

REPORT ON INQUIRY INTO THE CRIMES (CONSENT)
AMENDMENT BILL 2018

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

OCTOBER 2018

REPORT 3

THE COMMITTEE

COMMITTEE MEMBERSHIP

Ms Elizabeth Lee MLA	Chair from 22 March 2018 Member from 13 December 2016
Mrs Giulia Jones	Chair from 14 December 2016 to 22 March 2018 [On 21 March 2018 the Assembly discharged Mrs Giulia Jones MLA from the Committee and appointed Ms Nicole Lawder MLA in her place (for the period 22 March 2018 to 17 September 2018)] ¹ Member from 13 December 2016
Ms Bec Cody MLA	Deputy Chair from 14 December 2016 Member from 13 December 2016
Ms Nicole Lawder MLA	Member from 22 March 2018 (for the period 22 March 2018 to 17 September 2018)
Mr Chris Steel MLA	Member from 13 December 2016 to 23 August 2018
Mr Michael Pettersson MLA	Member from 23 August 2018

SECRETARIAT

Mr Andrew Snedden	Acting Secretary [from 10 April 2018]
Dr Andréa Cullen AGIA ACIS	Secretary [to 9 April 2018]
Ms Lydia Chung	Administrative Assistance

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¹ ACT Legislative Assembly, *Minutes of Proceedings*, No. 51, 21 March 2018, pp. 738; *Hansard*, 21 March 2018, p. 839.

RESOLUTION OF COMMITTEE APPOINTMENT

The Legislative Assembly for the ACT appointed the Standing Committee on Justice and Community Safety on 13 December 2016.

Specifically the resolution of 13 December 2016 establishing the Standing Committees of the 9th Assembly, as it relates to the Justice and Community Safety Committee states:

That:

(1) The following general purpose standing committees be established and each committee inquire into and report on matters referred to it by the Assembly or matters that are considered by the committee to be of concern to the community:

(d) a Standing Committee on Justice and Community Safety to perform a legislative scrutiny role and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services;

(4) Each general purpose committee shall consist of the following number of members, composed as follows:

(d) the Standing Committee on Justice and Community Safety:

(i) two members to be nominated by the Opposition;

(ii) two members to be nominated by the Government; and

(iii) the Chair shall be an Opposition member;

(5) Each committee shall have power to consider and make use of the evidence and records of the relevant standing committee during the previous Assembly.

(6) Each committee be provided with necessary staff, facilities and resources.

(7) The foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.²

² ACT Legislative Assembly, *Minutes of Proceedings*, No. 2, 13 December 2016, pp. 13–16.

On 20 September 2018, paragraph (4) of this resolution was omitted and the following paragraph substituted:

(4) Each general purpose committee shall consist of the following number of members, composed as follows:

(d) the Standing Committee on Justice and Community Safety:

(i) one member to be nominated by the Opposition;

(ii) two members to be nominated by the Government; and

(iii) the Chair shall be the Opposition member.³

³ ACT Legislative Assembly, *Minutes of Proceedings*, No. 73, 20 September 2018, p. 1028.

REFERENCE OF THE BILL TO THE STANDING COMMITTEE

On 8 May 2018 the Legislative Assembly referred the *Crimes (Consent) Amendment Bill 2018* to the Standing Committee on Justice and Community Safety for inquiry and report by 31 October 2018.⁴

The Bill and accompanying Explanatory Statement are at:

http://www.legislation.act.gov.au/b/db_57900/default.asp

⁴ ACT Legislative Assembly, *Minutes*, 8 May 2018, p. 804.

ACRONYMS

DPP	Director of Public Prosecutions - ACT
HRA	<i>Human Rights Act 2004</i> (ACT)
HRC	Human Rights Commission
NSWLRC	New South Wales Law Reform Commission

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RECOMMENDATIONS

Recommendation 1

That the *Crimes (Consent) Amendment Bill 2018* as introduced into the Legislative Assembly on 11 April 2018 not be proceeded with in its current form.

Recommendation 2

The Committee recommends that the ACT not consider or enact legislative change to introduce a definition of affirmative consent until the report from the current NSW Law Reform Commission inquiry in relation to sexual offences is presented.

Recommendation 3

The Committee recommends that, any legislative changes under ACT law proposing a definition of consent in relation to sexual offences, not include any element that requires proof that a perpetrator knew or should have known consent was given.

Recommendation 4

The Committee recommends that a definition of consent based on a concept of free and voluntary agreement, and affirmative and communicative consent be considered for enactment into ACT law.

***Recommendation 5**

The Committee recommends that Section 67 of the Crimes Act 1900 be amended to include a provision which states that the fact a person does not say or communicate consent is not, of itself, regarded as consent.

Recommendation 6

The Committee recommends that any legislative changes retain the fundamental presumption of innocence until proven guilty in that the burden of proof beyond reasonable doubt must remain with the prosecution.

Recommendation 7

The Committee recommends that legal advice be sought on the potential impacts of legislatively removing the current common law defence of 'honest mistake' ('the Morgan defence').

Recommendation 8

The Committee recommends that, in conjunction with legislative change and amendment, that a complementary education program on consent be put in place. The Committee also recommends that such a campaign especially focus on young people.

Recommendation 9

The Committee recommends that the ACT Government establish a cross-government, cross-sector working group, which includes representations from women's organisations, sexual assault and domestic violence services and the legal fraternity, or alternatively, that the ACT Government utilise an already existing group to provide advice on how the government can improve prosecution outcomes for victims of sexual assault, specifically with regards to consent.

*Recommendation replaced by Corrigendum tabled 31 October 2018.

Recommendation 10

The Committee recommends that all law reform must provide scope to deliver the best possible outcome for victims of sexual assault as well as the community.

1 CONDUCT OF THE INQUIRY

REFERRAL OF THE BILL

- 1.1 On 8 May 2018 the Assembly referred the *Crimes (Consent) Amendment Bill 2018* (the Bill) to the Standing Committee for inquiry and report. The referral motion, passed by the Assembly, reads:

Pursuant to standing order 174, it was moved—That the *Crimes (Consent) Amendment Bill 2018* be referred to the Standing Committee on Justice and Community Safety for inquiry and report by the last sitting day in October 2018.⁵

- 1.2 The Bill is a Private Member's Bill, introduced into the Assembly on 11 August 2018 by Ms Caroline Le Couteur MLA⁶.
- 1.3 The Bill was referred to the Committee on the recommendation of the Justice and Community Safety Scrutiny Committee (Legislative Scrutiny Role) (the Scrutiny Committee) in its report No. 17 dated 4 May 2018.⁷ The parts of the Scrutiny Committee report dealing with the referral of the Bill to the Standing Committee are at Appendix A.

COMMITTEE INQUIRY – ISSUES FOR EXAMINATION AND REPORT

- 1.4 The Committee considered the Bill in detail, along with the matters raised with respect to the Bill by the Scrutiny Committee. The Committee decided to prepare a guide to the issues the Committee considered were required of it in the inquiry. The Committee held discussions with Ms Le Couteur MLA and the ACT Bar Association to allow the development of discussion and points of inquiry the Committee decided should be examined. This document, which is a Terms of Inquiry (rather than Terms of Reference) was placed on the Committee website and is attached as Appendix B.
- 1.5 The Committee called for submissions by advertising the inquiry in The Canberra Times in early August 2018, by placing an invitation for submissions on the Assembly Committees website and by inviting interested stakeholders, including the Attorney-General, to participate in the inquiry.

⁵ ACT Legislative Assembly, *Minutes*, 8 May 2018, p. 804.

⁶ ACT Legislative Assembly, *Minutes of Proceedings No. 54*, 11 April 2018, p. 769.

⁷ ACT Legislative Assembly, Justice and Safety Committee (Legislation Scrutiny Role), *Report no. 17*, 4 May 2018

SUBMISSIONS

- 1.6 The Committee received 28 submissions. The individuals and organisations who lodged submissions are listed in Appendix C. Copies of submissions are available on the Committee's website.
- 1.7 As noted, the committee wrote to the Attorney-General inviting a written submission. The Attorney-General advised the committee :
- At this time, the Government will not make a written submission on the Bill. The government will provide a response to the committee's report, taking into account any available findings from the New South Wales Law Reform Commission's review of NSW sexual consent provisions, which commenced in early May 2018.⁸
- 1.8 During the Committee's inquiry, the NSW Law Reform Commission published a Consultation Paper on its reference on sexual consent in relation to sexual offences. The Committee discusses the Consultation Paper later in the report (at paragraph 4.13). The Committee notes that the NSW Law Reform Commission is now inviting submissions on the matters raised by the Paper.

PUBLIC HEARINGS

- 1.9 Public hearings were held on 28 September, 2 October and 9 October 2018. Witnesses who appeared before the Committee are listed in Appendix D. The Committee's website contains the transcripts of these hearings.
- 1.10 The Committee met on (i) 26 October 2018 to discuss the Chair's Draft report; and (ii) 29 October 2018 to discuss the committee's draft which was adopted on 29 October 2018.

STRUCTURE OF THE REPORT

- 1.11 The Committee has compiled a report which examines and reflects on the principal matters that were identified in submissions and arose during the course of the inquiry, based on the evidence it received and on other source material of direct relevance published during the inquiry period.
- 1.12 The central focus of the Committee's inquiry was directed to the current law, both statutory law and rules and the common law, relating to the defence of consent in sexual assault prosecutions in the ACT. In particular, matters raised by the Scrutiny Committee report, and

⁸ Letter from ACT Attorney-General, Gordon Ramsay MLA dated 27 September 2018

by submissions on the proposal for a proposal to change to the burden and onus of proof in sexual assault cases raised the issue of a fundamental element of the criminal law. This is a principal matter which the bill seeks to affect and to change thorough amendment.

- 1.13 The potential impact an affirmative consent model would have on sexual relationships. The Committee regarded it as important that the potential impacts on all stakeholders including victims, perpetrators, law makers, community organisations and the broader community be considered before recommending The Committee was also mindful of the extent of public debate on the issue of consent and the changes to the law.
- 1.14 The Committee's report is in six chapters and covers the following issues:
- Chapter 1 – Introduction and Conduct of the Inquiry
 - Chapter 2 – The Bill and its Provisions
 - Chapter 3 – Views put to the Committee on the Bill
 - Chapter 4 – Consent in sexual offences - other Jurisdictions
 - Chapter 5 – Summary of Issues, Committee Comment and Conclusions

ACKNOWLEDGMENTS

- 1.15 The Committee thanks Ms Le Couteur MLA for her assistance and submissions on the Bill during the course of the inquiry. The Committee notes that Ms Le Couteur MLA conducted considerable consultation with interested groups during the Bill's preparation. The submissions that were provided to Ms Le Couteur MLA during that process were available to the Committee and proved valuable to the Committee in the course of its inquiry.
- 1.16 The Committee also thanks Mr Ken Archer of the ACT Bar Association for speaking with the Committee in its preparation of the Terms of Inquiry which proved valuable to the Committee in forming the basis of its inquiry.
- 1.17 The Committee also acknowledges and thanks all those individuals and stakeholder groups and organisations who contributed to the inquiry by making submissions and appearing before the Committee to give evidence.

