LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SERVICES
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Submission Cover Sheet

Crimes (Consent) Amendment Bill 2018

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Submission to the Standing Committee on Justice and Community Safety Inquiry into the Crimes (Consent) Amendment Bill 2018

I would like to thank the Committee for inquiring into my Bill and thereby encouraging ongoing stakeholder and community engagement on this important issue. I acknowledge the concerns raised by both the ACT Human Rights Commission and the JACS Committee Scrutiny Report in relation to the Bill and have been seeking additional feedback to inform how they can be addressed.

As outlined in the Explanatory Statement the policy intent behind the Bill is to provide an affirmative definition of consent that aligns with modern community standards. This issue has been the subject of inquiries and report recommendations for nearly two decades. As far back as 2001, the ACT Law Reform Commission provided a report to the ACT Government on Laws Relating to Sexual Assault and the Model Criminal Code on Sexual offences Against the Person. This report recommended a positive consent standard. The Government and the Legislative Assembly must now commit to addressing this gap in our legal system without further delay. We must ensure that our jurisdiction is brought up to date within the term of the ninth Assembly, if not within the next 12 months and I am committed to ensuring this occurs.

This is a complicated and challenging area of the law and it is important that the issues raised by the Human Rights Commission and the Scrutiny report are addressed when new legislation is brought forward. I have no doubt that the Committee will receive further submissions that highlight the complexity of this legal reform, however it is clear that the time has come to develop a robust and positive legal framework for prosecuting sexual offences in the ACT. These complexities have and will become clearer through the Committee's inquiry process and so in this submission I have outlined some of the key issues and elements that I believe need to be addressed to ensure we have an 'affirmative, communicative model' for consent. I note that the Sexual Assault Reform Program (SARP) has been recently reconvened and that it may be appropriate for this expert group to focus on this issue, as well as other important and related reforms.

In light of further stakeholder consultations and feedback since the announcement of the Committee Inquiry process I am of the belief that a new Bill will be needed to effectively deliver a strengthened legal model for consent. It is clear that an affirmative definition based on a 'free and voluntary agreement' is the central element of the model, as is an 'objective fault test'. However in recognition of the concerns raised by the Scrutiny report and the Human Rights Commission, the objective fault test will need to be redrafted in a separate provision to the definition. This will also more closely align with the formulations of other Australian jurisdictions, such as NSW and Victoria. The wording of this will need to take into consideration the submissions to this inquiry and its report due at the end of October. This timing will also allow for

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consideration of the current NSW Law Reform Commission reference on Consent in Criminal Matters, with an early consultation response paper due to be released around the same time.

Background/ Law reform context for defining consent

The concept of consent is fundamental to prosecuting sexual offences. The ACT is currently the only jurisdiction in Australia not to have an affirmative definition of consent.[1] Section 67 of the *Crimes Act 1900* (ACT) lists a range of circumstances in which consent is negated but does not define what consent means.

Statutory definitions of consent seek to provide legal clarity and to set and inform community standards with respect to proscribed sexual activity. When consent is an issue at trial, it needs to be clearly and consistently explained to juries who in turn need to be able to make sensible decisions as to whether a particular sexual act was consented to or not. This was recognised in the Australian Law Reform Commissions' 2010 report Family Violence – A National Legal Response – which 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."[2] The ALRC has provided a clear and compelling case to change the law in the ACT and it's important to take on board these recommendations to keep pace with community expectations and other jurisdictions.

The ACT's own Law Reform Commission found the current formulation of section 67(1) to be inadequate. The Commission's 2001 report on the laws relating to sexual assault stated:

> "As presently formulated section 92P [now section 67(1)] offers little real guidance as to what is envisaged by the term 'consent'. It merely provides that, whatever it may be, consent is negated in the circumstances stipulated. Whilst statutory definitions frequently require some qualification, it is generally undesirable to attempt to cast light on the meaning of important terms only by offering explanations in purely negative terms. Such an approach is particularly undesirable in this area of the law because it inevitably tends to shift the focus from the crucial issue of whether there was actual consent to what are, at best, secondary issues, such as the existence of violence or threats. Any provision that refers to consent only by reference to the absence of certain factors is likely to be at best confusing and at worst misleading."[3]

The Commission recommended that the section should be repealed and replaced with a positive definition of consent, containing the terms 'free and voluntary agreement'.

