



Submission to the inquiry into: Current and proposed sexual consent laws in Australia

Our background and expertise

We are a group of academics and practitioners from diverse backgrounds. Collectively we have expertise in law, public health, and sociology, in issues of alcohol and other drugs, masculinities, and LGBTIQ+ populations, and have collectively authored many books, articles, submissions, and reports on areas of direct relevance to this inquiry. Our affiliations and expertise are detailed below.

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Our submission primarily focusses on the relationship between alcohol and other drug consumption and sexual consent laws in states and territories. In other work, we have suggested that 'in light of the factors that make the achievement of national uniformity in a federal constitutional setting where criminal law-making is primarily a matter for states and territories, a realistic first step might be the development of national principles or guidelines that can help to inform jurisdiction-specific reforms in the direction of clarity and internal consistency.'¹

Administration of an intoxicating substance for a sexual purpose

Section 46 of the *Crimes Act 1958* (Vic) stipulates that a person commits an offence if they give, cause another person to give, or cause a person to take an intoxicating substance that affects a person's senses or understanding, and intends that the substance will facilitate the person taking part in a sexual act with them or another person and that the substance will impair the person's capacity to give, withhold or withdraw consent. According to the explanatory memorandum on this provision, 'this includes impairment of [...] mental functions and decision-making ability.'² Further, the explanatory memorandum states that 'the offence is not intended to capture someone who seeks to get his or her

¹ Julia Quilter et al, *'Intoxication' and Australian Criminal Law: Implications for Addressing Alcohol and Other Drug-Related Harms and Risks* (2018) 60.

² Explanatory Memorandum, Crimes Amendment (Sexual Offences) Bill 2016, 16.



desired sexual partner “into the mood” with a few drinks. [The person] must have an intention to impair [the other person’s] capacity to consent.”³

Our main concerns with this provision are that it may not adequately capture consensual consumption of intoxicating substances and may have a disproportionately negative impact on some populations, such as queer people. The Victorian Law Reform Commission has noted that as section 46 of the *Crimes Act 1958* does ‘not include any consideration of consent, it [is] unclear if the offence [includes] situations such as a person buying another person a drink at the bar with the hope this may encourage someone to take part in a sexual act.’⁴ That is to say, there is no consideration of whether a person consents to consuming a substance knowing that it would impact their senses or loosen their inhibition because they intend to take part in a sexual act with the person providing them the substance. This provision is unlike similar provisions on drink spiking that do include consideration of consent. For example, section 41H of the *Summary Offences Act 1966* (Vic), which prohibits food or drink spiking, requires that the victim not be aware that the food or drink contains an intoxicating substance or more of an intoxicating substance than they would reasonably expect it to contain. By extension, if they are aware, they could be said to be consenting to its consumption. The same does not apply to section 46 of the *Crimes Act 1958*.

In submissions to the Victorian Law Reform Commission, the Victorian Pride Lobby also noted that it is unclear if the offence outlined in section 46 of the *Crimes Act 1958* includes situations such as ‘chemsex or party and play sessions – group sex at sex on premises venues or in private [*sic*] homes organised through [*sic*] sexual networking apps where drugs are taken.’⁵ The Lobby explained that, in these situations, ‘drugs such as methamphetamines, mephedrone and GHB/GBL are commonly used to loosen inhibitions and, in turn, help facilitate sexual adventure.’⁶ Because the offence does not include any consideration of consent, it does not protect people who are using intoxicating substances voluntarily, including where an intoxicating substance is given from one person to another where their consumption of that substance has the potential to affect consent. The Lobby argued that ‘many queer people are able to manage 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.’⁷ The Lobby also noted that ‘LGBTIQA+ organisations have developed resources on chemsex and consent.’⁸ Therefore, it could be argued that there is a reduced need for the criminal law to intervene. Indeed, in studies of men who engage in chemsex, it has been found that there is ‘a disjunct between participants’ perceptions of sexual violence

³ Explanatory Memorandum, Crimes Amendment (Sexual Offences) Bill 2016, 17.

⁴ Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 318.

