the issues paper points out, section 37A(a) of the *Crimes Act* stipulates that the objective of sexual offences legislation is 'to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity.' The issues that we canvass in our submission - cruising, chemsex, beats, sexting, sadomasochism and pozzing - all raise complex issues of consent to partaking in and witnessing sexual activity. Our submission addresses each of these issues in turn.

## Cruising and the law

Section 40(1) of the *Crimes Act* stipulates that a person commits an offence if they intentionally sexually touch a person and do not have a *reasonable belief* that the other person consents to the touching. Section 36A(1) stipulates that whether or not a person reasonably believes that another person is consenting to an act "depends on the circumstances." Section 47(3) of the *Jury Directions Act* stipulates that a general assumption about the circumstances in which a person may consent to a sexual act is not a reasonable belief, but reasonable community expectations may ground the formation of a reasonable belief. However, Wendy Larcombe et al note that there may not be "consistent, generally-accepted community norms about what is 'reasonable' in the negotiation of sexual consent... [D]ifferent 'communities' have different practices and expectations regarding sexual interaction."<sup>1</sup> Section 343 of the *Criminal Procedure Act* stipulates that sexual history evidence is not admissible to support an inference that the complainant is the type of person who is likely to have consent to the sexual activity in question.<sup>2</sup>

Under the communicative consent model in Victoria, consent must be expressed rather than implied.<sup>3</sup> Formerly, the law adopted an "honest" belief in consent test;<sup>4</sup> the reasonable belief in consent provisions have not yet been tested by a Victorian appellate court.

Sexual touching is commonplace in queer venues. Whether that be on the dancefloors of clubs or in the dark rooms of saunas. As Spencer Kornhaber opines, to dance at a gay bar "is to feel the loss of bodily autonomy that comes in any crowd supercharged by the wide presumption of

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<sup>1</sup> Wendy Larcombe et al, 'Reforming the Legal Definition of Rape in Victoria - What do Stakeholders Think?' (2015) 15(2) *Queensland University of Technology Law Review* 37. Note also the criticism of jury directions as leading to confusion and increased disputation: Asher Flynn and Nicola Henry, 'Disputing Consent: The Role of Jury Directions in Victoria' (2012) 24(2) *Current Issues in Criminal Justice* 174-5, 180.

<sup>2</sup> See also *Criminal Procedure Act 2009* s 352(a).

<sup>3</sup> Flynn and Henry, 'Disputing Consent', 172.

<sup>4</sup> Larcombe et al, 'Reforming the Legal Definition of Rape in Victoria'.

flirting. No one's lower back, at the very minimum goes ungrazed by strangers.”<sup>5</sup> The question arises: is this erotic freedom or sexually predatory behaviour? This question requires consideration of consent, and the reasonable belief thereof. In the deafening loudness of a dancefloor or the muted silence of a sauna, consent is less communicated in words than in body language. In a silent dark room, it is felt more than seen or heard. It is what Kornhaber terms “the choreography of cruising.”

But does that touching as signalling, if unwanted, count as sexual assault? Rennie McDougall argues that “to lump the two ends of the spectrum [touching at queer venues and sexual violence] together under one category of assault trivialises the seriousness of aggressive acts and ignores the fact that unexpected - but non-threatening - encounters can be a positive part of sexual discovery.”<sup>6</sup> To police these spaces according to heteronormative laws can lead to the policing of queer sexuality. When the law talks of a reasonable belief of consent depending on the circumstances, could it be argued that these sexualised spaces themselves shape beliefs on what is and is not consensual. That is to say, consent is contextual; the boundaries are not especially clear in some circumstances.

The permissiveness of sexual touching in queer venues can also make it harder for people who have experienced assault to come forward and be taken seriously. Again, this may be due to different understandings over consent.

Some may argue for further guidance on reasonable belief to reduce ambiguity, others may argue that further guidance will increase complexity in the law.<sup>7</sup> Ultimately, it is made difficult by the different contexts in which sexual acts occur. As Asher Flynn and Nicola Henry have pointed out, “it is important to consider the extent to which the law is capable of dismantling problematic notions and deep-seated stereotypes.”<sup>8</sup> This is particularly so when the law is predicated on a heteronormative model of sexual relations that fails to properly take into account queer sexual practices.

## Chemsex and the law

Section 46(1) of the *Crimes Act* stipulates that a person commits an offence if they give a substance to another person that would affect that person's capacity to give, withdraw or withhold consent to sex. There is no defence to say that the other person consented to taking this substance.

