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 Pettersson MLA

Submission Cover Sheet

Crimes (Consent) Amendment Bill 2018

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Ms Elizabeth Lee MLA
Committee Chair, JACS Committee
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Via email – LACommitteeJCS@parliament.act.gov.au

Dear Ms Lee,

CRIMES (CONSENT) AMENDMENT BILL 2018

Executive summary

1. The proposed legislation is unfortunately misconceived. The legislation conflates the different aspects of consent, and ignores the crucial aspect of recklessness which, in the area of sexual offending, has developed greatly at common law.
2. There is no need for a statutory definition of consent from the point of view of the victim. It is inherent in the meaning of consent at common law that it be freely and voluntarily given. Further in the ACT, s 67 of the *Crimes Act 1900* greatly extends the situations in which consent of the victim is negated.
3. Accordingly the proposed legislation is at best unnecessary, certainly confusing, and probably regressive.
4. However there are aspects of recent law reform from comparative jurisdictions which could be incorporated into ACT law. Given that the committee is considering the issue of consent it is opportune to consider those aspects now. It is time to sweep away from our law the last vestige of the notorious case of *Morgan*, and redefine knowledge by the perpetrator about consent of the victim to cover the situation where the perpetrator has no reasonable grounds for believing that the victim consents to the sexual intercourse. Self-induced intoxication of an accused should also be excluded from the jury's consideration of whether the accused has knowledge that sexual intercourse is without the consent of the victim.

ACT DIRECTOR OF PUBLIC PROSECUTIONS

Reserve Bank Building 20–22 London Circuit CANBERRA CITY ACT 2601
Phone +61 2 6207 5399 I Fax +61 2 6207 5428 I GPO Box 595 CANBERRA CITY ACT 2601 I DX: 5725

Consent has two aspects

These proposals, although no doubt well intentioned, miss the mark. However, it is opportune to raise considerations for law reform in the context of this proposed Bill.

For sexual offending, the concept of "consent" has 2 aspects. The **first aspect** is the consent of the victim: simply, does the victim actually consent to the sexual conduct. The **second aspect** is the state of mind of the perpetrator as to the consent of the victim[1].

To succeed in a prosecution for a sexual offence where consent is an element, the Crown must prove both the first aspect - that the victim did not consent, and the second aspect – that the perpetrator knew the victim did not consent or was reckless about whether or not the victim consented.[2]

Unfortunately, in its definition of consent the proposed legislation conflates these aspects. Furthermore, the second aspect, that is the state of mind of the perpetrator as to the consent of the victim, is now taken by the common law to be defined essentially in terms of recklessness. Reference to recklessness is notably absent from the definition of the meaning of consent in the proposed law. However the provisions which formulate the actual sexual offences, such as section 54 of the *Crimes Act 1900,* still retain under the draft the reliance on a recklessness as being crucial to the second aspect.

I will consider each of the two aspects of consent referred to above. As will be seen, there is a case for providing further certainty in relation to the second aspect of consent. However, the proposed legislation would be a regressive step.

The first aspect of consent – the consent of the victim

Consent is a crucial element of a number of sexual offences in the *Crimes Act 1900.* There is no definition of "consent" in the *Crimes Act*, but the common law has a very developed concept of what constitutes consent of the victim to sexual intercourse.

The dictionary definition for consent is to give permission, to 'agree' to what is proposed. At common law, consent must be 'freely given.'[3] Consent that is not freely given, by definition, cannot be consent.[4] Therefore, there is either consent, or there is not. For example, where there is a vitiating factor present, we do not say there is *lesser* consent, or *diminished* consent, we say that consent is negated.[5] And "consent that is negated is no consent."[6] What this means is that the term 'freely given' is inherent to the concept of consent. There simply cannot be consent without it.

A statutory definition of the first aspect of consent is therefore unnecessary and superfluous – it does not positively add to the common law concept of consent.

Section 67 of the Crimes Act makes further provision with respect to this first aspect of consent.

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[1] For ease of reference I will refer to the victim rather than the complainant, and to the perpetrator rather than the accused, noting that the Crown always bears the onus to prove its case beyond reasonable doubt.

[2] By way of illustration, s 54 of the Crimes Act provides:

> *A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years*

[3] *Gillard v The Queen* [2014] HCA 16 at [21].

[4] Ibid [24].

[5] *Crimes Act 1900* (ACT) s 67.

[6] Ibid.

It is convenient to set the section out in full:

67 Consent

(1) For sections 54, 55 (3) (b), 60 and 61 (3) (b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused—

(a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or
(b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or
(c) by a threat to inflict violence or force on, or to use extortion against, the person or another person; or
(d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or
(e) by the effect of intoxicating liquor, a drug or an anaesthetic; or
(f) by a mistaken belief as to the identity of that other person; or
(g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or
(h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or
(i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
(j) by the unlawful detention of the person.

(2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.

(3) If it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in subsection (1) (a) to (j), the person shall be deemed to know that the other person does not consent to the sexual intercourse or the act of indecency, as the case may be.