2 THE BILL AND ITS PROVISIONS

INTRODUCTION

- 2.1 In this chapter, the Committee discusses the background to the provisions in the Bill, as set out in the Explanatory Statement, and examines the report from the Scrutiny Committee on the Bill which led to the referral of the Bill to the Committee.

PROVISIONS IN THE BILL

- 2.2 The Explanatory Statement accompanying the Bill sets out the following basis for the consent provisions in the Bill:

The Bill will amend criminal laws to make key improvements to the criminal justice system to clarify the law of consent and provide better outcomes for victims and the community. These changes will define consent in the Crimes Act 1900 (giving effect to an outstanding recommendation from the Australian Law Reform Commission’s 2010 Report, “Family Violence - A National Legal Response”), and incorporate a further affirmative definition of consent - more in line with modern community standards and reflective of innovations in the law.⁹

and:

The basis for this proposed amendment is explained in the Explanatory Statement as implementing a recommendation for a Model Criminal Code which was to create a clear definition of consent for inclusion in all Australian criminal legislation.¹⁰

PROVISIONS OF THE BILL – CONSENT IN SEXUAL OFFENCES.

- 2.3 The relevant sections of the Bill are reproduced below to allow appreciation of their provisions as follows:

Subsection 67(1) - Definition of Consent

This clause would define consent by these elements:

⁹ Explanatory Statement, p. 1.

¹⁰ Explanatory Statement, pp 2-3.

For a sexual offence consent provision, consent of a person to an act mentioned in the provisions by another person is—

(a) the person gives free and voluntary agreement; and

(b) the other person—

(i) knows the agreement was freely and voluntary; or

(ii) is satisfied on reasonable grounds that the agreement was freely and voluntarily given.

This definition would help protect victims of sexual offences by ensuring that the communicative aspect of consent is relevant to a prosecution, and removing the possibility that consent can be “assumed”.

Subsection 67(1A) - Factors that Negate Consent

This clause is a consequential amendment to rectify numbering due to these new provisions.

Clause 8 – Section 67 (2) and (3)

This clause is a consequential amendment to rectify numbering due to these new provisions.

- 2.4 The Explanatory Statement, apart from providing a description of the effect of the specific clauses of the Bill, provides the following explanation:

In 2008, the Federal Government commissioned the National Council to Reduce Violence Against Women and their Children to draft a national plan to reduce violence against women. This plan of action was released as the 2009 report “Time for Action” which included a number of legal reform pathways, and highlighted serious concern over the lack of uniformity or progress across Australian jurisdictions in relation to consent in sexual offences.

The Australian Law Reform Commission (ALRC) reviewed the 2009 report and reported back on the status of the law in each state and territory and at a federal level, and on what reforms should be undertaken to implement the action plan. In 2010, ALRC returned their final report into family violence. In chapter 25, the ALRC report explored consent reform in detail, and made recommendations to harmonise laws in each jurisdiction. The ACT has thus far failed to fully implement the recommendations in chapter 25.

This Bill gives effect to recommendation 25-4 of the ALRC report, and to the “similarity of age” recommendation outstanding from the 1999 Model Criminal Code implementation.¹¹¹²

- 2.5 A significant element in the drafting of the Bill is raised in the Explanatory Statement, a matter which is the subject of discussion on the Bill by the Scrutiny Committee and which is set out in a later part of this chapter.
- 2.6 The Explanatory Statement notes that the relevant provisions of the Bill do raise questions under provisions of Section 28 of the *Human Rights Act 2004*, which provides that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society, and in deciding whether a limit is reasonable, all relevant factors must be considered.
- 2.7 The Explanatory Statement also notes that, in drafting the Bill, regard consultations conducted during the drafting of the Bill to address *Human Rights Act* issues. The issues are:

Pursuant to section 28 of the *Human Rights Act 2004*, this Bill engages and places limitations on the following rights:

Rights in Criminal Proceedings (section 22).

There was concern raised by the Human Rights Commission in a previous consultation that the particular construction of the new definition of “consent” would have placed the burden of proof on the defendant to prove they received consent from the other party and would thus be incompatible with the right to be presumed innocent. A number of submissions [on the Bill’s drafting] wrote in support of placing the burden of proof on the defendant, but it was recognised there was a construction that could be adopted that would, on balance, satisfy this right while also bringing about the policy intent of this Bill. The definition of consent was revised accordingly and this Bill reflects the amended definition.

- 2.8 Engaging with the limitations framework at section 28(2) of the *Human Rights Act 2004*, human rights are impacted in these ways:

a) the nature of the right affected

Section 22(1) of the *Human Rights Act 2004* reads “everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law”. Further, section 22(2)(a) reads “anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else - to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge”. Rights in

¹¹

¹² *Explanatory Statement*, p. 3.

criminal proceedings are not considered non-derogable and are capable of being subject to reasonable limitations, demonstrably justified in a free and democratic society, pursuant to section 28 of the Human Rights Act 2004.

b) the importance of the purpose of the limitation

Section 67(1) (b) of the Bill engages with the right to be presumed innocent. The new definition of consent varies the fault element of the offences it engages with, to the extent that it may impact or change the evidential burden upon the accused. This limitation upon this right is to prevent a greater injustice of allowing the continuation of “implied consent” in sexual offences - where, merely because one of the negating factors was not engaged or that the accused was in effect reckless about seeking it. In fact, in the ACT, the common law defence to “honest belief” in receiving consent does not need to be reasonable.

c) the nature and extent of the limitation

By adopting an affirmative, communicative model for consent, and, in establishing consent, needing to prove that the accused either knows or reasonably believes that the consent was given, the nature of the burden of proof may change. In practical terms, knowledge of or reasonable belief of consent is not a provable fact, and its existence is ensconced entirely in the mind of the accused. How a prosecution might prove this is difficult to determine without close interrogation of evidence law in the ACT, and therefore, the extent of limitation is difficult to ascertain at this stage.

d) the relationship between the limitation and its purpose

The objective of the legislation is to institute an affirmative, communicative model of consent, and the construction adopted by this Bill is the least restrictive upon the rights of the accused while achieving that purpose.

e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The overriding objective of this Bill is to introduce a stronger, affirmative, conversational model of consent in the ACT.

This change is in line with community expectations and follows considerable public discussion on the nature of sex, consent and criminality in our community after the #MeToo Movement rose to prominence over the past two years. Other jurisdictions approach fault in consent either through recklessness provisions or common law defences to belief (as is the status quo in the ACT).

This model perpetuates the idea that non-consent needs to be expressed - either through physical resistance or verbal instruction -, and ignores the reality that many victims of sexual violence feel unsafe or unable to resist in

such ways. As a result, there is no less restrictive means to effectively achieve this Bill's overriding objective than the model proposed therein.¹³

2.9 The Committee finally notes that the Explanatory Statement stated:

The substantive improvements to human rights this Bill affords, combined with the mitigation of the limitations on sections 22 detailed above, should ensure that this Bill is compliant with section 28 of the *Human Rights Act 2004*.¹⁴

2.10 In presenting the Bill in the Legislative Assembly, Ms Le Couteur MLA, said:

In developing this Bill, I have considered section 22 of the ACT *Human Rights Act 2004*, which states that everybody charged with a criminal offence has the right to be presumed innocent until proven guilty. My Bill is based on feedback from the Human Rights Commission, and we have worked with them to ensure that our legislation both improves the definition of consent and meets our human rights obligations. On balance, I believe that the proposed legislation does not unduly burden the right to be presumed innocent and provides appropriate safeguards to ensure that people are not convicted merely because they are unable to overcome an unreasonable burden of proof.¹⁵

THE BILL – SCRUTINY COMMITTEE COMMENTS

2.11 The Scrutiny Committee reported on its examination of the Bill in Report 17 (4 May 2018). The Committee analysis and recommendations on the Bill are in Appendix A.

2.12 The Scrutiny Committee noted that, in considering the Bill to ascertain whether any provisions of the Bill amounted to an undue trespass on personal rights and liberties, the Committee drew attention to the effect of the Bill:

The Bill will amend the current approach in the ACT by defining consent of a person for various sexual offences (as well as the proposed new defence in section 66A applying to young persons of a similar age). A person will consent when they give free and voluntary agreement; and the other person knows the agreement was freely and voluntarily given, or is satisfied on reasonable grounds that the agreement was freely and voluntarily given. The effect of this provision will be that the prosecution can establish the mental element of lack of consent through showing that there were no reasonable grounds open to the defendant to believe that the agreement was freely and voluntarily given. It is intended that the Bill will remove the ability of the

¹³ Explanatory Statement, pp. 4-5.

¹⁴ Explanatory Statement, p. 5.

¹⁵ ACT Legislative Assembly, *Hansard*, 11 April 2018, p. 1212.

defendant to show that they had an honest belief that the other person had consented where that belief was not reasonable in the circumstances.

As the Bill increases the evidential burden on the defendant to establish the reasonableness of their belief that the other person was consenting, the Bill will extend the circumstances in which an innocent person may be found guilty because they are unable to meet their evidential burden. The Bill therefore engages the right to the presumption of innocence protected by section 22 of the *Human Rights Act (HRA)*.¹⁶

2.13 In a submission to the Scrutiny Committee, the Human Rights Commission highlighted a central concern with the Bill, firstly:

...it is not apparent why the Bill omits to expressly extend this clarification to the offences in s 66 of the *Crimes Act*, and it is not clear if the intention is to apply a legal burden instead. Placing a legal burden on the defendant in these circumstances **gives rise to a serious risk that a person may be convicted, not because he/she committed the criminal act, but because they were unable to overcome the burden** (emphasis added) placed upon them to show they did not.¹⁷

and:

We are concerned that the provisions as currently drafted as **likely to result in ambiguity and uncertainty** (emphasis added), as they appear to conflate two discrete issues: (i) consent by one person and (ii) the responsibility of the other person to take steps to ascertain consent exists. In our view, it would be preferable to adopt an approach consistent with other jurisdictions, by setting out the meaning of consent ('free and voluntary agreement') separately to the objective fault test for belief about consent.

The purpose of adopting an objective fault test is to ensure that the person has reasonable grounds for their belief about consent, and that the person seeking consent has the responsibility to take steps to ascertain consent exists. While an objective fault test is central to assessing whether consent was freely and voluntarily given, it is not clear how the relevant offences in the *Crimes Act* would operate if it were included within the definition of consent itself. Dealing with the definition of consent and knowledge about consent separately does not detract from the objective of promoting a communicative model of consent. The requirement that a person must have reasonable grounds for believing that the agreement was freely and voluntarily given

¹⁶ ACT Legislative Assembly, Justice and Community Safety Committee, (Legislation Scrutiny), *Scrutiny Report No 17*, 4 May 2018, p. 2

¹⁷ ACT Legislative Assembly, Justice and Community Safety Committee, (Legislation Scrutiny), *Scrutiny Report No 17*, 4 May 2018, p. 2

sends a clear message that a person must be certain of consent. This is a step that necessarily involves communication with the other person.¹⁸

- 2.14 The Scrutiny Committee's view on those provisions in the Bill affecting consent in sexual offences, particularly in light of the HRC comments on the Bill was:

Under the current offences, the unreasonableness of the belief of consent may be an element in establishing the defendant's lack of belief that the other person had consented. The need for consent to depend on the reasonableness of the grounds on which the defendant believes free and voluntary agreement was given may, therefore, have only a minor impact on how the knowledge of lack of consent is established. It is on this basis that the explanatory statement concludes that any limitation on the innocence is reasonable, considering the objective of the Bill to establish a clearer, affirmative definition of consent. As the explanatory statement suggests, the extent of any limitation of this right is 'difficult to ascertain at this stage'.