The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC), conducted a review of sexual offence laws throughout Australia. In 1999, The MCCOC similarly recommended criminal codes should include a positive definition of consent base on a 'free and voluntary agreement'.

In its combined response to the ACT Law Reform Commission Report and the MCCOC report the ACT Government stated, "The Government agrees with the commission and the MCCOC that consent should be

[1] See *Crimes Act 1958* (Vic) s 36; *Criminal Code (Tas)* s 2A(1); *Criminal Code* (Cth) s 192(1); *Crimes Act 1900* (NSW) s 61HA(2); *Criminal Law Consolidation Act 1935* (SA) s 46(2); *Criminal Code (NT)* s 192(1); *Criminal Code (Qld)* s 348(1); *Criminal Code (WA)* s 319(2)

[2] Family Violence – A National Legal Response, Australian Law Reform Commissions, (Report 114), recommendation 25 – 4, published 11 November 2010, available at https://www.alrc.gov.au/publications/25.%20Sexual%20Offences/consent#_ftn150.

[3] Australian Capital Territory Law Reform Commission, Report No 18: REPORT ON THE LAWS RELATING TO SEXUAL ASSAULT, Chapter 3, paragraph 19, available at http://www.austlii.edu.au/au/other/actlrc/reports/18.html#fnB37

defined as free and voluntary agreement".[4] However, no legislative change has occurred since the government's response in 2003. In a 2012 judgement in the ACT Supreme Court Justice Penfold reflected on the lack of legislative change in this area:

> "It is unfortunate, … that s 67, which was presumably intended to be an element in the protection of the vulnerable against sexual assault, has for so long been left in a state in which its operation in various respects seems to be quite unclear."[5]

Implementing an 'affirmative, communicative model of consent'

As I mentioned in my tabling speech on the current Bill, "When I grew up, the fairytale role model was Sleeping Beauty, who was rescued by Prince Charming. In this story, of course, consent by the passive Sleeping Beauty was 100 per cent assumed by the dashing prince." My intention is not to make Prince Charming prove that she wanted it, but if, upon waking, Sleeping Beauty realises what has happened and indeed did not want that kiss, the prosecution must prove that fact. Of course, this is a simplistic interpretation of what is a complex issue, but the point is this: the law needs to shift from assuming consent exists unless a person protests, to assuming all people are neutral on the matter until there is physical or verbal communication to indicate one way or the other. The way to achieve this is to implement an 'affirmative, communicative model of consent'.

I have already outlined above the reasons for moving to an affirmative model, which is almost universally supported. The communicative element is however, somewhat more contested. Many law reform advocates suggest a communicative element, such as already exists in Tasmania and Victoria, in addition to the affirmative definition, can further instruct decision-makers (judges and juries) in the interpretation of the law. Not only this, but communication is the gold standard in consent – ideally we want our laws to show the community at large that there is an expectation we should seek and receive physical or verbal confirmation that our sexual advances are wanted.

