



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SERVICES
Ms Elizabeth Lee MLA (Chair), Ms Bec Cody MLA (Deputy Chair)
Mr Michael Petterson MLA

Submission Cover Sheet

Crimes (Consent) Amendment Bill 2018

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Mr A Snedden
The Committee Secretary
Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

By email: LACCommitteeJCS@parliament.act.gov.au

Dear Mr Snedden,

INQUIRY INTO THE CRIMES (CONSENT) AMENDMENT BILL 2018 (ACT)

The ACT Law Society ('the Society') welcomes the opportunity to make a submission to the Standing Committee on Justice and Community Safety ('the Committee') regarding its Inquiry into the Crimes (Consent) Amendment Bill 2018 ('the Inquiry'). We note that the Crimes (Consent) Amendment Bill 2018 (ACT) ('the Bill') was presented to the Legislative Assembly by Ms Caroline Le Couteur MLA in April 2018 and was subsequently referred to the Committee for inquiry and report by the last sitting day in October 2018.

The Society is the peak professional association that supports and represents the interests of the members of the legal profession in the ACT. The Society maintains professional standards and ethics as well as providing public comment and promoting discussion regarding law reform and issues affecting the legal profession. The Society currently represents over 2,400 legal practitioners within the ACT.

The Society notes that clause 7 (section 67(1)) of the Bill introduces a statutory definition of *consent*. As the statutory definition of *consent* is drafted in similar terms to section 61HA of the *Crimes Act 1900* (NSW), we strongly urge the Committee to suspend its Inquiry until the New South Wales Law Reform Commission ('NSWLRC') has completed its Review of Consent in Relation to Sexual Assault Offences ('the NSWLRC Review'). The Society has had the benefit of reading the New South Wales Bar Association's preliminary submission to the NSWLRC Review and we understand that the NSWLRC will soon seek further public comment.

The Society makes the following recommendations in relation to the introduction of the statutory definition of *consent*.

1. Clause 7 (Section 67(1)(a))- Person gives free and voluntary agreement

1.1 Background

Section 67(1) of the *Crimes Act 1900* (ACT) (as it is currently drafted), provides that a person consents to, *inter alia*, sexual intercourse if the consent is not negated (for example, the consent cannot be caused by the effect of intoxicating liquor, a drug or an anaesthetic).¹ Section 67(2) further states that a person shall not be regarded as consenting to the sexual intercourse by reason only of the fact that he or she did not offer actual physical resistance to the act.

¹ *Crimes Act 1900* (ACT) s 67(1)(e).

Similar to the statutory definitions of consent in other jurisdictions,² clause 7 (section 67(1)(a)) provides that a person consents to an act mentioned in a *sexual offence consent provision* (i.e. sexual intercourse without consent)³ if they give free and voluntary agreement. *Consent* is further defined by reference to the current provisions in sections 67(1) and 67(2).⁴ The Society notes that the Final Report into *Family Violence- A National Legal Response* (2010) (completed jointly by the Australian Law Reform Commission ('ALRC') and the NSWLRC) recommended that federal, state and territory sexual offence provisions should include a statutory definition of consent based on the concept of free and voluntary agreement.⁵ In making this recommendation, the ALRC acknowledged that the concept of 'agreement' may give rise to interpretation issues.⁶

1.2 Recommendation

The Society considers that the 'free and voluntary agreement' concept is ambiguous because the ordinary meaning of the words 'free', 'voluntary' and 'agreement' are not precisely defined. The concept lacks legal certainty and could capture conduct that is undeserving of criminal sanction. For example, an accused who persuades another person to give consent to an act could be found criminally liable (even though the consent is not vitiated by any of the section 67(1) factors in the Act). The Society recommends that section 67(1) should not be amended to include the concept of 'free and voluntary agreement'. It is the Society's view that the factors that negate consent (as currently drafted in section 67(1)) provide sufficient clarity as to whether a person provides consent.

2. **Clause 7 (Section 67(1)(b))- Accused person knows (or is satisfied on reasonable grounds) that the agreement was freely and voluntarily given**

2.1 Background

Section 67(3) of the Act (as it is currently drafted), states that if any of the factors that vitiate consent are established, the accused shall be deemed to know that another person does not consent to, *inter alia*, the sexual intercourse. Clause 7 (section 67(1)(b)) of the Bill further defines *consent* by reference to whether the accused knows (or is satisfied on reasonable grounds) that the agreement was freely and voluntarily given.