The Committee is concerned that the new definition of consent may result in substantial changes to how knowledge or recklessness of the lack of consent is established. In particular, by including the need for an defendant to be satisfied on reasonable grounds within the definition of consent, and applying that definition to a number of offences, it is difficult to determine the extent of the evidential or legal burdens that may be faced by the defendant, such as whether they will need have evidence going both to their state of mind and the reasonableness of that state of mind.

Therefore, the Committee is not satisfied, on the information available to it, that the amendments to the definition of consent will have only a reasonable limitation on the right to the presumption of innocence.¹⁹

COMMITTEE COMMENT

- 2.15 The Committee made its detailed examination of the Bill based on the comments made to the Scrutiny Committee by the HRC on the Bill, and the assessment and analysis on the Bill made by the Scrutiny Committee in its report. The Committee sought – in the Terms of Inquiry paper discussed in chapter 1 and which is Appendix B – to focus its detailed examination on the terms of the Bill (in particular, the consent provisions) and the changes it proposes to ACT criminal law.

¹⁸ ACT Legislative Assembly, Justice and Community Safety Committee, (Legislation Scrutiny), *Scrutiny Report No 17*, 4 May 2018, p. 3.

¹⁹ ACT Legislative Assembly, Justice and Community Safety Committee, (Legislation Scrutiny), *Scrutiny Report No 17*, 4 May 2018, p. 3.

3 VIEWS PUT TO THE COMMITTEE ON THE BILL

INTRODUCTION

- 3.1 The Committee received 28 written submissions on the inquiry which canvassed views from individuals and organisations which, in a number of cases-provided input as a consultative process in the course of drafting the Bill. As noted, these are at Appendix C.
- 3.2 In this chapter, the Committee initially considers the views of the Bill's sponsor, Ms Le Couteur MLA. Ms Le Couteur MLA's two submissions to the Committee address the basis and underlying direction of the Bill's proposals and provides a discussion on the Bill's 'balancing' of providing an affirmative definition of consent in sexual offences that aligns with modern community standards.²⁰
- 3.3 The Committee has also considered submissions and evidence from two broad categories of organisations. The first is from those engaged in the application and administration of the laws relating to consent in sexual offence cases dealt with in the courts of the ACT, as prosecutors and as defence. These organisations are the ACT Director of Public Prosecutions, the ACT Bar Association, the ACT Law Society, the Human Rights Commission and Legal Aid ACT.
- 3.4 These points include:
- the proposed definition (as drafted) of consent currently applying under the sexual offence provisions of the *Crimes Act*;
 - reversal of the onus of proof placing the onus upon the person accused (rather than the prosecution), not just to prove an honest belief that consent was given, but to prove a higher standard of proof; and does the Bill raise the burden of the onus of proof to a standard that is too high?
 - conflation of the two aspects of consent in sexual offences. The first is the consent of the victim - does the victim actually consent to the sexual conduct; and, secondly, the state of mind of the perpetrator as to the consent of the victim;
 - the extent to which reasonableness as a factor in determining 'honest mistake' (the 'Morgan defence') applies in the ACT;
 - the social implications of the Bill, including measures may be required to effectively implement the intentions of the Bill in addition to a change to the law; and, how will the Bill impact personal and sexual relationships.

²⁰ Caroline Le Couteur MLA, *Submission 23*, p, 1.

- 3.5 The second category of organisations who made submissions and gave evidence to the Committee are organisations which, as part of their role in the community, provide support, advice and advocate for Canberrans regarding sexual and reproductive health, and in supporting those who have been subject of sexual violence and assault. As stated, this approach by the Committee includes the views which were contributed by these organisations during the drafting of the Bill.²¹
- 3.6 These points include:
- the proposed changes to definitions of consent in sexual offences, and the result that may have for both victim and perpetrator in sexual offence matters;
 - comment and proposals for reform of consent provisions in view of the Bill's proposals, and giving effect to community interest and advocacy for change to the law of consent in sexual offences in the ACT;
 - the social implications of the Bill, including measures may be required to effectively implement the intentions of the Bill in addition to a change to the law; and, how will the Bill impact personal and sexual relationships.

VIEWS PUT TO THE COMMITTEE – MS LE COUTEUR MLA

- 3.7 As the Committee noted, discussions were held with Ms Le Couteur MLA in July 2018, drawing on Ms Le Couteur MLA's first submission to the inquiry. Ms Le Couteur MLA made a second submission to the Committee during the period the Committee allowed for submissions.
- 3.8 In her second submission, Ms Le Couteur MLA has set out her views on a means to answer the observations and objections to the drafting of the Bill:

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.²²

- 3.9 Ms Le Couteur MLA's submission also noted that, underlying the proposal to amend or re-draft the Bill, is a question of timing:

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 consideration of

²¹ Caroline Le Couteur MLA, *Submission 2*, pp. 1-2 (particularly the list of attachments to the submission, pp. 3 following). See also Caroline Le Couteur MLA, *Submission 23*.

²² Caroline Le Couteur MLA, *Submission 23*, p. 1.

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.²³

- 3.10 In addition to this submission – which the Committee deals with further in chapter 5 – Ms Le Couteur MLA did advance the following points as being fundamental to a definition central to consent which meets the criteria for an appropriate application and definition of consent as a defence. They are:

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.²⁴

- 3.11 As an important argument, Ms Le Couteur MLA has emphasised the need – identified by her submission and others – that there needs to be a means of clarifying the criminal law to address the current situation confronting victims in sexual offences:

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.²⁵

²³ Caroline Le Couteur MLA, *Submission 23*, p. 1.

²⁴ Caroline Le Couteur MLA, *Submission 23*, p. 4.

²⁵ Caroline Le Couteur MLA, *Submission 23*, p. 5.

- 3.12 The Committee draws on Ms Le Couteur MLA's submission in its comments and conclusions in chapter 5.

VIEWS PUT TO THE COMMITTEE – LEGAL PRACTITIONER BODIES

ACT DIRECTOR OF PUBLIC PROSECUTIONS (DPP)

- 3.13 The ACT Director of Public Prosecutions (DPP) submitted to the Committee several points which the Committee notes are a summary of DPP's broader submission:

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.

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.²⁶

- 3.14 The DPP's submission detailed two matters involving consent:

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.

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.

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*,

²⁶ ACT DPP, *Submission 10*, p. 1

still retain under the draft the reliance on a recklessness as being crucial to the second aspect.²⁷

3.15 In relation to the issues of recklessness, the DPP noted that:

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.²⁸

3.16 In evidence, the DPP confirmed a number of points raised regarding the Bill that were made in the DPP's written submission.

3.17 In answer to Committee questions on how consent is dealt with by prosecutors, the Committee was told:

A jury has to be convinced that there was or there was not consent. The issue of whether consent is present on behalf of the victim is a matter that the jury has to engage with. It is inherent in the meaning of that term that consent be freely and voluntarily given. Consent that is not freely and voluntarily given is clearly not consent. From the point of view of a common-sense approach by a jury, that is the approach that we invite juries to take and the approach that juries will take. I supplement that by saying that we also have additional assistance in the ACT in section 67 of the *Crimes Act*, which assists in identifying circumstances where consent that is apparently given is vitiated.²⁹

3.18 As far as these consideration are not reflected in (or unaffected by) the Bill, the DPP advised that:

The difficulty comes back to this issue that there is no reference to recklessness in what is picked by the definition of consent. It is like there are two ships passing in the night in terms of the way in which the provisions operate. But at the moment the issue of consent is based around a concept of what consent of the victim actually means, what the real meaning of that is, with the supplementary examples given by [the ACT Crimes Act] section 67.³⁰

²⁷ ACT DPP, *Submission 10*, pp. 2-3.

²⁸ ACT DPP, *Submission 10*, p. 4.

²⁹ DPP, *Transcript of Evidence*, 28 September 2018, p. 21.

³⁰ DPP, *Transcript of Evidence*, 28 September 2018, p. 21.

- 3.19 In relation to submission put to the Committee that a level of criminal culpability applies to both an accused who knows that consent is not given and to an accused who believes he or she is acting reasonably, and whether a different level of liability might apply, the DPP advised that:

We really come to this issue of the reasonableness of the belief in consent. Hopefully we will have a chance to talk about that specifically later. But the law really has developed, in developing its concept of recklessness, to encompass both of the positions that you have just postulated and both of those amount to recklessness in the eyes of the common law.

One way of explaining that is to refer to advertent recklessness, where a perpetrator adverts to a lack of consent but continues nevertheless. But the common law also continues inadvertent recklessness, where a perpetrator may think that the victim is consenting but proceeds nevertheless. But in those circumstances it is clear that there is a possibility that the victim is not consenting. That is really the latter part of the proposition, that scenario you put to me.³¹

- 3.20 The Committee also discussed the proposal of an affirmative model of consent which is a basis of the Bill. The DPP noted that there needs to be a distinction drawn between that proposal and the criminal law, and to have particular attention to:

...the difference between societal attitudes on the one hand and how the criminal law deals with a matter. We need to be very certain that people we are prosecuting and having convicted of sexual assault have transgressed a very clear line.

It is all very well to posit this affirmative position on consent, but I think we know in the real world that that is not the way human beings interact. The criminal law needs to deal with the real world as to how people actually react. That is what the criminal law does—we look at human behaviour as it actually happens and we draw lines on particular parts and say that that type of behaviour is prohibited.³²

- 3.21 The Committee comments on the matters raised by the DPP in chapter 5.

ACT BAR ASSOCIATION

- 3.22 The ACT Bar Association submission to the committee put its comment on the consent provisions of the Bill as:

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

³¹ DPP, *Transcript of Evidence*, 28 September 2018, p. 22.

³² DPP, *Transcript of Evidence*, 28 September 2018, p. 24.

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.³³

and:

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 [Crimes Act] 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 Act 2004* and the presumption of innocence found in section 22 of the *Human Rights Act 2004*.³⁴

3.23 In evidence, the Bar Association noted that the Bill’s proposal would, if enacted, send the ACT off on a different course to other jurisdictions:

The concern is with [Crimes Act] section 67, which provides in subsection (1) (b) that the other person knows the agreement was freely and voluntarily given and then, particularly, is satisfied on reasonable grounds the agreement was freely and voluntarily given. It is not a formulation I have seen anywhere else in interstate law. That is not to say there are not objective formulations of the fault element elsewhere; there clearly are. New South Wales has one; Victoria has one. In fact, the ACT may be one of the last jurisdictions not to have an objective fault element.