For example, the Victorian legislation aims to implement the affirmative model by requiring the jury to look for communicative evidence of consent. This was achieved with the implementation of the *Jury Directions Act 2015*. The Victorian Criminal Law Review introducing the new laws explains the changes and the rationale as follows:

> "The Jury Directions Act 2015… adds two further items to the list of defined consent-negating circumstances in section 34C of the Crimes Act:
>
> - the person does not say or do anything to indicate consent to the act, and
> - having initially given consent to the act, the person later withdraws consent to the act taking place or continuing.
>
> The addition of these situations to the list of consent-negating circumstances provides an even clearer endorsement of the communicative model of consent. The first circumstance is a development of what was a jury direction under the old section 37AAA(d) of the Crimes Act. Elevating this from a jury direction about evidence to a matter of definition concerning the nature of consent will make clear that an absence of any word or action to indicate consent is not merely good evidence of a lack of consent but, rather, is a lack of consent. This reflects the principle that consent does not exist unless it is communicated. The second circumstance reiterates the importance of a

[4] Government Response to the ACT Law Reform Commission Report on the Laws Relating to sexual Assault and the Model Criminal Code Report on Sexual Offences Against the Person, August 2003, page 24

[5] R v Schippani [2012] ACTSC 108 (13 July 2012) at paragraph [89].

person's capacity to withdraw their consent to sex. It emphasises that if a person withdraws their consent, it ceases to exist from that time onwards."[6]

The Tasmanian model gives explicit effect to the communicative model as follows:

> "Without limiting the meaning of "free agreement", and without limiting what may constitute "free agreement" or "not free agreement", a person does not freely agree to an act if the person –
>
> (a) does not say or do anything to communicate consent;"[7]

As I have outlined previously, it is clear that the Bill as it stands will require redrafting in order to address concerns raised by the JACS Committee Scrutiny report and the ACT Human Rights Commission. I acknowledge the concerns raised in relation to the human right to the presumption of innocence and am keen to explore ways to resolve this technically complicated legal matter, including through the outcomes of the committee's inquiry process. Evidence in sexual assault matters inevitably relies on competing narratives by the only two people present about what happened and about whether consent existed. The risk that the accused's presumption of innocence is undermined by the way the definition is currently constructed is one that must be addressed whilst ensuring it that any revised definition combines the affirmative, communicative definition of consent with an objective fault test to prove the elements of consent.

Notwithstanding these issues, an objective fault test in and of itself does not reverse the onus of proof onto the defendant. An objective fault test means that a defendant may only rely on a belief that is both honest and reasonable. That is, would a reasonable person in the circumstances of the case hold the same belief that the complainant was consenting. Reasonable belief in consent is an objective standard, but it must be for the prosecution to prove that standard has not been met, not the defendant to prove it has been met. A subjective fault test means the defendant had an honest belief that the complainant was consenting and relies only on what was in the mind of the accused at the time of alleged offence.

An objective fault test is critical to ensure that any definition of consent can be referred to and used as a basis for argument in legal proceedings. Without an objective fault test, an enhanced definition of consent – even if it includes an affirmative, communicative model of free and voluntary agreement to sexual activity, will have little effect.

A recent study of how laypersons interpret the meaning of reasonableness showed that people still tend to fall back on how the victim of sexual assault behaves in determining whether a defendant had a reasonable belief that the victim consented.[8] While this is an important factor, it is also important for juries to take into account the actions, or lack of action, taken by a defendant to ascertain the complainant's consent. As illustrated by the following extract from a forthcoming book on this topic implementing legislative change relies on educating both the legal system and the community:

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[6] Criminal Law Review Department of Justice and Regulation, *Victoria's New Sexual Offence Laws – An Introduction*, p 13, available at: https://assets.justice.vic.gov.au/justice/resources/f33fe495-275d-465f-8087-ba96872b27f1/copy+of+%28cd-15-260259%29+--+discussion+paper-+victoria+s+new+sexual+offence+laws-+an+introduction+-web+site+version+3+pdf.pdf

[7] *Criminal Code (Tas)* s 2A(2)(a)

[8] Chapter 4, Simon Bronitt and Patricia Easteal (2018) Rape Law in Context: Contesting the Scales of Injustice. Federation Press, Sydney

> "the legal boundaries for 'free and voluntary' consent are set by wider cultural and societal attitudes about gender and sexuality, and thus will continue to be contested within our legislatures and courtrooms alike."[9]

In most legal proceedings where consent is at the heart of the case the evidence presented is based on two competing views of the circumstances, with no independent witness. In other words, the jury must come to their conclusion based on 'what he said' versus 'what she said' and that simple fact cannot be changed by law. What we can hope to achieve, by changing the law, is to prevent these cases of non-consensual sex in the first place.

