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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Chair
Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
PO Box 1020
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Dear Chair,

Crimes (Consent) Amendment Bill 2018

The ACT Bar Association has been invited to appear before the ACT Legislative Assembly's Standing Committee on Justice and Community Safety.

The Bar is grateful for the opportunity to put to the Committee views about the *Crimes (Consent) Amendment Bill 2018* presented by Ms Le Couteur MLA. The Bar acknowledges that the issues raised by the Bill are important and complex. The Bar is appreciative of the process that has been adopted in this instance. Too much legislation in the domain of changes to the criminal law is passed in a reactive way to issues that achieve media currency and without, with respect, sufficient public scrutiny of the terms and effects of that legislation.

The Bar has very publicly raised concerns about recent legislative changes to sexual offending provisions under the *Crimes Act* 1900 as being poorly targeted and which have had the effect of criminalising conduct that should not be the subject of sanction by the criminal law. An inappropriate reliance has been placed on police and DPP discretion to make legislation operate in a reasonable way. Experience suggests that discretions can be inappropriately influenced. Statutes enacted for one purpose are employed to cast the net of criminal sanction wider in areas that the Assembly clearly did not contemplate.

The New Section 66A Provision

In the *Explanatory Statement* to the Bill the purpose of this amendment is said to be to amend child pornography offences to ensure that images consensually shared by young people will not result in their prosecution. Philosophically, the Bar supports the proposals. Sections 64 to section 66 have been amended in recent years and the bar has been consulted as to the terms of those amendments. A consistent theme of the Bar's

submissions has been the inappropriate effect these provisions have on consensual behaviour of children or young people. The submissions that Ms Le Couteur has received in respect of this Bill suggests that the concerns held by the Bar are more widely shared.

The Bar would invite some care in ensuring that the amending provision is appropriately drafted and ensures that onus of proof provisions are appropriate within the context of the specific offence provision.

The generic approach adopted as drafted does not always fit well with the relevant offence provision.

We make specific comment as follows:

Sections 64(1) & (3)

The note to the proposed section 66A makes clear that the burden cast upon an accused is an evidential burden only. This is appropriate.

Some thought should be given to the extent to which it can be said that the child (for the purposes of section 66A (2)(c)) can consent to another child or young person "offering" or "procuring" the child. Thought may reasonably be given to whether, as a matter of fact, a child can consent to the "offering" or "procuring" and whether, as a matter of principle, that behaviour ("offering" or "procuring") should be treated in the same way, in respect of issues concerning consent as circumstances involving "use". It is also noted that in respect of section 64(1) issues of criminal responsibility will also arise given the age that falls potentially within the defence under the proposed 64(2)(a) and (b).

Section 64A

The provision is not covered by the draft Bill. Given that "sexting" would involve, at least, the production, publication of child exploitation material, then the provision would have to be addressed in any comprehensive attempt to address the issue.

Section 65(1)

Again, it is noted that the note to the proposed section 66A makes clear that the burden cast upon an accused is an evidential burden only. That is appropriate.

Section 66

In its submission to the Government in relation to the existing section 66 provision, the Bar expressed very public concern about the width of the provision.

The application of the proposed section 66A to this provision has some complexity. Section 66(1)(a) attaches criminal liability in a variety of circumstances:

1. encouraging a young person to commit an act of a sexual nature;

2. encouraging a young person to take part in an act of a sexual nature; and
3. encourage a young person to watch someone else committing or taking part in an act of a sexual nature.

Given the focus of the provision is on the act of encouragement, it is difficult to see how, for the purposes of the proposed section 66A, a child could consent to that act of encouragement. Unless it is said that, in an ex-post facto sense, it could be inferred that the child or young person consented to the encouragement continuing. The example given in the section (of the child being shown an image on the screen), highlights the difficulty of the approach. If the child or young person says to a friend (who is a child) "look at this" and puts an image in front to the child, it is hard to say that the child who was shown the image has "consented" to that act or to that has given "encouragement" to that act.

The Bar has previously put in relation to these recently introduced grooming provisions that they capture conduct that should not be criminalised. The example in the section highlights the point. Unless done for a grooming purpose, why, in the example given, should that conduct as between children or young people constitute a criminal offence?

In respect of section 66(3) a similar problem arises. In the sending of an image it does not make logical sense to excuse that behaviour on the basis of the child consenting to his/her own conduct.

It is also unclear why the burden of establishing the defence in the context of section 66 places a legal (as distinct from evidential) burden on an accused. We note this is an issue that the Human Rights Commissioner has raised with the Committee previously.

The Bar would suggest that if the issue the Bill wants to address is "sexting" then a specific provision addressing that area of conduct might be the simpler approach. Other relevant sections can be made subject to that provision.

Meaning of Consent

As a matter of principle, the Bar welcomes consideration of the law of consent as it relates to sexual offending in the ACT. In saying this, the Bar is of the view that the issue is a complex one and not capable of easy resolution. The Bar is not convinced that the existing provisions require fundamental conceptual review.

The comments that follow address issues that arise in respect of consent in the context of sexual assault.

The rights of people who allege that they have been the victim of sexual assault must be balanced against the right of those who stand accused to have their guilt determined in accordance with balanced laws and otherwise in the context of a fair trial. As a general proposition the Bar supports statutory expressions of crime of sexual assault that provide a balanced and clear expression of criminal liability. Any definition of consent must criminalises only that conduct that is generally regarded to be of such culpability that it should attract criminal sanction.