³³ ACT Bar Association, *Submission 3*, pp. 3-4

³⁴ ACT Bar Association, *Submission 3*, pp. 3-4

However, this is unique in that it appears, on its face, to put a legal onus on the accused to demonstrate that satisfaction. Perhaps it is a lack of clarity, but I think that in itself is significant. On its face it seems to go far beyond even that question of objectivity to a question of a reversal of onus—putting it on to the accused person. That is a very significant matter and not something that should be undertaken lightly.³⁵

- 3.24 When questioned about the possibility of developing and applying a form of positive consent terminology or definition, and still be able to achieve legal verification so as to ensure protection of women victims, the Bar Association representative noted:

A lot of different meanings might go with the idea of a positive consent standard. Perhaps the most obvious one is to understand it by way of an objective fault element, which essentially means that, in terms of the way we think of the law, a person has to have some grounds or some reasonableness to their belief in consent.

Insofar as that puts an onus, practically speaking, on an accused person to actually ascertain agreement, then I think we are progressing towards a law reform that might in an overarching way be something considered a positive standard where there is some kind of obligation. That is a separate issue to proving the offence. I am not suggesting to have those confused, but it is a concern in relation to this Bill.³⁶

- 3.25 In this context, it was also a matter that the Bar Association stated was important as a matter of consideration and debate, particularly in light of the ACT's different position in relation to consent, and the matters being examined by the NSWLRC:

...as you are aware, the Bar's position is that subjective fault is the appropriate fault in relation to this. That essentially is based around an idea that significant penalties reflecting significant criminality should go with a criminal state of mind, a state of mind we could describe as culpable rather than inadvertent so that it does not pick up someone who honestly believes in consent but is mistaken.

But I have to acknowledge that, in terms of way the law is moving in other jurisdictions, other jurisdictions are picking up and have picked up the idea that the belief has to be reasonable, and that is where the objective aspect comes in. I think that is where this idea of a positive consent standard rests to some extent.³⁷

- 3.26 Further commentary on the question of subjective fault was highlighted:

As the law currently stands, an honest, though mistaken, belief in consent would stand against a conviction. However, the reasonableness of the belief is something that gets taken into account in determining whether or not a belief is honest. So the more

³⁵ ACT Bar Association, *Transcript of Evidence*, 9 October 2018, p. 52.

³⁶ ACT Bar Association, *Transcript of Evidence*, 9 October 2018, p. 52.

³⁷ ACT Bar Association, *Transcript of Evidence*, 9 October 2018, p. 53.

unreasonable a belief may be, the less likely it is to be considered that there is any doubt about the honesty of the belief held.

We largely hold to the Morgan position in the sense of the subjective fault element here. But as I think was referred to by the director, there are a number of ways in the ACT that knowledge of lack of consent can be proven. They all essentially fall under this idea of recklessness. Then that gets a number of features. You can either know that there is a lack of consent or you can be aware of the possibility that there is a lack of consent. That will result in a conviction. Or you may be someone who did not turn your mind to it, and that is broadly picked up by the idea of recklessness just when it comes to sexual assault.³⁸

- 3.27 As noted in relation to other views put to the Committee, the Committee deals with views put to it by the Bar Association in chapter 5.

ACT LAW SOCIETY

- 3.28 The ACT Law Society (the Society) submission on the Bill advocated the following approach to the Bill:

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.³⁹

- 3.29 While its submission accords with other views on how the Bill might be dealt with, the Committee notes the following conclusions and recommendations from the Society for the Committee's consideration:

- 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.⁴⁰
- 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

³⁸ ACT Bar Association, *Transcript of Evidence*, 9 October 2018, p. 55.

³⁹ ACT Law Society, *Submission 22*, p. 1

⁴⁰ ACT Law Society, *Submission 22*, p. 2

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. 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.⁴¹

- 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 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.⁴²
- 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) An affirmative model of consent currently operates in Tasmania (as a factor that vitiates consent) and in Victoria (as a factor that vitiates consent and as a direction to the jury).⁴³
- 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 consent and accordingly, would be more problematic than the objective test proposed by the Bill.⁴⁴

3.30 In evidence to the Committee, the Society also followed up matters raised in its submission. These included comments in relation to the test of consent in the Bill:

The first limb of the test—the “freely and voluntarily” or “free and voluntary”—although using slightly different words is the same concept in that the consent is free and there is voluntary agreement. But the second limb of the test in terms of the fault

⁴¹ ACT Law Society, *Submission 22*, p. 3

⁴² ACT Law Society, *Submission 22*, p. 3

⁴³ ACT Law Society, *Submission 22*, p. 3

⁴⁴ ACT Law Society, *Submission 22*, p. 3

element and the knowledge in the mind of the accused is certainly different in the Bill.⁴⁵

- 3.31 In enlarging on this observation, the Society representative noted – in some detail – the difficulty posed in presenting definition of consent in sexual offences definitions to an ACT jury, and particularly in the context of the Bill’s proposals:

Explaining these legal tests to juries takes judges several hours as it is. A charge to the jury, typically, in a sexual assault trial will run anywhere from two to three hours. That is a lot of law to explain to 12 laypeople who have never studied law before; at least, that is the presumption.

Adding more law and adding more complexity is not simplifying that process. I would suggest, and the society would suggest, that it is in fact making it more likely that they will fall back on their own prejudices, their own gut instincts in relation to the case, rather than the legal tests being espoused. That is particularly significant in the ACT, where there is no ability to have a judge-alone trial for sexual offences.⁴⁶

Having two separate issues dealt with in the one apparent test is going to be very hard to unpack for a jury. It is going to be very hard for a judge to explain that to a jury.

...The question is: how is a judge going to explain this to a jury and how is a jury going to understand? If the jury cannot understand then it does not matter what the test is. If it becomes too convoluted for a jury to understand, the test becomes irrelevant and the jury go and do what the jury want to do.⁴⁷

- 3.32 In relation to the intention stated in the Bill – to propose new definition of consent – the submission to the Committee by the Society was:

The Law Society questions whether the laws of sexual assault are the right way to make that normative change.

Normative change through the law is a controversial area. Normative change through the law, I suggest, works when laws are simple and easily understood. So drugs are illegal; it is an easy concept. It is easy for people to know. Cocaine is a drug or ecstasy is a drug, and it is easy for them to understand that it is illegal to possess that drug; it is illegal to sell that drug. So the law can have a normative effect in that case.

In relation to laws of consent, I suspect that is not the case in the same way. Yes, penalising and criminalising activity does have an effect, but getting down to the nuances of how consent plays out in a bedroom is not something which is likely to be changed effectively by changes to the criminal law. Ultimately it is educative programs in the community that the Law Society feels are a better place to make such changes than tweaking the criminal law as it applies in the courtroom scenario, which is

⁴⁵ ACT Law Society, *Transcript of Evidence*, 9 October 2018, p. 59.

⁴⁶ ACT Law Society, *Transcript of Evidence*, 9 October 2018, p. 60

⁴⁷ ACT Law Society, *Transcript of Evidence*, 9 October 2018, p. 60

probably not considered by defendants or accused at the time that they are in a bedroom situation, thinking of engaging in sexual activity.⁴⁸

- 3.33 In relation to one other matter, the means available to a jury to determine the extent of communication of consent, and the interpretation that needs to place by a jury on communication of consent - the fundamental “yes means yes; no means no” - test - the Committee was told:

That is all well and good when things are communicated in words. But are they always communicated in words? My experience in sexual assault trials is no, they are not. Frequently, for a variety of reasons, people do not communicate. We know from research that that can be because victims are so scared that they freeze. Therefore, there is no communication. So we run the risk with some communicative models that we are going to come back to, where nothing is said, analysis and drawing inferences from what happens.

and:

Effectively, the test in this bill raises the standard. It goes beyond belief. It goes up to satisfaction or being satisfied. That raising the bar, effectively, I suspect, if enacted, would lead to trials being even more aggressive in terms of how the victim or the complainant is cross-examined in the trial.

Therefore, if it is not said—frequently that is the case; there are no actual words that are in dispute; it is actions—then that means more aggressive cross-examination and the like, which does seem a little problematic in the circumstances where we have been reforming now consistently across a number of jurisdictions, including the ACT.⁴⁹

- 3.34 As noted, the Committee provides its comments on the evidence of the Society in chapter 5.

ACT HUMAN RIGHTS COMMISSION

- 3.35 The Human Rights Commission (HRC) submission on the Bill was the same as the submission made to Ms Le Couteur MLA on the Bill (annexed to Ms Le Couteur MLA’s first submission to the Committee).⁵⁰

- 3.36 The HRC submission on the Bill that was made to the Scrutiny Committee is discussed in chapter 2. The HRC provided evidence to the Committee, in which the two submissions and material prepared by the HRC was discussed.

⁴⁸ ACT Law Society, *Transcript of Evidence*, 9 October 2018, pp. 60-61

⁴⁹ ACT Law Society, *Transcript of Evidence*, 9 October 2018, p. 63.

⁵⁰ See, Caroline Le Couteur MLA, *Submission 2, (Attachment 9)* ACT Human Rights Commission.

3.37 The HRC noted its view that:

All jurisdictions have a legislative definition of consent. The ACT is the odd person out by not having that. In terms of a model, probably the Victorian amendment is the most recent amendment in this respect. It is also a human rights jurisdiction, but it is not a code jurisdiction, nor are New South Wales, Victoria and South Australia.

We think that an appropriately defined community model will provide greater protection of a person's freedom and autonomy to make decisions about having sex. But it has to be very carefully defined what is free and voluntary, taking into account all the relevant circumstances, including steps taken by the accused to ascertain the presence of consent. Ultimately this will advance women's right to equal protection of the law without discrimination, given that sexual assault is a predominantly gendered crime.

and:

Our concern is primarily with the way the bill has been drafted. A key concern—several other legal bodies have repeated this—is the conflation of the definition of consent and the belief about consent. We recommend that these provisions be redrafted. There is similar legislation. New South Wales, Tasmania and Victoria have similar legislation where they do not conflate. The Victorian parliamentary scrutiny committee had no concerns with its amendments; so that is a good thing.

The objective fault test I think is a big improvement on a subjective, out of date, out of touch with community standards test. That is in many comparable models: New South Wales, Tasmania, UK, Canada and New Zealand.

In drafting I think it would be prudent to rely on criminal law expertise, not just human rights expertise, because whatever happens will impact on the whole framework of the Criminal Code.⁵¹

3.38 The HRC observed it did not agree with the Law Society view, and the DPP submissions, that the definition of free and voluntary agreement, is ambiguous and lacks legal certainty.