As alluded to in the extract above, we live in a society where beliefs and attitudes that victim-blame women for sexual assault and rape prevail. According to the 2014 Australian National Community Attitudes towards Violence against Women Survey:

- 12% of Australians thought that if a woman goes to a room alone with a man at a party, it's her fault if she is raped;
- 16% believed women often say no when they mean yes;
- 19% believed if a woman is raped while drunk/drug affected she is at least partly responsible; and
- 43%, almost half of respondents, believed rape results from men not being able to control their need for sex.[10]

These results are shocking. What they do show is that tackling issues around sexual consent and sexual assault needs real cultural change. This is fundamental to positive, respectful sexual activity and should be reinforced by the highest standards in our community, the laws that govern us.

This cultural change must be driven by the highest point in our community, the legislation. And where our legislation are found wanting, as is the case here in the ACT, cultural change must be reinforced by legislative change. The laws of the ACT need to meet the expectations and values of the community. This legislative reform will support all members of the community to understand what consent is and that consent is and should be central to any sexual activity.

Implications for the criminal justice system

The nature of this Bill and this inquiry will contribute to breaking down the stigma and shame associated with sexual assault victimisation. We know that historically, sexual abuse, sexual assault and rape are in the category of the least reported crimes, not least because of society's tendency to blame the victim. Victims fear coming forward because they are often not believed and many are asked how they contributed to the offence. For example, questions about what a person was wearing, why a person was in a particular place or whether they had been drinking are common place when a victim alleges sexual assault and are all forms of victim blaming and imply that a victim was complicit. Many victims are unsure of whether they will survive the legal system which has historically and often been seen as too hard. When this is viewed in the context of the survey results cited above it is not hard to see why. It may be the case in the ACT that those cases

[9] Chapter 2, Simon Bronitt and Patricia Easteal (2018) Rape Law in Context: Contesting the Scales of Injustice. Federation Press, Sydney

[10] Vic Health 2014 Summary Report on the findings from the 2013 National Community Attitudes towards Violence Against Women Survey (NCAS), available here: https://www.vichealth.vic.gov.au/media-and-resources/publications/2013-national-community-attitudes-towards-violence-against-women-survey

that do come to the attention of the police are prosecuted at a rate on par with other crimes, but it is still the case that many cases that should be reported are not:

> "approximately 85% of sexual assaults never come to the attention of the criminal justice system."[11]

This legislation is not about prosecuting more sexual offence cases or achieving greater numbers of convictions, it is about achieving more just outcomes for complainants and defendants in sexual assault cases where consent is contested.

Primarily though it is about promoting a broader societal shift in how consent is thought about. As with the greater recognition of domestic and family violence in recent years resulting in more people seeking assistance and leaving abusive relationships, we have seen momentum building in recent years with the #metoo and publications such as the RedZone Report into sexual assault and harassment on Australian University campuses, this is empowering people to come forward who have been victims. Updating the ACT Crimes Act and the conversations about this legislative change will likely continue this trend.

Victims and survivors can be marginalised and experience social isolation and exclusion as a result of the traumatic experience of sexual assault and can have a lasting impact on mental, physical wellbeing and social inclusion. Unfortunately court processes can add to this trauma, in spite of many positive changes in the ACT. It is important that our laws set the expectations for what is acceptable and what society will not tolerate so that victims of sexual assault have a voice and the courage to approach the criminal justice system. Cultural change can be a slow process and while we have seen great momentum in recent times, we must also have a clear legal framework to deal with these matters. A definition of consent that is based on free and voluntary agreement provides a benchmark for those victims to overcome the first hurdle in coming forward – their own self-doubt and guilt about the assault – by giving some meaning to the word consent, survivors can legitimately ask themselves, did I consent to what happened, did I voluntarily agree to what happened of my own free will?