⁵ Victorian Pride Lobby, Submission to Victorian Law Reform Commission Inquiry into Improving the Response of the Justice System to Sexual Offences, 23 December 2020, 3.

⁶ Victorian Pride Lobby, Submission to Victorian Law Reform Commission Inquiry into Improving the Response of the Justice System to Sexual Offences, 23 December 2020, 3-4.

⁷ Victorian Pride Lobby, Submission to Victorian Law Reform Commission Inquiry into Improving the Response of the Justice System to Sexual Offences, 23 December 2020, 4.

⁸ Victorian Pride Lobby, Submission to Victorian Law Reform Commission Inquiry into Improving the Response of the Justice System to Sexual Offences, 23 December 2020, 4. See LGBT Foundation, ‘Chemsex and consent’ <<https://lgbt.foundation/news/chemsex-and-consent/228>>; Galop, ‘Consent and chemsex’ <<https://galop.org.uk/resource/chemsex-and-consent-what-the-law-says/>>; London Friend, ‘Chemsex and consent’ <<https://londonfriend.org.uk/chemsex-and-consent/>>.



and legal definitions.⁹ Whilst we are not aware of any cases of provisions such as these being applied in the context of chemsex,¹⁰ there is still a risk that these provisions could be applied in that context.

In other research, we have pointed to how the criminal law commonly focuses on the regulation of alcohol and other drugs in the context of sexual violence and less so on other factors, such as gender and masculinities.¹¹ In an evaluation of the development of Australian criminal laws concerning alcohol and other drugs, we concluded that ‘the management of substances was ultimately deemed to be appropriate, thus centring substances as having a critical, causal role in harms such as family violence, while gender is unaddressed.’¹² Alcohol and other drugs, as opposed to gender, are often said to pose ‘risk factors’ for sexual offending, but this obscures the ‘complex dynamics’ that contribute to sexual offending.¹³ In section 46 of the *Crimes Act 1958*, there is no consideration of levels of consumption, of the effects of different substances or consumptive practices, nor of gender or sexuality. Consequently, there is a risk that the provision will have a detrimental effect on some groups (such as queer people, as described above) or that it is so broad as to capture practices such as buying a drink for a prospective sexual partner to loosen their inhibitions, as suggested by the Law Institute.

The wording of this provision could also have a deleterious implication for alleged victims, as it could call into question their credibility as a defence lawyer may seek to argue that the elements of the offence have not been made out. Research we have conducted indicates that provisions such as these frequently lead to questioning around ‘the credibility and/or reliability of the victim’ in court proceedings,¹⁴ particularly around the level of consumption and the impact that that may have on consent. For example, to what degree might consumption of alcohol or other drugs loosen inhibitions versus impair consent to sexual acts? This kind of questioning can obviously have a deleterious effect on victims, particularly vulnerable victims. It can also create complexities that can be difficult to navigate in practice. Sexual situations can be ambiguous, with many individuals engaging in sex in an exploratory manner and holding different understandings of the language they may use to communicate interest and consent. What individuals argue are appropriate ways of enacting and engaging sexual consent do not necessarily occur in actual practice.¹⁵ Consent can be dependent on a variety of nuanced factors that are sometimes not reflected in the law.

A similar provision can be found in section 218 of the *Criminal Code Act 1899* (Qld), which stipulates that a person commits a crime if they cause a person to take a drug or other thing with intent to stupefy or overpower the person to enable a sexual act to be engaged in with the person. This provision has similar problems to the Victorian provision. Another similar provision can be found in section 192 of the *Criminal Code Act Compilation Act 1913* (WA), which stipulates that a person is guilty of a crime if they

⁹ Jack Freestone et al, ‘Playing at the edges, navigating sexual boundaries, and narrating sexual distress: Practices and perspectives of sexuality and gender diverse people who use GHB’ (2022) 108 *International Journal of Drug Policy*.

¹⁰ The only reported decision we are aware of concerning chemsex is *Health Care Complaints Commission v DAC* [2017] NSWCATOD 98 (28 June 2017) in which a medical practitioner was found guilty of unsatisfactory professional conduct for using GHB.