3.39 In relation to the DPP view, the HRC noted:

I know that the DPP said that a lot of this is inherent in the nature of consent under the common law, but I actually think it does the community a service to make this explicit in legislation.⁵²

3.40 The Human Rights Commissioner also commented on the matter of the burden of proof, as affected by the Bill:

⁵¹ ACT HRC, *Transcript of Evidence*, 9 October 2018, p. 75.

⁵² ACT HRC, *Transcript of Evidence*, 9 October 2018, p. 77.

I do have a concern about the possible reverse of the burden of proof by requiring the accused to be satisfied on reasonable grounds that the agreement was freely and voluntarily given. It is really the conflation issue that is the concern in my mind. All comparable consent laws incorporate an objective fault test. They do not actually give rise to any issues of the presumption of innocence. That is because there is no alteration of the legal burden of proof; it still remains with the prosecution. So there is nothing inherent that makes it a legal burden; it is really the drafting.⁵³

- 3.41 The HRC also questioned that approach taken in several submissions that drafting (or –re-drafting) of the Bill – if deemed necessary – wait until the NSW Law reform commission report on its current consent reference is completed:

As I understand the evidence of the bar and the Law Society, they support retaining the current subjective test. That raises the question as to whether it is worth waiting to see what is happening in the New South Wales model because that is about refining what they already have in terms of an objective test. I think there is scope for us to at least introduce a form of that test that has been in operation in every other jurisdiction in Australia as there is always scope to tweak that going forward.⁵⁴

LEGAL AID COMMISSION (ACT)

- 3.42 The Legal Aid Commission of the ACT (Legal Aid) provided evidence to the Committee on the matters raised by the Bill, as the principal public defender in matters relating to criminal sexual offences. Legal Aid noted that – in relation to the proposals in the Bill:

At the end of the day we would say that at this point there is no pressing need to amend the legislation to insert a definition for consent. There is not a definition of consent, but consent is a concept that operates effectively and is understood by those people who are the players in the courtroom. Similarly, the same thing would apply to the understanding of recklessness and how it operates in sexual assault. That is a suitable vehicle for determining the perpetrator’s state of mind.

Legal Aid also agree—and I think it was referred to by the previous witness—that there is a conflation between the two elements in the definition which makes that definition quite unworkable. Consent is really something in the victim’s mind; it has got nothing to do with the mind of the perpetrator. Consent is focused solely on what is in the victim’s mind. The second element as to whether a person is reckless as to the lack of consent is focusing on what is in the perpetrator’s mind. So the two things do not fit together.

⁵³ ACT HRC, *Transcript of Evidence*, 9 October 2018, p. 77.

⁵⁴ ACT HRC, *Transcript of Evidence*, 9 October 2018, p. 80.

But that:

The objectives of the act as specified, as I understand it, are to clarify the law of consent and to achieve better outcomes for victims. They are the two listed things. At present in the way it is drafted I do not think it achieves those two objectives. Providing a defence of consent does not in any way address some of the rape myths that some of the submissions have addressed.⁵⁵

VIEWS PUT TO THE COMMITTEE BY COMMUNITY ORGANISATIONS

3.43 The Committee has published a number of submissions from Community organisations made on the Bill and has noted that a number of the organisations making that a number of these submissions were provided to Ms Le Couteur MLA during drafting of the Bill. In particular, the Committee received submissions from:

- ACT Council of Social Services⁵⁶
- Women's Centre for Health Matters⁵⁷
- Women With Disabilities ACT⁵⁸
- Youth Coalition of the ACT⁵⁹
- YWCA Canberra⁶⁰
- Women With Disabilities ACT⁶¹

3.44 In addition, the committee received submissions from:

- Young Women Speak Out⁶²
- Advocacy for inclusion⁶³
- Rape and Domestic Violence Service Australia⁶⁴
- Sexual Health and Planning ACT⁶⁵
- AIDS Action Council of the ACT⁶⁶

⁵⁵ ACT Legal Aid, *Transcript Of Evidence*, 9 October 2018, pp. 88-89.

⁵⁶ *Submission 24.*

⁵⁷ *Submission 25.*

⁵⁸ *Submission 18.*

⁵⁹ *Submission 27.*

⁶⁰ *Submission 11.*

⁶¹ *Submission 18.*

⁶² *Submission 26.*

⁶³ *Submission 28.*

⁶⁴ *Submission 20.*

⁶⁵ *Submission 19.*

⁶⁶ *Submission 16.*

- Civil Liberties Australia⁶⁷

- 3.45 The views put to the Committee by these organisations come from expertise and experience in dealing with broad-ranging issues including gender-based violence, sexual and reproductive health and advocacy. These are views that the Committee found valuable in reviewing legislation aimed at providing protection and as an avenue for prevention of sexual offending.
- 3.46 These include organisations involved in women's health, gender issues, the support and protection of the interests of woman with disabilities, AIDS action and assistance. The Committee also notes the representations and views of groups supporting young women and youth.
- 3.47 The views put to the Committee by these organisations are in favour of the intention of the Bill for the introduction of a free and voluntary affirmative consent requirement for sexual activity as an explicit guidance on what is acceptable sexual participation.
- 3.48 The submissions also emphasised that the Bill is an important step in recognising the shift in societal attitude to consent. It was submitted that in the broader community, "yes means yes" is a more accurate view of what consent should be and the law should reflect this view. It was also submitted that by enacting an affirmative consent model into legislation, it sets a boundary of socially acceptable behaviour with a framework of redress in the event that boundary is breached.
- 3.49 All organisations were also of the view that a change in the law alone is not going to alter behaviour or attitude and that community consultation and ongoing education, particularly for young people, was important to address the broad culture of sexual violence in Australia.

SUMMARY OF VIEWS PUT TO THE COMMITTEE IN EVIDENCE

- 3.50 The Committee discussed the views, summarised above, in detail with representatives of a number of submission makers, and highlights their views in the following summary:

People who learn to ask for and confidently give positive consent are also learning to respect their own boundaries, and those of their sexual partner, and to communicate effectively. We believe steps like positive consent, backed up by a strong education campaign, can build a culture that breaks down destructive gender stereotyping, be ultimately empowering to everyone and combat other non-sexual offences, including domestic violence. This is particularly important for young people, who are unfamiliar with communicating in intimate scenarios; for example, during their first sexual relationship. Reinforced with adequate education, positive consent has the scope to

⁶⁷ *Submission 17.*

empower communication amongst young people and generate confidence and awareness about personal boundaries.⁶⁸

...

What has been identified is not the issue with positive consent in and of itself; it is that the perpetrators are being interpreted as being able to make a defence that is not leading to outcomes that are in line with community expectations. Our view on that is that the ACT is very fortunate that we can look at the findings of that inquiry and possibly apply it to our own legislation. As you are aware, we do not even have a basic framework at the moment, and that really needs to be put in place as a bare minimum.⁶⁹

...

The good news is that this power imbalance is finally changing in our community and women are being heard. Their allegations of sexual assaults and rapes are listened to and investigated. It is about time the law reflected these changing attitudes in the community. Canberra proudly calls itself a liberal and progressive city. Unfortunately the law of consent in the ACT is archaic and puts a blot on its progressive image. All other states and territories define consent as what it is, rather than what it is not. It is difficult to understand why the ACT is still sticking to the current definition of consent, which puts the onus of proof entirely on the victim. The current law fails to protect victims of sexual assault who were too scared or felt unsafe to say no.⁷⁰

...

The evidence shows that since 2007, when New South Wales transitioned to an affirmative definition of consent, there have been no statistical variations in convictions for sexual violence or in acquittals or overturns of previously tried and convicted cases. Fundamentally it is not about increasing the conviction rate or acquittal rate; it is about clarifying what is a very complex piece of legislation, not only from a legislative perspective but also very much from a social perspective.

If we as a society want to educate people about what consent is, it is hard to come from a negative perspective. If you say to somebody, for example, "I will tell you all the things that are not a glass of water," rather than, "These are the things that make up a glass of water," it is much easier to understand from that perspective. Sexual assault and consent is a very complex issue, so it helps to have an affirmative definition of it to understand.⁷¹

...

⁶⁸ YWCA Canberra, *Transcript of Evidence*, 28 September 2018, p.28.

⁶⁹ YWCA Canberra, *Transcript of Evidence*, 28 September 2018, p.30.

⁷⁰ Young Women Speak Out, *Transcript of Evidence*, 28 September 2018, p. 35.

⁷¹ Youth Coalition of the ACT, *Transcript of Evidence*, 28 September 2018, p. 43.

In my experience merely threatening the sanction of the law is ineffective and counterproductive as an approach to sexual violence prevention. It alarms those who are not the problem. It sidesteps the needs and the experience of those who have been victimised and it has no effect on those who offend other than to highlight the gap between what gets said about sexual assault and what actually is tolerated and gets done about it.

...

The greatest impact education can have on raising awareness of and preventing sexual violence comes when educators—be they parents and carers and families or teachers and youth workers in our schools and other community facilities, university lecturers, healthcare professionals—are all able to link a commitment to ethical conduct with the standards reflected in our laws and can do so in an open, honest and nuanced way with regard to the complexity that our sexual interactions and encounters with one another as human beings in body can represent.⁷²

Parents are often surprised about how young their children are when they are first exposed to it. And we are not sure. I can see that some of the work that we have achieved in the last couple of decades has been severely tested in an environment where the lack of verbal negotiation of consent, the lack of sexual interaction that demonstrates a respect for a partner or the need to engage and understand whether they are okay or not is not what we are seeing modelled in pornography online.

I think we have a split as a community at the moment between what is being modelled as sexual relationships in terms of that kind of content and the kinds of things we are articulating as our expectation of the standard of conduct. I do not believe that it is an either/or—and certainly we do not take the view as an organisation that all sexually explicit material is inherently and necessarily harmful—but it is clear that early exposure to sexual material can have negative impacts and that parents and the community in general are quite concerned about what this modelling does for us.⁷³

....

It is important to know, though, that it is not just young people who are sexually active and need to understand how consent works and what is legal and what is not. Women in their 50s and 60s and older are dating again after a long period of being in long-term relationships that have come to an end. And some of them have reported to us that they are finding it difficult to have those conversations with their partner. We found that 79 per cent of women in the survey that we did in November last year—there were 510 women who participated in that—aged 40 or older had engaged in sexual activity with another person in the past 12 months.

⁷² Sexual Health and Family Planning ACT, *Transcript of Evidence*, 2 October 2018, pp. 35-36...

⁷³ Sexual Health and Family Planning ACT, *Transcript of Evidence*, 2 October 2018, pp. 40-41.

They are not all going to be people who are in long-term relationships and who have already got clear, established rules about what they will consent to and what they do not. Some of these women are going to be having those conversations with new partners and it is really important for them to understand what their rights are and what is okay.⁷⁴

...

Sometimes what can happen is that activity commences without any conversation about it before it started. If someone experiences rape freeze in that situation—and they were not expecting that this was about to start and then it starts, and they experience rape freeze—affirmative consent would be a really good thing to have in that situation. When everyone understands that you need affirmative consent before you do the thing then you are in a situation where, if someone is experiencing rape freeze, that is clearly not okay; you cannot give affirmative consent in that position.

