



## Dr Marisa Paterson MLA

ACT LEGISLATIVE ASSEMBLY

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MEMBER FOR MURRUMBIDGEE

Dear JACS Scrutiny Committee,

Thank you for the Justice and Community Safety (JACS) (Scrutiny) Committee's (the Committee) report of 15 March 2022, and the comments on the Crimes (Consent) Amendment Bill 2022.

I have considered in detail each of the matters you raise and have worked with the Parliamentary Counsel Office to further finesse and strengthen the Bill.

### ***Positive communication***

The Committee raised concern that the Bill "will require both the complainant and the accused person to take affirmative steps to communicate or ascertain consent. In this way, the Bill goes further than recent reforms in other jurisdictions". The committee further raised concern that a recent review in Ireland "generally considered that a proportionate reform would be for the trial to take into account what, if anything, the accused person did to ascertain consent as part of assessing the reasonableness of the accused person's belief in consent".

I thank the Committee for bringing this to my attention.

The intention in this Bill is that an accused person cannot rely on silence and inaction to claim that they reasonably believed another person consented to a sexual act.

I note the Committee's concern that 'while not strictly imposing a legal burden on the accused person, the Bill may still limit the presumption of innocence protected as a right in criminal proceedings by section 22 of the *Human Rights Act 2004*'.

To be clear, there is no element in this Bill or in these amendments which is required to be proven by an accused person or which requires that the accused introduce evidence to establish their innocence. Establishing that an accused person's mistaken belief in consent (if any) is unreasonable is entirely for the prosecution, as is presently the case.

The change that this Bill introduces in bringing forward a hybrid test is that honest but unreasonable belief will no longer be acceptable and relying on either a victim-survivor's silence or an accused person's failure to do anything at all to ascertain consent will not be acceptable as a defence. This is in line with growing community expectations about consent and aligns with the changes recently passed in New South Wales.

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I believe this is a proportionate reform taking into account what, if anything, an accused person said or did to ascertain consent in assessing the reasonableness of an accused person's belief that consent was given.

This reaffirms the Bill's intent to introduce a hybrid subjective-objective test and ensures appropriate provision from which to establish the intent of an accused person, while retaining their right to the presumption of innocence.

The revised Explanatory Statement provides further analysis on this.

### ***Principles of consent***

The title of Section 50A has been amended from 'Principles of consent' to 'Objects - pt 3', making it clear that the Objects of this part relate to consent for a sexual act in Part 3 of the Act. This addresses concerns raised by the Scrutiny Committee that 'it is not clear to the Committee what legal effect, if any, these principles are intended to have, including whether they are only intended to guide the interpretation of sexual offence provisions in Part 3 of the Act, applies more broadly to any offence potentially involving undefined sexual acts, or seeks to establish a distinct right'.

The amendment from 'principles' to 'objects' aligns with recent reforms in NSW, as referenced by the Committee in your report.

The Supplementary Explanatory Statement clarifies that the objects of consent are intended to guide the interpretation and application of the sexual offence provisions of Part 3 of the *Crimes Act 1900*.

### ***Right to recognition and equality before the law (section 8 HRA)***

The Scrutiny Committee report raised concern that: "the amendments in the Bill may have a disproportionate impact on accused persons whose age, mental or cognitive impairment or other disability may impact on their ability to take steps or recognise when such steps (to obtain consent) might be necessary".

This was further noted as being of concern because: "where a person does not take any steps to ascertain consent, the circumstances of the case are not otherwise considered".

I note the Committee reports that "NSW reforms did not require an accused person to take steps to find out whether the other person consents where the accused person had a cognitive or mental health impairment which was a substantial cause of the accused person not doing or saying anything to obtain consent".

I wish to reassure the Committee that the matters raised about criminal responsibility whereby an accused person has a cognitive or mental impairment or illness which was a substantive cause of their not doing or saying something to obtain consent has been considered in detail in the drafting of this Bill.

I am confident that the ACTs *Criminal Code 2002* Division 2.3.2 appropriately addresses this matter; and will be a matter for consideration of any sexual offence provision through the criminal justice process. This division applies to 'circumstances where there is no criminal responsibility'

and necessitates that a trier of fact must consider an accused person's cognitive capacity or impairment.

I am confident that human rights under the *Human Rights Act 2004* are therefore not impinged on through this Bill. However, I do thank the Committee for raising this important matter and ensuring that it has been adequately considered and addressed.

The Explanatory Statement has been revised to reference specifically the *Criminal Code 2002* in relation to this. This clarifies that the right to equality protected by section 8 of the HR Act is retained.

I wish to again thank the Committee for your comments on the Crimes (Consent) Amendment Bill 2022.

Yours sincerely,

A handwritten signature in black ink that reads "M. Paterson". The signature is written in a cursive, slightly slanted style.

Dr Marisa Paterson MLA  
Member for Murrumbidgee  
2 May 2022