¹¹ Kate Seear & Sean Mulcahy, ‘Enacting safety and omitting gender: Australian human rights scrutiny processes concerning alcohol and other drugs’ (2022) 49(3) *Contemporary Drug Problems*.

¹² Kate Seear & Sean Mulcahy, ‘Enacting safety and omitting gender: Australian human rights scrutiny processes concerning alcohol and other drugs’ (2022) 49(3) *Contemporary Drug Problems* 268.

¹³ Kate Seear & Sean Mulcahy, ‘Enacting safety and omitting gender: Australian human rights scrutiny processes concerning alcohol and other drugs’ (2022) 49(3) *Contemporary Drug Problems* 269.

¹⁴ Julia Quilter et al, ‘Intoxication’ and *Australian Criminal Law: Implications for Addressing Alcohol and Other Drug-Related Harms and Risks* (2018) 47.

¹⁵ Andrea Waling, ‘Pay close attention to what my eyes are saying without having to spell in out’: Heterosexual relations and discourses of sexual communication in #MeToo commentaries’ (2022) *Sexualities*.



cause a woman, girl, man, or boy to take a drug or other thing with intent to stupefy or overpower the person to enable a man to have unlawful carnal knowledge of the person. The provision does not apply if the victim is non-binary, or the accused person is a woman or non-binary. Whilst this may be dealt with by the principles of statutory interpretation, which state that words denoting a gender or genders include each other gender, a person reading this provision unfamiliar with these principles may think they are not captured by this provision. Section 192(2) stipulates that it is no defence that the act of the accused person was done with the consent of the other person. Section 293 further stipulates that a person is guilty of a crime if they administer or attempt to administer any stupefying or overpowering drug or thing to another person with the intent to commit or facilitate the commission of an indictable offence. Notably, this provision is inclusive of all genders.

A similar provision, without the focus on a sexual purpose, can be found in section 169 of the *Criminal Code Act 1924* (Tas), which stipulates that a person is guilty of a crime if they cause another person to take any drug, alcohol, or other thing with intent to stupefy or overpower that person to facilitate the commission of an offence. Similarly, section 38 of the *Crimes Act 1900* (NSW) stipulates that a person is guilty of an offence if they cause another person to take an intoxicating substance, including alcohol or a narcotic drug or any other substance that affects the person's senses or understanding, with intent to enable themselves or to assist a third person to commit an indictable offence. Likewise, section 316 of the *Criminal Code Act 1899* (Qld) stipulates that a person is guilty of a crime if they administer or attempt to administer any stupefying or overpowering drug or thing to another person with intent to commit or to facilitate the commission of an indictable offence. Again, section 176 of the *Criminal Code Act 1983* (NT) stipulates that a person is guilty of an offence if they administer or attempt to administer any stupefying or overpowering drug or thing to another person with intent to commit or to facilitate the commission of an indictable offence. These provisions are narrower because they require intent to commit to an *unlawful* act as opposed to a sexual act broadly. **Consideration should be given to incorporating some of this language into provisions under Victorian and Queensland law to avoid those provisions being applied in circumstances or to populations where there is no intention to commit an unlawful act.**

A broader provision can be found in section 28 of the *Crimes Act 1900* (ACT), which stipulates that a person is guilty of an offence if they intentionally and unlawfully cause another person to take a poison or other injurious substance with intent to injure or cause pain or discomfort to that person. This raises the question of: what amounts to 'discomfort'?

There is no such provision in South Australian law.

Procuring a person by drugs

Section 91B of the *Crimes Act 1900* (NSW) stipulates that a person is liable to imprisonment if the person uses a drug or intoxicating liquor to procure, entice or lead away another person for purposes of prostitution. The courts have held that 'procure' means to 'arrange' or 'recruit'.¹⁶ A similar provision can be found in section 17 of the *Sex Work Act 1992* (ACT), which stipulates that a person must not supply or offer to supply a controlled medicine or prohibited substance to another person for the purpose of inducing the person to provide or continue to provide commercial sexual services. Again, section 7 of the *Prostitution Act 2000* (WA) stipulates that a person is not to supply or offer to supply a prohibited drug to another person with the intending of inducing another adult to act or continue to act