It also means that people will have a bit more of an awareness in the community, hopefully, that this is actually a thing that occurs to some people. When something happens that they were not expecting or something happens that triggers a past trauma—keeping in mind the massive rates of sexual abuse that a lot of people in our community have already experienced by the time they get to 15 or 16 years old; rape freeze is something that does happen to people—if we can get to a point where people can understand that it is important to get consent before you start then we will not have as much of an issue with that.⁷⁵

...

We were certainly mindful of the incidence of sexual assault perpetrated on women who have limited ability to articulate speech. When they get into the courts, they are not assumed to have capacity. Certainly in defence their poor articulation of words will be used against them. We were also very mindful of grooming behaviours. Young women with intellectual disabilities are more vulnerable to that grooming, and our submission has outlined the barriers which then prevent them reporting the abuse and, if it gets to court, getting satisfaction in the court.

We want to acknowledge in the context of women with disabilities that we know reform processes are going on in the ACT—specifically the restorative justice program and the development of a victims charter of rights and the ACT disability strategy. They need to be aware of the consent provisions in this bill and to be worked in conjunction with them.⁷⁶

...

⁷⁴ Women's centre for Health matters, *Transcript of Evidence*, 2 October 2018, pp. 43-44.

⁷⁵ Women's Centre for Health matters, *Transcript of Evidence*, 2 October 2018, p. 45.

⁷⁶ Women With Disabilities ACT, *Transcript of Evidence*, 9 October 2018, p. 67.

One of the issues relevant to this bill concerns the reasonableness of belief that consent has been given and what that actually means. We believe the bill could definitely be strengthened in that area. Research and anecdotal evidence tell us that women with disabilities, particularly those with cognitive impairment, tend to be compliant and may agree to suggestions put to them by a would-be perpetrator of a sexual assault. That means that it is very important that a nod from a woman who is non-verbal should not necessarily be taken as a reasonable belief that this is consent.⁷⁷

...

We also are acutely aware that when cases come to us in regard to abuse in these sorts of settings where individual advocacy is required, it brings to us a picture of exactly why it is so hard to reach these people and why as a community we must be more forceful in ensuring that they have education about their rights as well as what consent means to them. So I feel that there needs to be increased awareness and education, but it very much needs to be inclusive of people with disabilities as a whole.⁷⁸

...

Under an affirmative model, consent is characterised in the affirmative rather than the negative as a positive act of communicating yes rather than the mere absence of a communicated no. This model is founded on the ideals of mutuality and reciprocity in sexual relationships and aims to promote a shared responsibility to ensure respect for each partner's sexual autonomy.

It does this by creating an obligation on each party to communicate with the other in order to reach the necessary mutuality of understanding. It also requires that consent be communicated either through words or actions and thereby replaces the traditional presumption that submission can equate to consent.

Despite our strong support for the intentions of the bill, we do have significant concerns about the drafting, the fatal provision being clause 67(1). We have outlined these concerns in detail in our submission but, very briefly, we believe that clause 67(1) may result in ambiguity for three reasons: first, it appears to conflate the elements of consent and knowledge of consent. Second, it appears to reverse the burden of proof to some extent. And, third, it does not clearly provide for an objective fault standard.⁷⁹

- 3.51 The Committee has highlighted relevant comments made during evidence by each of the submission makers who presented evidence to the Committee during hearings. As noted elsewhere, the Committee considers these comments in chapter 5.

⁷⁷ Women With Disabilities ACT, *Transcript of Evidence*, 9 October 2018, p. 69.

⁷⁸ Advocacy for Inclusion, *Transcript of Evidence*, 9 October 2018, p. 74.

⁷⁹ Rape and Domestic Violence Service Australia, *Transcript of Evidence*, 9 October 2018, p.

4 CONSENT IN SEXUAL OFFENCES - OTHER JURISDICTIONS

INTRODUCTION

- 4.1 In the course of this inquiry, it was clear to the Committee that current statutory provisions governing the law of consent in sexual offences in other jurisdictions are an important point of comparison with current ACT law, and are a matter of comment in all submissions, and in evidence taken by the Committee.
- 4.2 Of particular relevance, are provisions in other jurisdictions in Australia, which a number of submissions and witnesses noted had legislative provisions which enacted definitions of consent which reflected a different and more effective definition of consent in sexual assault offences.
- 4.3 Of relevance to the discussion were the provisions in NSW and Tasmanian legislation, and in particular, in the case of NSW, as this jurisdiction has a direct and immediate effect on the laws of the ACT, both through geographical proximity, and as the basis for the *Crimes Act 1900* in the ACT.

OTHER JURISDICTIONS

NEW SOUTH WALES

- 4.4 In New South Wales, the current law relating to consent in sexual offences is in Section 61 HA of the *Crimes Act 1900* (NSW).
- 4.5 For a person accused of sexual assault to be found guilty, the prosecution must prove three “elements” beyond a reasonable doubt:
- the accused engaged in sexual intercourse with another person;
 - the person did not consent to the sexual intercourse; and
 - the accused knew the person did not consent.
- Section 61HA deals with the second and third elements.
- 4.6 Section 61HA provides:
- (1) Offences to which section applies

This section applies for the purposes of the offences, or attempts to commit the offences, under sections 61I, 61J and 61JA.

(2) Meaning of consent

A person

"**consents**" to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.

(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.

4.7 This provision is currently the subject of a special reference by the NSW Attorney-General to the NSW Law Reform Commission (NSW LRC). Details of the reference are dealt with in the following section of this chapter.

4.8 In relation to NSW current law, the DPP provided the Committee with this comment on the issues of recklessness. The DPP noted that: '...part of the Common Law's current 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 of recklessness.'⁸⁰

4.9 In enlarging on this matter, the DPP noted the effective answer provided to this difficulty by NSW *Crimes Act*:

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

Section 61 HA

... (See para 4.6 above for the section)

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).

⁸⁰ ACT DPP, *Submission 10*, pp. 4-5.

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.⁸¹

NSW LAW REFORM COMMISSION – REFERENCE ON CONSENT IN SEXUAL OFFENCES

- 4.10 In May 2018, the NSW Attorney-General referred the question of consent in sexual assault offences to the NSWLRC for inquiry and report.
- 4.11 When initiating the reference, the NSW Attorney-General’s media release noted:
- Mr Speakman [NSW Attorney-General] initiated the review after a young woman endured two trials and two appeals with no final resolution. The proceedings centred on the issues of consent and the accused’s knowledge of whether the complainant consented, which the review will consider.⁸²
- 4.12 The trials and appeals referred to in the media release are the 2017 case *R v Lazarus*, in which the question of consent in an alleged sexual assault played a decisive part in the decision of the courts.⁸³
- 4.13 The NSW LRC invited preliminary submissions on this reference, and – on 19 October 2018 – issued a Consultation Paper seeking detailed submissions on matters it has identified as questions raised by the reference.⁸⁴
- 4.14 The Committee notes that a large number of issues are raised by the Consultation Paper which are relevant to issues considered by the Committee in this inquiry, and comments further on the NSW LRC process at the end of this chapter and in chapter 5.

⁸¹ ACT DPP, *Submission 10*, p. 4

⁸² Attorney-General for NSW, Media Release, ‘*Sexual Consent Laws to be reviewed*’, 8 May 2018, <https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/sexual-consent-laws-to-be-reviewed.aspx>

⁸³ See, *R v Lazarus*, [2017], NSWCCA, 279.

⁸⁴ NSW Law Reform Commission, *Consultation Paper 21*, ‘Consent in relation to sexual offences’, October 2018, <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Consultation-Papers/CP21.pdf>

TASMANIA

- 4.15 In 2004, Tasmania enacted amendments to the state's Criminal Code that inserted a statutory definition of consent and imposed additional constraints on the availability of the defence of mistaken belief in consent.
- 4.16 The amendments were enacted to ensure that the issue of consent to sexual conduct would be tested and assessed according to standards of mutual and reciprocal consent and, in accordance with Section 2A(2)(a) of the Tasmanian Criminal Code, the amendment provides that a complainant did not communicate consent is sufficient to establish absence of consent.
- 4.17 In the Tasmanian Criminal Code consent is defined in s 2A as 'free agreement'. The section reads:

2A. - Consent

- (1) In the Code, unless the contrary intention appears, "consent " means free agreement.
- (2) 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; or
 - (b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or
 - (c) agrees or submits because of a threat of any kind against him or her or against another person; or
 - (d) agrees or submits because he or she or another person is unlawfully detained; or
 - (e) agrees or submits because he or she is overborne by the nature or position of another person; or
 - (f) agrees or submits because of the fraud of the accused; or
 - (g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or
 - (h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or
 - (i) is unable to understand the nature of the act.
- (3) If a person, against whom a crime is alleged to have been committed under chapters XIV or XX, suffers grievous bodily harm as a result of, or in connection

with, such a crime, the grievous bodily harm so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.

- 4.18 The Tasmanian consent provisions, having been in force for some time, have been the subject of some study, and in particular, on the Impact of Introducing the affirmative model of consent in Tasmanian rape trials.⁸⁵ This particular study found, inter alia, that:

There is evidence that judges and counsel continue to rely on a pre-reform notion of consent and indications that the prosecution tailor cases to their understanding of the jury's preconceived views about rape, rape victims and consent to sexual intercourse. The thesis concludes that the general reluctance or inability to engage with the new concept of consent that the reforms have instituted must be addressed by providing education about the meaning and effect of the amended legislation if there is to be any hope of achieving positive attitudinal change within both the criminal justice system and the broader community.⁸⁶

- 4.19 The Committee has not considered or inquired into matters raised by the changes to Tasmanian consent provisions apart from noting the 2004 amendments, and the assessment in the analysis published on its implementation.

COMMITTEE COMMENT

- 4.20 The Committee has provided a brief analysis of the current provisions relating to consent and notes two considerations.
- 4.21 The first is the NSW provisions. Section 61 HA of the *Crimes Act 1900* (NSW) may provide a good model for an amendment of the ACT *Crimes Act*, if the Committee accepted the view of the DPP (and several other submitters, who made a similar suggestion).
- 4.22 However, the referral of the matters relating to consent in sexual offences to the NSWLRC (on the same day the Bill was referred to the Committee by the Legislative Assembly) has resulted in submissions to the Committee, by the Attorney-General and by the Bill's sponsor, Ms Le Couteur MLA, that consideration of the Bill be deferred until the NSWLRC finalises and published its report and recommendations to government in 2019.
- 4.23 The Committee considers these matters in chapter 5.

⁸⁵ Cockburn, Helen, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials*, PH. D Thesis, Univ. of Tasmania, June 2012. <https://eprints.utas.edu.au/14748/2/whole-cockburn-thesis.pdf>

⁸⁶ Cockburn, *ibid.*, *Abstract*, p. iii.