The Bar is of the view that the present statutory expressions of liability substantially meet that test[1] although, as a number of Courts have observed, the provisions that govern

[1] The test has been set out in a number of ACT decisions:

In *DPP V Walker [2011] ACTCA 1* the ASCT Court of Appeal defined criminal liability in the following way:

> 27. Brennan J explained the ambulatory nature of the expression "mens rea" as it applied to various states of mind as an ingredient in different offences in *He Kaw Teh (1985) 157 CLR at 568-575* in a passage approved by Gleeson CJ, McHugh, Gummow and Hayne JJ in *R v Lavender [2005] HCA 37; (2005) 222 CLR 67* at 77. Instructively, Brennan J observed in He Kaw Teh 157 CLR at 568:
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> "The requirement of mens rea is at once a reflection of the purpose of the statute and a humane protection for persons who unwittingly engage in prohibited conduct.
> It is one thing to say that mens rea is an element of an offence; it is another thing to say precisely what is the state of mind that is required. It is the "beginning of wisdom", as Lord Hailsham of St. Marylebone said in *Reg. v. Morgan* [1975] UKHL 3; [1976] AC 182, at 213, to see "that 'mens rea' means a number of quite different things in relation to different crimes". Indeed, it may connote different states of mind in respect of the several external elements of the same crime. If A strikes B and causes him bodily harm, A's moral blameworthiness may depend on whether A moved accidentally, or whether he was unaware that B or anybody else was there, or whether he did not mean to cause bodily harm and could not and did not foresee that he would cause bodily harm. The particular mental states that apply to the several external elements of an offence must be distinguished, not only as a matter of legal analysis, but in order to maintain tolerable harmony between the criminal law and human experience."
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> 28. The elements of the offence in s 54(1) are that:
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> a. the accused engages in sexual intercourse with another person;
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> b. the sexual intercourse is without the other person's consent;
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> c. the accused knows that the other person does not consent, or is reckless as to whether the other person consents, to the sexual intercourse.
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> 29. In many criminal offences direct evidence of the accused's actual intention at the time of the alleged guilty act will not be available. Often that state of mind must be established by objective evidence from which the accused's intention can be inferred. In sexual assault cases the intention of an accused will usually have to be inferred from the whole of the circumstances.

The test of inadvertent recklessness was considered in *R v Stevens (No 2) [2017] ACTSC 296 (2 March 2017):*

> 8. Having regard to the manner in which the decision in Tolmie was dealt with in Sims, I do not consider that it involved a specific approval of Kirby P's formulation of the concept. In the circumstances, it would be consistent with the decision of the High Court in Banditt and Gillard if the direction that I gave in relation to non-advertent recklessness was to the effect of that given by the trial judge in Banditt, with additional references to the verbal formulae expressed in Morgan, which were approved in Gillard, namely:
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> Recklessness does not have to be the product of conscious thought. If the accused does not even consider whether the complainant is going to consent or not then that is reckless. This can be described in various ways: namely, that the accused's state of mind is at least indifferent to the complainant's consent, if he just goes ahead willy-nilly not even caring whether she consented or not, or that he has gone ahead without caring

consent, including section 67 of the Crimes Act 1900 , might be given greater clarity: see *Gillard v The Queen [2014] HCA 16; 88 ALJR 606* and *Agresti v The Queen [2017] ACTCA 20 (11 May 2017).*

The Bar is convinced that the Bill does not meet this test. Consent is defined to mean "free and voluntary agreement" or if the accused "is satisfied on reasonable grounds that the agreement was freely and voluntarily given". The following comments are made.

1. No guidance is given to the concept of "free and voluntary agreement". Is a complainant persuaded to engage in a sexual act someone who engages freely and voluntarily in that act? Whilst it is said in the Explanatory Statement that the Bill involves the introduction of an "affirmative communicative model for consent", it is not clear that this is what the Bill does.

2. The provision would create a legal liability notwithstanding the existence of an honestly held belief that the complainant was consenting.

3. The provision seems to cast a legal burden on the accused to the matters at the amended section 67(1)(b). That would require the accused to prove that he/she was satisfied on reasonable grounds that the agreement was freely and voluntarily given. This not only shifts the ultimate onus of proof to an accused but by the use of the expression "satisfied" lifts the level of satisfaction from a lower threshold of "belief". Such an approach overthrows the general approach to criminal liability set out in the Crimes Act 1900 and Criminal Code 2002 (see section 58). It would also be contrary to the right to a fair trial set out in section 21 and of the Human Rights 2004 and the presumption of innocence found in section 22 of the Human Rights Act 2004 . The concept of "reasonable grounds" imports an objective element into the definition of criminal liability in this area of the law. A person should not be guilty of a sexual assault where, notwithstanding the existence of an honestly held belief, the accused failed to satisfy an undefined "objective standard". The concept of recklessness is the appropriate vehicle for attaching criminal liability to conduct not involving knowledge. This flows from the principle that a person should be punished (particularly in respect of serious crimes) when he or she had recognised the harmful effect of that conduct or is wilfully blind to those consequences. As a question of logic the concept of "reasonableness" plays a part in how a jury will test the issue of an "honestly held belief" and whether the prosecution have excluded that possibility beyond a reasonable doubt.

4. The suggestion made in the Explanatory Statement as a justification of the reversal of proof that the existing provisions of the Crimes Act 1900 "perpetuates the idea that non-consent needs to be expressed - either through physical resistance or

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whether she was a consenting party. If the accused was reckless in that sense then the law says that he is reckless.

verbal instruction" is simply wrong and ignores the terms of section 67 of the Crimes Act 1900.

The Bar would welcome the opportunity of meeting with members of the Committee to further discuss the issues raised by this Bill.

Finally, the Bar supports the indication given in the Explanatory Statement that there is a need for a much wider discussion in our schools and in our community generally about the nature of sex and consent. Too much reliance is a placed on the criminal law to effect change in this area.

Yours faithfully

Ken Archer
President
ACT Bar Association