¹⁶ *ZA v R* [2018] NSWCCA 244 at [24].



as a prostitute. Similarly, section 7(2) of the *Sex Industry Offences Act 2005* (Tas) stipulates that a person must not supply or offer to supply a controlled substance for the purpose of inducing another person to provide or continue to provide sexual services in a sexual services business. (Section 7(1) also contains a broader provision that stipulates that a person must not supply or offer to supply a controlled substance to a sex worker generally.) Finally, section 10 of the *Sex Industry Act 2019* (NT) stipulates that a person commits an offence if they intentionally supply or offer to supply a dangerous drug to another person that results in that person performing or continuing to perform sex work.

A similar provision can be found in section 8 of the *Sex Work Act 1994* (Vic), which stipulates that a person must not supply or offer to supply a drug of dependence with intent to induce another person to engage or continue to engage in sex work. In 2022, during the debate on decriminalisation of sex work in Victoria, there was an attempt to amend this provision, with the proponent stating that ‘it is very easy to go down a path, when drugs are mentioned, to just think that there is criminal activity happening there and there is coercion happening and violence et cetera.’¹⁷ The proponent argued that the existing provision ‘classifies the supply or offer of supply of a drug of dependence wholly and solely as an indicator of force’,¹⁸ noting that the provision also covers assaults, threats to assault, intimidation, false representations, false pretences, and fraud with intent to induce another person to engage or continue to engage in sex work. Another parliamentarian noted that this could impact ‘consensual relationships.’¹⁹ A question thus arises over how the supply of a drug can persuade a person to engage in sex work, how this might impact consent (which is not specifically mentioned in the provision), and whether and how the criminal law should deal with this matter. We would point out, however, that except for the Northern Territory and Tasmanian provisions, the drug must be supplied with the intent to *induce* or *procure* a person to engage in sex work.

Nevertheless, all these provisions perpetuate a problematic assumption that drugs automatically act as a gateway to sex work, and that people who participate in sex work because they have been offered drugs lack agency. The way that sex work is articulated in many of these provisions is rather categorical in nature, whereby the ‘victim’ either is or is not a sex worker. The reality is that, for many, sex work is far more dynamic and multifaceted. Some individuals may be paid for sex on some occasions, including through exchange of alcohol and other drugs, but not identify as a sex worker.²⁰ Some many identify as a sex worker but only at certain times with certain partners. Some may enter and exit sex worker multiple times over many years, but many be engaging in drug use during sex – or, more relevantly, be offered drugs by a partner – on many occasions, such that distinctions between commercial and non-commercial sex may seem arbitrary in the context. Having sex in exchange for drugs is not uncommon in the context of chemsex but is not necessarily experienced in a negative way or done under duress. Nevertheless, such acts may fall afoul of many of these provisions, depending on how sex work is interpreted.

Regarding the Victorian amendment, the proponent argued that the existing provision has ‘unintended harmful consequences for sex workers choosing to do sex work who use drugs, such as criminalisation, oppositional contact with police, and resulting barriers to accessing essential services, including health promotion and peer education, housing, health and even legal services.’²¹ Another parliamentarian noted

¹⁷ Victoria, *Parliamentary Debates*, Legislative Council, 10 February 2022, 262 (Andy Meddick).

¹⁸ Victoria, *Parliamentary Debates*, Legislative Council, 10 February 2022, 262 (Andy Meddick).

¹⁹ Victoria, *Parliamentary Debates*, Legislative Council, 10 February 2022, 262 (David Limbrick).

²⁰ See, e.g., Max Morris, ‘The limits of labelling: Incidental sex work among gay, bisexual, and queer young men on social media’ (2021) 18 *Sexuality Research and Social Policy*; Adam Bourne et al, *The Chemsex Study: Drug Use in Sexual Settings Among Gay and Bisexual Men in Lambeth, Southwark, and Lewisham* (2014); P Macioti et al, *Understanding the Health and Social Wellbeing Needs of Sex Workers in Victoria* (2022).