5 SUMMARY OF ISSUES, COMMITTEE COMMENT AND CONCLUSIONS

INTRODUCTION

- 5.1 The Committee has provided – particularly in chapter 3 – a review of the evidence and observations put to it on the Bill. It particularly notes that the Bill’s sponsor, Ms Le Couteur MLA, makes it clear in her second submission to the inquiry, that the Bill – as presented on 11 April 2018 – requires amendment to ensure the Bill will fulfil its intended purpose.
- 5.2 The Committee also has noted that the Attorney-General shares a view advanced by Ms Le Couteur MLA, namely, that any decisions on how to frame legislation which achieves clear definitional clarity, and also provides an equally clear provision requiring affirmative and positive consent to participate in sexual activity requires some preliminary consideration of this Committee’s report, and other matters.
- 5.3 There are two quotes which the Committee found distilled the essential difficulty with the Bill; one from the DPP, and the other from Ms Le Couteur MLA.
- 5.4 The DPP told the Committee:

The issue of consent in sexual offending is one of the most difficult issues in the criminal law. One of the basic reasons for that is that consent in the criminal law has two aspects: it has an aspect of consent from the point of view of the victim but also there has to be an appreciation of consent, or lack of consent, on behalf of the perpetrator. Those two aspects of consent have proved to be very difficult for criminal law over many years.

...

I do not want to take up too much time, but in welcoming the opportunity to talk about consent I also welcome the opportunity that is provided by this inquiry for the community to engage in issues of consent. One of the underlying driving forces behind this bill is undoubtedly a debate around issues of positive consent. That is a very important debate for the community to have. Speaking as criminal lawyers and as prosecutors, we welcome community attention to that issue and we welcome a model for societal behaviour that really emphasises the necessity for positive consent to

sexual relations being obtained. There is an increasing awareness in society of the importance of that, and that is where this debate is going.⁸⁷

5.5 Ms Le Couteur MLA put the view to the Committee that:

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.⁸⁸

5.6 These two quotes constitute a summary of the issues which the Committee sought, following its initial assessment of the Bill, and publication of the Terms of Inquiry referred to in chapter 1, to address in this inquiry.

5.7 The Committee has concentrated its examination on the issue which was clearly at the centre of an examination of the Bill, and was of very significant importance as a proposed change to the current law governing consent in sexual assault offences in the ACT.

5.8 The Committee received submissions on matters raised by the Bill in relation to consent as it relates to image transmission, the Committee received view supporting the proposals and supports those provisions.

5.9 In her submission to the Committee on the future treatment of the Bill, Ms Le Couteur MLA noted:

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

⁸⁷ *Transcript of Evidence*, 28 September 2018, pp. 19-20.

⁸⁸ Ms Caroline Le Couteur MLA, *Submission 23*, p. 2

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.⁸⁹

- 5.10 The Committee has taken Ms Le Couteur MLA's stated position into account in making recommendations on the Bill.

SUMMARY – ISSUES CONSIDERED IN THE INQUIRY

DEFINITION OF CONSENT

- 5.11 As noted in chapters 3 and 4, the Committee has considered a number of views on the principal matters in relation to consent in sexual assault offences and how the Bill proposes to amend the current law. These matters can be described as the two aspects of consent:
- The first issue of whether the complainant/victim actually consented to the sexual activity.
 - The second issue of whether the perpetrator knew or was reckless to the fact that the victim did not consent to the activity.
- 5.12 It was submitted by the DPP that it is a requirement for the Crown to 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.⁹⁰
- 5.13 As was noted during the inquiry, the clear view of legal practitioner submissions and that of the HRC was that in its definition of consent the Bill conflates the two aspects of consent.
- 5.14 In addition, the second leg of consent, the state of mind of the perpetrator as to the consent of the victim, is currently taken by common law to be defined essentially in terms of recklessness.
- 5.15 It was clear to the Committee that 'recklessness' remains a crucial element in determining consent in sexual offending, but that it cannot be conflated with the first and distinctive element of whether or not the victim actually consented.
- 5.16 The Committee has considered this question carefully and has concluded that legal advice be sought specifically on the concept of recklessness (which the DPP submitted has developed greatly in common law)⁹¹ insofar as to what extent 'reasonableness' is considered in

⁸⁹ Ms Caroline Le Couteur MLA, *Submission 23*, p. 2

⁹⁰ ACT DPP, *Submission 10*, p. 2

⁹¹ ACT DPP, *Submission 10*, p. 2

determining the common law defence of 'honest' mistake (the 'Morgan defence'). The Committee has recommended to this effect.

AFFIRMATIVE AND COMMUNICATIVE CONSENT

5.17 In her submission, Ms Le Couteur MLA noted that:

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.⁹²

5.18 Submissions to the Committee, as discussed and quoted in chapter 3, show that there is strong community support for such an approach to developing a workable formula for affirmative and communicative consent.

5.19 The Committee believes that it is important, in light of the views considered during the inquiry, and subject to the recommendations from the NSWLRC's inquiry into consent, that an appropriate model definition of consent which includes affirmative and positive communication of consent be considered for inclusion in ACT law.

BURDEN OF PROOF

5.20 The Committee notes that the findings and recommendations by the Scrutiny Committee, which resulted in reference of the Bill to the Committee focussed on this matter. The evidence taken by the Committee from the legal practitioner bodies (including the HRC) in particular has provided the committee with a sufficient level of concern over this question to convince the Committee that this element of the Bill requires consideration and re-drafting.

⁹² Ms Caroline Le Couteur MLA, *Submission 23*, p. 4

SOCIAL CONTEXT IMPLICATIONS AND EDUCATION

- 5.21 There was strong support in all submissions for a continuation of developing programs to educate the community – particularly at the school level – in the nature of sexual consent issues and for the importance for socially acceptable behaviour standards.
- 5.22 In a concluding paragraph of her submission, Ms Le Couteur MLA affirmed a strong theme in submissions:

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.⁹³

- 5.23 The Committee endorses the last sentence of the quote and acknowledges that changes in the law alone will not bring about broader and better understanding of consent in sexual offending.
- 5.24 Education and awareness is paramount in schools and across the community. The Committee also recognises that there appears to be a disconnect between the community and the judiciary about this – communicative and affirmative consent – and the potential risk for young people who don't understand the law and potential changes.
- 5.25 The Committee recommends this approach and details its views in its recommendations.

COMMITTEE COMMENT AND CONCLUSIONS

- 5.26 A definition of consent based on a concept of free and voluntary agreement, and affirmative and communicative consent should be considered for enactment into ACT law.
- 5.27 The Legislative Assembly, the Committee and Ms Le Couteur MLA should wait for the findings and recommendations made by the NSWLRC resulting from the inquiry on sexual consent in relation to sexual offences which is due in 2019. As all aspects of the consent provisions in

⁹³ Ms Caroline Le Couteur MLA, *Submission 23*, p. 7.

NSW (and ACT law) can be reasonably expected to be subject of the findings of the NSWLRC inquiry, the Committee is of the view that it is prudent to await the conclusions of the NSWLRC inquiry.

- 5.28 The Committee has also concluded that legal advice be sought specifically on the issue of recklessness, insofar as to what extent 'reasonableness' is and should be considered in determining the common law defence of 'honest' mistake (the 'Morgan defence').

RECOMMENDATIONS

Recommendation 1

That the *Crimes (Consent) Amendment Bill 2018* as introduced into the Legislative Assembly on 11 April 2018 not be proceeded with in its current form.

Recommendation 2

The Committee recommends that the ACT not consider or enact legislative change to introduce a definition of affirmative consent until the report from the current NSW Law Reform Commission inquiry in relation to sexual offences is presented.

Recommendation 3

The Committee recommends that, any legislative changes under ACT law proposing a definition of consent in relation to sexual offences, not include any element that requires proof that a perpetrator knew or should have known consent was given.

Recommendation 4

The Committee recommends that a definition of consent based on a concept of free and voluntary agreement, and affirmative and communicative consent be considered for enactment into ACT law.

***Recommendation 5**

The Committee recommends that Section 67 of the Crimes Act 1900 be amended to include a provision which states that the fact a person does not say or communicate consent is not, of itself, regarded as consent.

Recommendation 6

The Committee recommends that any legislative changes retain the fundamental presumption of innocence until proven guilty in that the burden of proof beyond reasonable doubt must remain with the prosecution.

Recommendation 7

The Committee recommends that legal advice be sought on the potential impacts of legislatively removing the current common law defence of 'honest mistake' ('the Morgan defence').

*Recommendation replaced by Corrigendum tabled 31 October 2018.

Recommendation 8

The Committee recommends that, in conjunction with legislative change and amendment, that a complementary education program on consent be put in place. The Committee also recommends that such a campaign especially focus on young people.

Recommendation 9

The Committee recommends that the ACT Government establish a cross-government, cross-sector working group, which includes representations from women's organisations, sexual assault and domestic violence services and the legal fraternity, or alternatively, that the ACT Government utilise an already existing group to provide advice on how the government can improve prosecution outcomes for victims of sexual assault, specifically with regards to consent.

Recommendation 10

The Committee recommends that all law reform must provide scope to deliver the best possible outcome for victims of sexual assault as well as the community.

- 5.29 The Committee thanks the organisations and individuals who have contributed to its inquiry, by making submissions, and/or appearing before it to give evidence.
- 5.30 The Committee recognises the significant commitment of time and resources required to participate in this inquiry and is grateful that it was able to draw on a broad range of expertise and experience in its deliberations

Elizabeth Lee MLA

Chair

October 2018

APPENDIX A – REPORT BY THE STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY (LEGISLATIVE SCRUTINY ROLE) ON THE CRIMES (CONSENT) AMENDMENT BILL 2018, MAY 2018

CRIMES (CONSENT) AMENDMENT BILL 2018

This Private Member’s Bill will amend the *Crimes Act 1900* to extend the protection given to young people of similar age who consensually share intimate images to the production, trading and possession of child exploitation material or pornographic performances, and to include a statutory definition of consent in relation to sexual offence provisions.

***Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—
Committee terms of reference paragraph (3)(a)***

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

Various sexual offences under the Crimes Act involve establishing a lack of consent, either as an element of the offence (eg sexual intercourse without consent under section 54, an act of indecency without consent under section 60) or as a defence (eg sexual intercourse with a young person under paragraph 55(3)(b), act of indecency with a young person under paragraph 61(3)(b)). Section 67 of the Crimes Act currently sets out various acts which negate what might otherwise be consent, such as the infliction or threat of violence or humiliation or effect of intoxicating substances. The Crimes Act does not, however, provide any further definition of what constitutes consent. Courts in the ACT therefore refer to the common law position. Establishing sexual intercourse without consent, for example, involves establishing that the sexual intercourse was without the person’s consent and that the defendant knew or was reckless as to whether the person did not consent. Recklessness includes where the defendant did not care about whether the person was consenting, either because they did not stop even though they knew there was a risk that the person did not consent, or had not considered whether the person consented or not.⁹⁴

The Bill will amend the current approach in the ACT by defining consent of a person for those various

⁹⁴ See *Sims v Drewson* [2008] ACTSC 91, as approved in *Director of Public Prosecutions v Walker* [2011] ACTCA 1

sexual offences (as well as the proposed new defence in section 66A applying to young persons of a similar age). A person will consent when they give free and voluntary agreement; and the other person knows the agreement was freely and voluntarily given, or is satisfied on reasonable grounds that the agreement was freely and voluntarily given. The effect of this provision will be that the prosecution can establish the mental element of lack of consent through showing that there were no reasonable grounds open to the defendant to believe that the agreement was freely and voluntarily given. It is intended that the Bill will remove the ability of the defendant to show that they had an honest belief that the other person had consented where that belief was not reasonable in the circumstances.