During chemsex or party and play sessions - group sex at sex on premises venues or in private homes organised through sexual networking apps where drugs are taken - drugs such as

<sup>5</sup> Spencer Kornhaber, ‘Cruising in the age of consent’, *The Atlantic* (July 2019). See also Martin Weinberg and Colin Williams, ‘Gay Baths and the Social Organisation of Impersonal Sex’ (1975) 23(2) *Social Problems*.

<sup>6</sup> Rennie McDougall, ‘Discussing consent in gay spaces requires nuance, not sex panic’, *Slate* (19 December 2017).

<sup>7</sup> Larcombe et al, ‘Reforming the Legal Definition of Rape in Victoria’, 41-42.

<sup>8</sup> Flynn and Henry, ‘Disputing Consent’, 173.



methamphetamines, mephedrone and GHB/GBL are commonly used to loosen inhibitions and, in turn, help facilitate sexual adventure. This can raise consent concerns. Notably, the law does not protect voluntary drug use where that drug is given from one person to another and will affect consent. This could include through blowbacks (where one person inhales smoke and then blows it into the mouth of another person), smoking, injecting, swallowing or snorting drugs prepared by another person.<sup>9</sup>

Many queer people are able to manage their drug use safely and are able to negotiate sex in a way that works for them. Some undertake risk reduction activities, such as attending party sessions with friends who can look after them or discussing safe sex practices with other participants. One in ten men have reported being sexually assaulted during chemsex sessions.<sup>10</sup> This includes following voluntary drug consumption. When people do experience sexual assault in these settings, they may be reluctant to label it as such. This may be, in part, due to issues around consent.<sup>11</sup> Sometimes, in these settings, consent is not clearly defined but taken as a given.<sup>12</sup> In response, LGBTIQ+ organisations have developed resources on chemsex and consent.<sup>13</sup>

The media focus on chemsex can also detract from the use of alcohol in queer venues and the effect that that can have on consent to sex. This section could also capture a person buying drinks for another person that they are intending to have sex with, though the explanatory memorandum to the section states that it “is not intended to capture someone who seeks to get his or her desired sexual partner ‘into the mood’ with a few drinks” and that it is a higher threshold to impact consent. The law may need some clarification.

## Beats and the law

Section 17(1A) of the *Summary Offences Act* prohibits exposing one’s genitals in a public place and section 19(1) further prohibits such behaviour where it is sexual. The definition of “public place” includes parks and gardens.

There is a debate around whether beats are an expression of sexual freedom or oppression.<sup>14</sup> Regardless, many still use them. One concern is that the laws against sex in public places may make bashing or theft victims at beats reluctant to report such incidents. On the flipside, it is

<sup>9</sup> For further discussion of the phenomenon of chemsex, see Kerryn Drydale et al, ‘Destabilising the “Problem” of Chemsex: Diversity in settings, relations and practices revealed Australian gay and bisexual men’s crystal methamphetamine use’ (2020) 78 *International Journal of Drug Policy*.

<sup>10</sup> Jamie Wareham, ‘Almost 1 in 4 who engage in chemsex know somebody who died during a chillout’, *Gay Star News* (14 September 2017).

<sup>11</sup> Lauren Smith et al, ‘Chemsex exemplified much wider issues with drugs and sexual consent’, *The Conversation* (3 April 2018).

<sup>12</sup> Zachary Zane, ‘It’s time to talk about chemsex and consent’, *The Advocate* (11 September 2017).

<sup>13</sup> LGBT Foundation, ‘Chemsex and consent’ (25 September 2018) <<https://lgbt.foundation/news/chemsex-and-consent/228>>; Galop, ‘Consent and chemsex’ <<http://www.galop.org.uk/consent-chemsex/>>; London Friend, ‘Chemsex and consent’, <<https://londonfriend.org.uk/chemsex-and-consent/>>.

<sup>14</sup> Matthew Wade, ‘And the beat goes on’, *Star Observer* (22 January 2016).

commonplace for police officers to take down car registrations, names and addresses of people attending a known beat and sometimes harass these people.<sup>15</sup> Signs are sometimes erected warning that police patrol the area. Websites such as Squirt warn users when beats are being patrolled. Whilst bashings and policing may be less common than in the past, there is still the risk.<sup>16</sup> Again, the policing of sex in public may lead to under-reporting of violence at beats.

The law defines a behaviour as “public” if it occurs “in circumstances where such behaviour could be seen by any member of the public who happened to be present if he were looking.”<sup>17</sup> This does not include toilet cubicles, which are common places of sex in beats. However, with the increasing closing down of public toilets or their replacement with automated public toilets, beats may more regularly include parks and gardens, which are more of a legal grey zone.