²¹ Victoria, *Parliamentary Debates*, Legislative Council, 10 February 2022, 262 (Andy Meddick).



that this provision makes supply of illicit drugs ‘double illegal’.²² In a recent survey of sex workers and service providers conducted by researchers at our Centre, ‘several sex worker participants described feeling stigmatised for their drug consumption as well as for their sex work, articulated by a service provider as “double the stigma”’.²³ Ultimately, the provision was retained and, as of 1 December 2023, will be re-enacted as section 53L of the *Crimes Act 1958* (Vic). Our concern is, post-decriminalisation of sex work, the criminal law will still retain the vestiges of narrow and harmful stereotypes about sex work that can function to reproduce stigma towards sex workers.²⁴

A similar provision can be found in section 66 of the *Criminal Law Consolidation Act 1935* (SA), which stipulates that a person is guilty of an offence if the person compels or by undue influence gets another person to provide or continue to provide commercial sexual services. Section 66(5) stipulates that evidence of supply of an illicit drug may be relevant to the question of whether, in a particular case, a person’s conduct amounts to compulsion or undue influence. Here, the supply of a drug is a factor that *may* be considered in determining whether there was compulsion or undue influence. By implication, this recognises that there may be situations in which the supply of a drug does not create a compulsion or undue influence. This could offer a useful example to law reform in other jurisdictions.

There is no such provision in Queensland law.

As of 30 July 2023, there will be a new section 36AA of the *Crimes Act 1958* (Vic), which will stipulate that a person does not consent to an act if the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid. This would mean that making a false or misleading representation about payment to a sex worker renders any subsequent sexual act non-consensual. In our view, this provision should be adopted in other jurisdictions.

Impact of sexual consent laws on sexual consent education

Criminal law is ineffective in addressing sexual offending, in and of itself, particularly if it is not accompanied with education. There is, however, no national strategy or framework for the development, implementation, and delivery of school-based relationships and sexuality education (RSE), including that which involves sexual consent education. Rather, the need for comprehensive RSE as related to sexual consent is recognised in the *National Women’s Health Strategy 2020-2030*, the *National Men’s Health Strategy 2020-2030*, the *National Plan to End Violence against Women and Children 2022-2032*, and the *Fourth National Sexually Transmissible Infections Strategy 2018–2022*. While each of these strategies provide some guidance as to what young people can and should learn through school based RSE, these have not been adopted into a national RSE framework. The *National Strategy for Young Australians* (2020) refers to young people’s experiences of sexual violence and associated sexual consent violations, but it does not promote comprehensive RSE as a strategic response to these experiences.

In addition, RSE is not mandated or compulsory across all of Australia, and mandatory RSE is not applied consistently. For example, while Victoria promotes a comprehensive and mandatory approach to RSE, this approach is not applied consistently across all schools for a variety of reasons, including lack

²² Victoria, *Parliamentary Debates*, Legislative Council, 10 February 2022, 262 (David Limbrick).

²³ P Maciotti et al, *Understanding the Health and Social Wellbeing Needs of Sex Workers in Victoria* (2022) 32-33.

²⁴ For a further discussion of sex work law and stigma, see Theodore Bennett & Zahra Stardust, ‘Positive potential: How sex positivity can benefit legal thinking and sex work regulation in Australia’ (2022) 48(1) *Monash University Law Review*.



of training, funding, or cultural, religious, or political pushback.²⁵ States such as Western Australia mandate a health and wellbeing curriculum, but this does not necessarily include sexual consent or comprehensive RSE involving sexual communication practices. While it has been mandated that consent be taught in schools across Australia,²⁶ there is no national curriculum regarding this manner. Some states and territories refer to respectful relationships curriculum, but this curriculum explicitly states that it does not include or address sex education, and therefore does not meet the mandated requirement for consent to be taught. This means that the teaching of consent in the context of healthy relationships does not actually include discussions of sex and sex-related activities, with its applicability being either assumed or implied. As a result, there is a distinct disconnect between respectful relationships curriculum and sexual consent, and particularly how principles of respectful relationships might apply in sexual scenarios.²⁷ Whilst the respectful relationships curriculum deals with healthy relationships and boundaries, sex is not specifically covered. There may be an assumption that learning from the respectful relationships curriculum will naturally flow into sex-related activities, but this is not made explicit in the curriculum. There is also a significant lack of resourcing to train teachers to adequately deliver RSE, alongside political and moral debates as to what RSE content should contain, making the delivery of RSE that includes discussions of sexual consent highly inconsistent and challenging.²⁸ Many young people are also disenfranchised from schools, and thus may access information about sex and relationships elsewhere, including in other contexts such as through viewing pornography, content produced for an entirely different purpose and which is not designed to educate on sexual communication and consent.²⁹