2.2 Recommendation

The Society strongly agrees with the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) that the Bill introduces a definition of *consent* that is likely to result in ambiguity and uncertainty. Clause 7 (section 67(1)) conflates two separate issues, being firstly, whether a person provides consent and, secondly, whether the accused knows, or reasonably believes, that the consent is provided.⁷ Such could potentially result in an accused being found guilty of sexual intercourse without consent even if a jury was satisfied that "consent" was in fact given, if they were also satisfied that such was not valid consent as defined under the proposed amendment because the accused did not "know" consent was given and had no reasonable basis for implying same.

It is the Society's view that the objective test (clause 7 (section 67(1)(b)(ii))) is problematic and accordingly, it should not be inserted into section 67(1). Under the objective test, the accused may be found guilty of having sexual intercourse without consent despite the fact that he or she honestly believed that consent was provided. The question of whether the accused believed that consent was provided would be judged by reference to the objective standards of the community. If the objective test is adopted, the accused will be unable to rely on the

² *Crimes Act 1900* (NSW) s 61HA(2); *Criminal Law Consolidation Act 1935* (SA) s 46(2); *Criminal Code Act* (NT) s 192(1).

³ Crimes (Consent) Amendment Bill 2018 (ACT) cls 7- 8.

⁴ *Ibid*.

⁵ Australian Law Reform Commission, *Family Violence- A National Legal Response*, Report No 114 (2010) vol 1, 37; New South Wales Law Reform Commission, *Family Violence- A National Legal Response*, Report No 128 (2010) vol 1, 37.

⁶ *Ibid* 68.

⁷ Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), Parliament of the Australian Capital Territory, *Scrutiny Report No 17* (2018) 3.

common law defence of honest and reasonable mistake of fact. The objective test will render the defence meaningless or it will create two conflicting legal concepts of consent to be determined by a jury in one trial. The defence would serve no purpose as it would be irrelevant whether an accused honestly believed that the other person had in fact consented. Similar to the operation of the objective test, an accused would be found guilty unless he or she believed that the other person had validly consented in law (i.e. that the belief was based on what the other person had communicated to the accused or was reasonably implied in the circumstances).

The Society is concerned that the introduction of a subjective (clause 7 (section 67(1)(b)(i))) and objective test (clause 7 (section 67(1)(b)(ii))) will give rise to interpretation issues. The recent decision of the New South Wales Court of Criminal Appeal in *R v Lazarus*⁸ illustrates the difficulties faced by trial judges in interpreting section 61HA(3) (the accused's knowledge about consent) of the *Crimes Act 1900* (NSW). The Court found that the trial judge had failed to direct herself about the steps taken by the accused to ascertain whether consent had been given.⁹ The Court ordered that in the interests of justice, the accused would not be tried for a third time.¹⁰

The Society notes that the NSWLRC Review will consider, *inter alia*, the utility of introducing an 'affirmative model of consent' by inserting an 'affirmative consent' provision into section 61HA of the *Crimes Act 1900* (NSW).¹¹ An affirmative model of consent currently operates in Tasmania (as a factor that vitiates consent)¹² and in Victoria (as a factor that vitiates consent¹³ and as a direction to the jury).¹⁴ The Society strongly advises against the insertion of an affirmative consent provision into section 67(1) of the *Crimes Act 1900* (ACT). A provision that negates consent on the basis that a person does not say or do anything to communicate (or indicate) consent is likely to result in ambiguity and uncertainty. An affirmative consent provision would vitiate any subtle and ambiguous signals about consent¹⁵ and accordingly, would be more problematic than the objective test proposed by the Bill.

The Society is also concerned that under the Bill, the same level of criminal culpability applies in respect of both an accused who knows that consent is not given and an accused who thinks that he or she is acting reasonably (but who, according to an objective test, is acting unreasonably). An accused who fails to take reasonable care to ensure that a person provides consent should be subject to a lower penalty than an accused who intentionally disregards a person's lack of consent.

It is hoped that the recommendations outlined above are of assistance to the Committee. Please do not hesitate to contact the Society should you have any queries or require further information.

Yours sincerely,



(for) Sarah Avery

President

⁸ [2017] NSWCCA 279.

⁹ *Ibid* [144], [148]-[149].

¹⁰ *Ibid* [168].

¹¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 May 2018, 41 (Mark Speakman, Attorney General).

¹² *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(a).

¹³ *Crimes Act 1958* (Vic) s 36(2)(l).

¹⁴ *Jury Directions Act 2015* (Vic) s 46(4).

¹⁵ Helen Mary Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (Degree of Doctor of Philosophy, The University of Tasmania, 2012) 11 <<https://eprints.utas.edu.au/14748/2/whole-cockburn-thesis.pdf>>.