## Sexting and the law

The issues paper canvasses the possibility of criminalising sending unsolicited sexual images as a form of “cyberflashing”.

In hook up apps like Grindr and Scruff, conversations sometimes kick off with the sending of an explicit picture. Dr David Ley argues that “within gay male circles, this behaviour is very common, and is not viewed as a problem... many men are happy to get such pictures and usually respond in kind.”<sup>18</sup> Others argue that it “is a rite of passage on the apps.”<sup>19</sup> Grindr has built in a functionality whereby users can state if they would never accept ‘not safe for work’ (NSFW) pictures, not at first, or always. On Squirt, profiles often feature a dick pic instead of a face, so that users scrolling through will see dicks more often than faces. The attempt to criminalise the sending of unsolicited dick pics and the like is complicated, and as Susanne Paasonen, Ben Light and Kylie Jarrett write, “highlights the dominance of dick pics as inherently toxic and tied to issues of harassment.”<sup>20</sup>

We question the claims of proponents that this is “unquestionably a form of technology-facilitated sexual violence.”<sup>21</sup> As is acknowledged in the limited literature on this phenomenon, it very much depends on the context and the situation in which the act occurs. In some even heterosexual male circles, dick pics are circulated amongst one another in a form of

<sup>15</sup> ‘On the beat: Debate on public sex dividing the gay community’, *Crikey* (4 October 2010).

<sup>16</sup> Simon Copland, ‘The history and importance of gay beats’, *SBS* (17 October 2016).

<sup>17</sup> *Inglis v Fish* [1961] VR 607 (17 May 1961).

<sup>18</sup> Ella Braidwood, ‘Why do men send dick pics?’, *Pink News* (20 April 2018).

<sup>19</sup> Michael Alvear, ‘83 percent of gay men have sent a dick pic on dating apps, says survey’, *Huff Post* (18 March 2015).

<sup>20</sup> Susanna Paasonen, Ben Light and Kylie Jarrett, ‘The Dick Pic: Harassment, Curation and Desire’ (2019) 5(2) *Social Media and Society* 7.

<sup>21</sup> Asher Flynn, ‘Cyberflashing - old-style sexual harassment for the digital age’, *Monash Lens* (6 September 2019). See also, in contrast, Andrea Waling, ‘Our relationship with dick pics: It’s complicated’, *The Conversation* (17 October 2018).



“frecting”.<sup>22</sup> On queer hook up apps, dick pics can form part of erotic exchanges between users and the “self-pornification” of users.<sup>23</sup> It is important that the law takes these practices into account.

## Sadomasochism and the law

Sadomasochism is not explicitly dealt with in the *Crimes Act* or the *Summary Offences Act*, but does arise in the common law.

In manslaughter cases where death occurs during the course of sadomasochistic activities, it has been held that a person cannot consent to an act that “involved exposure to the risk of serious injury”,<sup>24</sup> which would suggest criminality even where no injury is inflicted.<sup>25</sup> This includes erotic asphyxiation<sup>26</sup> and gagging.<sup>27</sup> Summarising these decisions, Theodore Bennett writes that “whilst the masochistic parties factually consented to participating in some sadomasochistic activities, they did not consent to the degree of force actually used or offer specific consent for the exact activities which took place”, according to the courts.<sup>28</sup> This has obvious implications for assault law,<sup>29</sup> including sexual assault law. It raises the possibility that courts will assess whether there is consent to each act forming part of sexual intercourse rather than the sexual intercourse itself. Though judges may disavow “any moralistic response to the sexual predilections of those involved in bondage or sadomasochistic activities”,<sup>30</sup> there is an undoubtedly moralistic strain within the jurisprudence.<sup>31</sup> The Tasmania Law Reform Institute has argued that “the decided cases reveal an inconsistent, paternalistic and out-dated approach to criminalisation.”<sup>32</sup>

2.8% of sexually active people have engaged in BDSM activity in the previous year, with engagement in BDSM significantly more likely among bisexual and gay men.<sup>33</sup> 26% of sadomasochists report experiencing discrimination due to their sexual practices<sup>34</sup> and, whilst section 6(g) of the *Equal Opportunity Act* protects discrimination on the basis of lawful sexual

<sup>22</sup> Chloe Sargeant, ‘News Corp clutches pearls after learning blokes send dick pics to their m8s’, *Pedestrian* (29 July 2017).

<sup>23</sup> Evangelos Tziallas, ‘Gamified Eroticism: Gay Male “Social Networking” Applications and Self-Pornography’ (2015) 19 *Sexuality and Culture*.