Additionally, research has shown that sexual encounters can be complicated and nuanced,³⁰ and are rife with gendered power dynamics. This can make it difficult for people, especially women and gender diverse people, to feel safe in their capacity to exercise autonomous decision-making in sexual situations, including because of fear of retribution such as being shamed or assaulted.³¹

Young people are also looking for information on how to navigate sexual communication that would encompass more than just a binary model of consent, and which would protect them against potential criminal consequences for flawed expressions of consent.³² Emerging research has documented that legal approaches to sexual consent in educational settings do not support the effective engagement and learning of young people; instead this research has found that it generates further fear and confusion

²⁵ Andrea Waling et al, "It's kinda bad, honestly": Australian students' experiences of relationships and sexuality education' (2020) 35(6) *Health Education Research*; Andrea Waling et al, "Please teach students that sex is a healthy part of growing up": Australian students' desires for relationships and sexuality education' (2021) 18 *Sexuality Research and Social Policy*.

²⁶ Michelle Elias, 'Consent education will be mandatory across Australian schools from next year', *The Feed* (17 February 2022).

²⁷ Andrea Waling, Andrea, Alexandra James & Jackson Fairchild, 'Expert stakeholders' perspectives on how cisgender heterosexual boys and young men navigate sex and intimacy in Australia: A case for "heterosexual intimacies" in policy and practice' (2023) 20 *Sexuality Research and Social Policy*.

²⁸ Pandora Pound et al, 'What is best practice in sex and relationship education? A synthesis of evidence, including stakeholders' views' (2017) 7(5) *BMJ Open*.

²⁹ Andrea Waling, Adrian Farrugia & Suzanne Fraser, 'Embarrassment, shame, and reassurance: Emotion and young people's access to online sexual health information' (2023) 20 *Sexuality Research and Social Policy*.

³⁰ Andrea Waling, "Pay close attention to what my eyes are saying without having to spell in out": Heterosexual relations and discourses of sexual communication in #MeToo commentaries' (2022) *Sexualities*; Jen Gilbert, 'Contesting consent in sex education' (2018) 18(3) *Sex Education*.

³¹ Melanie Beres & Jo MacDonald, 'Talking about sexual consent' (2015) 30(86) *Australian Feminist Studies*.

³² Adrian Farrugia et al, 'The "be all and end all"? Young people, online sexual health information, science and skepticism' (2021) 31(11) *Qualitative Health Research*.



when it comes to discussing sexual activity, rather than understanding.³³ While laws that move towards an affirmative consent model are designed to prevent assaults through distributing responsibility for obtaining consent to all participants in a sexual encounter and introducing requirements that consent be more explicit, this needs to be supported through better resourcing and political support of comprehensive sexual consent and sexual communication education. Importantly, this needs to include discussions of sexual activities and provide opportunities to demonstrate how to have challenging conversations and navigate communication within sexual encounters.³⁴

Conclusion

We thank the Committee for the opportunity to make this submission and for their time and consideration and can be contacted via the corresponding author if any further details are required on our submission.

Yours sincerely,

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³³ Andrea Waling, Alexandra James & Jackson Fairchild, 'Expert stakeholders' perspectives on how cisgender heterosexual boys and young men navigate sex and intimacy in Australia: A case for "heterosexual intimacies" in policy and practice' (2023) 20 *Sexuality Research and Social Policy*.

³⁴ Andrea Waling, "Pay close attention to what my eyes are saying without having to spell in out": Heterosexual relations and discourses of sexual communication in #MeToo commentaries' (2022) *Sexualities*; Jen Gilbert, 'Contesting consent in sex education' (2018) 18(3) *Sex Education*.