Section 67(1) sets out a number of circumstances which go to the first aspect of consent, the consent of the victim, and negate consent of the victim. As the High Court in *Gillard*[7] noted, consent that is negated is no consent. In other words if the consent of the victim was caused by any of the factors set out in section 67(1) then there was no consent, and the first aspect of consent is satisfied.

Section 67(3) deals with the second aspect of consent, that is from the point of view of the perpetrator. The effect of subsection (3) is that if it is established that the perpetrator knew that the consent of the victim was caused by any of the factors set out in subsection (1), the perpetrator is deemed to know that the victim did not consent.

To illustrate how that operates using section 54 as an example, if the consent of the victim to sexual intercourse was caused by any of the factors set out in section 67(1) then there was no consent. And if the perpetrator knows that the consent of the victim was caused by any of those factors, the perpetrator is deemed to know that the victim was not consenting. By virtue of subsection 54(3) proof of knowledge is sufficient to establish the requisite element of recklessness.

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[7] *Gillard v The Queen* [2014] HCA 16

The important point is that s 67 expands greatly the circumstances where the consent of the victim is negated.

The second aspect of consent – knowledge of the perpetrator that the victim does not consent to sexual intercourse

The operative mental element (*mens rea*) for sexual offending in the Territory under the current law is actually recklessness. For example, s 54 of the *Crimes Act* provides that a person who engages in sexual intercourse with another person without the consent of that person and who was reckless as to whether that other person consents has committed an offence. It is further provided that proof of knowledge or recklessness is sufficient to establish the element of recklessness.

In this context it should be noted that the common law has developed a broader concept of recklessness in relation to sexual offences than more generally obtains. For sexual offences, recklessness covers advertent recklessness (that is, a state of mind on the part of the accused that "the other person might not be consenting, but I will engage in sexual intercourse anyway") and inadvertent recklessness (that is, a state of mind on the part of the accused whereby the accused does not even consider whether the other person is consenting, but engages in sexual intercourse).

In order to preserve this expansive common law concept of recklessness, which has developed to mirror changing societal attitudes towards the issue of consent, the second aspect of consent should be defined to incorporate this concept of recklessness as to consent.

What is unclear is the extent to which *Morgan v DPP*[8] still influences the law in the ACT. *Morgan* was a decision of the House of Lords in the UK which decided that an honest belief by a man that a woman with whom he engaged in sexual intercourse was consenting was a defence to rape, irrespective of whether that belief was based on reasonable grounds.

Ideas for reform

Following *Morgan v DPP* a person charged with rape could rely on having an honest mistaken belief in consent. Various legislatures subsequently introduced legislation requiring any mistaken belief in consent to be honest and reasonable. The ACT does not have such a provision. In the ACT a trial judge must direct the jury in a relevant case that in deciding whether an accused person was under a mistaken belief in consent, that jury *may* consider whether the belief was reasonable.[9] This falls short of limiting the jury's consideration to belief which is *reasonable* as opposed to simply *honestly* held. This is in contrast to other jurisdictions such as NSW[10] and Victoria[11] where the belief is limited to those that are reasonably held, and one of the factors to be taken into account in determining this is what steps the accused has taken to find out if the other person consented.

One of the problems with the *Morgan* analysis is that it is now clear that an honest belief that the victim was consenting to sexual intercourse does not necessarily exclude the existence

[8] [1976] AC 182
[9] Evidence (Miscellaneous Provisions) Act 1991, s 73
[10] *Crimes Act 1900* NSW s61HA(3)(c)
[11] *Crimes Act 1958* Vic s36A.

of recklessness. This is clear from *Getachew v The Queen*[12] where the High Court stated at [27]:

> An accused's belief that the complainant *may* have been consenting, even *probably was* consenting, is no answer to a charge of rape. It is no answer because each of those forms of belief demonstrates that the accused was aware that the complainant might not be consenting or, at least, did not turn his or her mind to whether the complainant might not be consenting.

Fortuitously, there exists a legislative model which takes account of all of the issues that need to be addressed. In the New South Wales Crimes Act, the **second aspect** of consent is dealt with in the following manner:

> ***Section 61HA***
>
> ***(3) Knowledge about consent***
>
> A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:
>
> (a) the person knows that the other person does not consent to the sexual intercourse, or
> (b) the person is reckless as to whether the other person consents to the sexual intercourse, or
> (c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.
>
> For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:
>
> (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
> (e) not including any self-induced intoxication of the person.

This provision strikes the right balance. The reference in paragraph (a) to the knowledge of the perpetrator would include in the ACT context the knowledge that is deemed by section 67(3), that is, the knowledge that consent of the victim to sexual intercourse has been caused by any of the means set out in section 67(1).

The reference to recklessness in paragraph (b) would incorporate the common law developments of the concept of recklessness in relation to consent in sexual offending.

And paragraph (c) incorporates a reasonable person test in relation to consent. This is probably one of the things that was sought to be achieved by the proposed Bill.

Finally, self-induced intoxication of the perpetrator is excluded from the consideration of the jury in determining whether there are reasonable grounds for believing the victim consented.

Consideration should certainly be given to such a provision in the ACT.

Yours faithfully,

[redacted]

Jon White SC
Director of Public Prosecutions

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[12] *Getachew v The Queen* (2012) 248 CLR 22