<sup>24</sup> *R v Stein* [2007] VSCA 300 (13 December 2007) [22].

<sup>25</sup> Theodore Bennett, ‘A Polyvocal (Re)Modelling of the Jurisprudence of Sadomasochism’ (2012) 36(1) *University of Western Australia Law Review* 207-8.

<sup>26</sup> *R v McIntosh* [1999] VSC 358 (3 September 1999).

<sup>27</sup> *R v Stein* [2007] VSCA 300 (13 December 2007).

<sup>28</sup> Bennett, ‘A Polyvocal (Re)Modelling of the Jurisprudence of Sadomasochism’, 207.

<sup>29</sup> Bennett, ‘A Polyvocal (Re)Modelling of the Jurisprudence of Sadomasochism’, 208.

<sup>30</sup> *R v McIntosh* [1999] VSC 358 (3 September 1999) [22].

<sup>31</sup> See, for example, *R v Brown* [1994] 1 AC 212.

<sup>32</sup> Tasmanian Law Reform Institute, *Consensual Assault: Final Report* (2018) 31 [4.2.6].

<sup>33</sup> Juliet Richters et al, ‘Demographic and Psychosocial Features in Bondage and Discipline, “Sadomasochism” or Dominance and Submission (BDSM): Data from a National Survey’ (2008) 5(7) *The Journal of Sexual Medicine*.

<sup>34</sup> Susan Wright, *Second National Survey of Violence and Discrimination Against Minorities* (National Coalition for Sexual Freedom, 2008).

activity, there are questions as to the lawful status of sadomasochism. There may be a need for statutory clarification of the common law when it comes to consent to sadomasochism.

## Pozzing and the law

Whilst HIV transmission is no longer an explicit offence under the *Crimes Act*, it may fall foul of sections 16-18 and 22-23 which cover causing injury, causing serious injury and conduct endangering life or persons.<sup>35</sup> The Court of Appeal, in *Neal v R*, has held that informed consent is capable of providing defence to a charge of recklessly endangering a person with HIV through unprotected sexual intercourse but not intentionally infecting a person with HIV.<sup>36</sup>

Pozzing, sometimes also referred to as bug-chasing or gift-giving, is the practice of intentionally infecting a person with HIV, usually with their consent, sometimes at breeding or seeding parties where a person will ejaculate loads of semen inside the anus of another person without a condom. Much of the media attention around *Neal* focussed on this “gay sexual subculture” in lurid terms and moralistic undertones.<sup>37</sup> The HIV positive partner is cast as the blameworthy deviant without consideration of the responsibilities - or choices - of the HIV negative partner.

Part of the problem is trying to fit what is essentially a health issue that is best managed under the *Public Health and Wellbeing Act* within the confines of the criminal law. More contemporary work suggests the need to move away from a criminalisation approach to HIV transmission.<sup>38</sup> Whilst we understand it is the Government’s position not to prosecute people for HIV transmission unless there are allegations of serious criminal behaviour including intent to cause harm, there is a risk that the law, despite recent reforms, still allows this.

## Conclusion

The law against sexual offences is undoubtedly shaped by community expectations, but the “community” in question may have a limited understanding of or even negative attitude towards queer sexual practices, which they may regard as wrong or harmful. What some may regard as shocking, intrusive or even harmful, others may regard as symbolic of queer cultures of sexual expressiveness and permissiveness.

<sup>35</sup> For further discussion, see David Carter, ‘Transmission of HIV and the Criminal Law: Examining the Impact of Pre-Exposure Prophylaxis and Treatment-As-Prevention’ (2020) 43(3) *Melbourne University Law Review*.

<sup>36</sup> See also *Neal v R* [2011] VSCA 172 [72]-[73].

<sup>37</sup> Michael Hurley and Samantha Croy, ‘The Neal Case: HIV Infection, Gay Men, Media and the Law’ in National Association of People Living with HIV/AIDS, *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (NAPWA, 2009). See also Jennifer Power, *Movement, Knowledge, Emotion: Gay Activism and HIV-AIDS in Australia* (Australian National University Press, 2011) Epilogue.

<sup>38</sup> See e.g. Chris Ashford, Max Morris and Alex Powell, ‘Bareback Sex in the Age of Preventative Medication: Rethinking the “Harms” of HIV Transmission’ (forthcoming) *The Journal of Criminal Law*.



**Victorian Pride Lobby**

To date, the law against sexual offences has been almost exclusively focussed on sexual violence done by men to women to the exclusion of queer sexual practices. It is important that, in inquiring into sexual offences, the Commission take into account the diverse views and opinions of queer communities.