As it currently stands in the ACT Crimes Act, there is only a list of factors that negate consent. This is problematic in that nothing can be negated if it doesn't first exist. This means the way the current legislation is drafted assumes as a basic premise that consent was given… unless certain factors existed to negate it. This is obviously a historical leftover from the days when in a sexual assault matter, a victim's evidence alone was insufficient to convict unless corroborated by other factors. Thankfully, the situation has improved since the removal of compulsory corroboration warnings by judges in sexual assault matters but we still have some way to go.

Ideally, there should be a presumption that consent does not exist – unless certain factors exist to ensure it does.

Changes to legislation that have occurred over the years, such as rape shield laws, where a victims prior sexual history can no longer be taken into account have made it easier for victims to come forward and easier for the community more broadly to understand what constitutes rape and/or sexual assault.

Research continues to attest that that the chances of sexual assault survivors being further traumatised by the courts system remains high, while the likelihood of securing a conviction remains shamefully low.

Having an affirmative and communicative definition of consent should improve this situation. This legislative definition of consent will set a benchmark for community expectations, which in turn informs the attitudes of jurors. It should give legal counsel on both sides more clarity and less confusion about whether consent existed. When legislative reforms on the definition of consent are passed, it will be vitally important to

[11] Australian Institute of Family Studies, *Sexual Assault Laws in Australia*, ACSSA Resource Sheet No. 1 — February 2011, available at: https://aifs.gov.au/publications/sexual-assault-laws-australia

ensure that all stakeholders engaged in the criminal justice system, such as police, the courts, prosecutors, lawyers and members of the judiciary are well informed and educated about the change in law.

Social implications

The social implications of this Bill and legislative improvements to provide a more robust legal framework for consent in the ACT will support the momentum that has been established by the #metoo movement, the Australian Human Rights Commission's report on Sexual Assault and Sexual Harassment at Australian Universities, reforms occurring as a result of the Royal Commission into Institutional Responses to Child Sexual Abuse. All of these have promoted discussions across all parts of society about what constitutes abuse and consent.

Until recently, these conversations were considered less relevant and in some cases, not necessary and certainly less likely to occur in mainstream media and education. The very nature of the inquiry into this Bill is promoting conversations and discourse about the issue, which contributes to enhanced understanding. This in turn should lead to healthier and more respectful relationships which are a fundamental underpinning to our society.

From a legal perspective, understanding, legislating and forming judgements about consent is complex, but from a social and community perspective it is really very simple. In the 1970's we learnt "No means No'. And in the 1990s we said "only Yes, means Yes". Sadly a freely given Yes is still not the benchmark for all our sexual encounters and certainly not for those cases that go before the courts. By legislating a clearly communicated affirmative definition of consent, this sends a clear signal to our community, that those entering into a sexual relationship of any kind, are required to be mindful of the feelings and wishes of the other person.

This Inquiry is a contributor to the discourse and debate that surrounds the issue of consent.

Further to this, there is an ongoing need to educate the community more broadly about consent, respectful relationships, the non-consensual sharing of intimate images and/or other non-consensual sexual acts and the breaking down of stereotypical myths and beliefs about sexual assault and rape. This needs to occur in school settings targeting students and young people, but also through professional development opportunities for teachers, community service and youth workers in a range of settings. The development of education opportunities and resources for community groups as well as for the full range of stakeholders in the criminal justice system are a necessary and important part of effectively implementing the intentions of the Bill.

I conclude by reiterating that I am committed to ensuring a positive definition of consent is included in the *Crimes Act 1900* (ACT) during the term of this current Assembly and look forward to the report of this Inquiry and the NSW Law Reform Commission's preliminary report to inform next steps.

Yours sincerely

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