As the Bill increases the evidential burden on the defendant to establish the reasonableness of their belief that the other person was consenting, the Bill will extend the circumstances in which an innocent person may be found guilty because they are unable to meet their evidential burden. The Bill therefore engages the right to the presumption of innocence protected by section 22 of the HRA.

The ACT Human Rights Commission, in its submission to the Crimes (Consent) Amendment Bill 2018—Exposure draft, dated 26 March 2018, raised the following concerns:

...

It is also welcome that the bill clarifies that, for the offences against ss 64 and 65, the defendant bears only an evidential burden in relation to the relevant matters. As we have previously noted, an evidential burden is more likely to be considered a proportionate limitation on the right to be presumed innocent (s 22(2)), in accordance with the reasonable limits test in s 28 of the HR Act.

However, it is not apparent why the bill omits to expressly extend this clarification to the offences in s 66 of the Crimes Act, and it is not clear if the intention is to apply a legal burden instead. Placing a legal burden on the defendant in these circumstances gives rise to a ***serious risk that a person may be convicted, not because he/she committed the criminal act, but because they were unable to overcome the burden*** (emphasis added) placed upon them to show they did not.

In our view, absent a clear justification for treating the offences in s 66 differently to the other child pornography offences in ss 64 and 65, the bill should clarify that the defendant has an evidential burden for those matters as well. Consideration could also be given to aligning the similar-age consent defences (that impose a legal burden on the defendant) currently contained in the Crimes Act – including in s 55 (sexual intercourse with a young person) and s 61 (acts of indecency with young people) – with this approach to ensure greater consistency across the Crimes Act...

...

While the Commission strongly supports the introduction of a statutory definition of consent that reflects a ‘communicative model’ of consent, we have some concerns about the provisions as currently drafted. Under the bill, the meaning of consent for the purposes of sexual and intimate image abuse offences is defined as requiring both (i) free and voluntary agreement by the person; and (ii) either subjective or objective knowledge by the other person that consent was present. The Explanatory Statement to the exposure bill states at page 2 that the objective knowledge requirement of the definition is ‘modelled upon the “reasonable belief” construction of section 273.2 of the Criminal Code (Canada) R.S.C., 1985, c. C-46’. The ‘reasonable belief’ construction in the comparable Canadian legislation, however, is **not** (emphasis added) included as part of the definition of consent, but is instead set out in a separate provision which addresses various matters where belief in consent is not a defence...

...

We are concerned that the provisions as currently drafted as **likely to result in ambiguity and uncertainty** (emphasis added), as they appear to conflate two discrete issues: (i) consent by one person and (ii) the responsibility of the other person to take steps to ascertain consent exists.

In our view, it would be preferable to adopt an approach consistent with other jurisdictions, by setting out the meaning of consent (‘free and voluntary agreement’) separately to the objective fault test for belief about consent. The purpose of adopting an objective fault test is to ensure that the person has reasonable grounds for their belief about consent, and that the person seeking consent has the responsibility to take steps to ascertain consent exists. While an objective fault test is central to assessing whether consent was freely and voluntarily given, it is not clear how the relevant offences in the Crimes Act would operate if it were included within the definition of consent itself. Dealing with the definition of consent and knowledge about consent separately does not detract from the objective of promoting a communicative model of consent. The requirement that a person must have reasonable grounds for believing that the agreement was freely and voluntarily given sends a clear message that a person must be certain of consent. This is a step that necessarily involves communication with the other person.

The Committee is concerned that the explanatory statement to the Bill (as tabled) or the revised explanatory statement to the Bill (as available on the legislation register) has not addressed the Human Rights Commission’s concerns and, in the Committee’s view, it should do so.

Under the current offences, the unreasonableness of the belief of consent may be an element in establishing the defendant’s lack of belief that the other person had consented. The need for consent to depend on the reasonableness of the grounds on which the defendant believes free and voluntary agreement was given may, therefore, have only a minor impact on how the knowledge of lack of consent is established. It is on this basis that the explanatory statement concludes that any limitation on the innocence is reasonable, considering the objective of the Bill to establish a clearer, affirmative

definition of consent.

As the explanatory statement suggests, the extent of any limitation of this right is 'difficult to ascertain at this stage'. The Committee is concerned that the new definition of consent may result in substantial changes to how knowledge or recklessness of the lack of consent is established. In particular, by including the need for an defendant to be satisfied on reasonable grounds within the definition of consent, and applying that definition to a number of offences, it is difficult to determine the extent of the evidential or legal burdens that may be faced by the defendant, such as whether they will need have evidence going both to their state of mind and the reasonableness of that state of mind. Therefore, the Committee is not satisfied, on the information available to it, that the amendments to the definition of consent will have only a reasonable limitation on the right to the presumption of innocence. The Committee therefore recommends that an inquiry is needed to establish the possible operation and impact of the amendments to the definition of consent included in the Bill.

The Committee draws this matter to the attention of the Assembly, and recommends that the Assembly refer the Bill to the Standing Committee on Justice and Community Safety for inquiry and report.

The Bill also introduces protections for young people who engage in various offences relating to the production and possession of exploitative material (sections 64 and subsection 65(1)), and grooming and depraving young persons (section 66). The Bill will not apply those offences where the young person being exploited or groomed was 10 years or older, there is not more than two years difference between the young person and the defendant, and the young person consented to the acts in question.

As stated in the note to the proposed offences, this exception to the provision generally places an evidential burden on the defendant to show there is a reasonable possibility that the relevant circumstances existed. As stated in section 58 of the *Criminal Code 2002*, where a burden of proof is imposed on a defendant, or the defendant wants to rely on an exception, exemption, excuse, qualification or justification provided by the law creating an offence, only an evidential burden is imposed. As this places a burden on the defendant, it engages the presumption of innocence protected by section 22 of the HRA and should have been addressed in the explanatory statement. However, in the Committee's view the introduction of the exception in proposed section 66A does not disadvantage the defendant by increasing the burden on them to disprove an element of the offence, and is a reasonable limitation given the Bill's objective of reducing the risk of inappropriate criminalisation of young people who engage in consensual behaviour.

However, as referred to above, the note to the proposed section 66A in the Bill only refers to the evidential burden applying to offences against section 64 and subsection 65(1), and does not mention section 66. Subsection 66(2) states that the "Criminal Code, chapter 2 (other than the immediately applied provisions) does not apply to an offence under subsection (1)." Chapter 2 of the Criminal Code includes section 58 relating to evidential burdens. The Committee takes the view that this provision is unlikely to be sufficiently clear to change what would otherwise be the likely

interpretation of proposed section 66A to impose only an evidential burden. Any uncertainty as to the inadvertent imposition of a legal burden should be clearly addressed.

The Committee therefore requests that the Member consider amending the explanatory statement to include consideration of the impact of the proposed section 66A on the right to the presumption of innocence in relation to the offence in section 66, and consider amendment of the proposed section to make it clear whether only an evidential burden is intended.

In addition, if the Committee's recommendation that an inquiry be held on the impact of the Bill's amendment to the definition of consent is adopted, and given that the proposed definition of consent will also apply to the proposed section 66A, the Committee recommends that the inquiry should also include consideration of the possible operation and impact of the proposed section 66A.

The Committee draws this matter to the attention of the Assembly, and asks the Member to respond.

APPENDIX B – MATTERS FOR INQUIRY PUBLISHED BY THE COMMITTEE

Crimes (Consent) Amendment Bill 2018

Introduction

The Standing Committee has been referred this Bill by the Legislative Assembly for inquiry and report.

The Committee is to report to the Assembly on the Bill by the end of October 2018

The Bill is a Private Member's Bill (PMB) introduced on 11 April 2018 by Ms Caroline Le Couteur MLA.

The Bill

- The Bill link is – http://www.legislation.act.gov.au/b/db_57900/default.asp
- The Bill Explanatory Memorandum link is – http://www.legislation.act.gov.au/es/db_57901/default.asp
- Ms Le Couteur's speech on introduction of the Bill on 11 April, 2018 link is - <http://www.hansard.act.gov.au/hansard/2018/pdfs/20180411a.pdf>
- The Bill, as with all Bills introduced to the Legislative Assembly was subject of comment and report by the Scrutiny of Bills Committee of the Assembly. The Scrutiny of Bills Committee comment and observations on the Bill are also attached. These are in Scrutiny of Bills Report of the Assembly in its Report No 17 for the Ninth Assembly.
- The link to the Scrutiny of Bills report is – https://www.parliament.act.gov.au/_data/assets/pdf_file/0011/1196084/Report-17-Final.pdf

Referral of the Bill to this Committee link is at Minutes of the Assembly, page 804, Tuesday, 8 May 2018.

Matters to be considered by the Committee

A relevant reference in the inquiry is the ALRC Report on family violence:

<https://www.alrc.gov.au/publications/27.%20Evidence%20in%20Sexual%20Assault%20Proceedings/relevance-and-consent>

Another is to the current NSW LRC reference on Consent in Criminal Matters, which has received a number of preliminary submissions:

http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Consent/Preliminary-submissions.aspx

There are a number of points the Committee wants to further consider, and is seeking views on these points. They relate to clauses 5 to 9 of the Bill which seek to amend parts of sections 66 Section 67 of the *Crimes Act 1900* (ACT).

Detailed questions to be considered by the Committee

1. What will be the effect of the proposed definition (as drafted) of consent applying under the sexual offence provisions of the *Crimes Act 1900* (ACT)?
 - i. How will a standard definition of consent operate with regard to each applicable sexual offence?
 - ii. Is this definition of consent preferable to the current statutory/common law formulations, in particular s67 of the *Crimes Act 1900* (ACT)?
2. The Committee understands that one of the intentions of the Bill is to propose an 'affirmative community model' for consent. Will the Bill effectively deliver this model, and are there any preferred alternatives to achieve the same intended outcome?
3. The Committee has been advised that the Bill, as currently drafted, effectively *reverses the onus of proof*. This places an onus upon the person accused (rather than the prosecution), not just to prove an honest belief that consent was given, but to prove a higher standard of proof; that the accused either *knows* or 'is *satisfied* on *reasonable grounds* that the agreement was freely and voluntarily given'.
 - i. Does the Bill reverse the onus of proof, and what is the effect of the *reverse onus of proof*?
 - ii. Does the Bill raise the burden of the onus of proof to a standard that is too high?
 - iii. What is the effect of a higher standard of proof that the accused *knows* or 'is satisfied on *reasonable grounds* that the agreement was freely and voluntarily given'?
 - iv. What is the effect of the test of *reasonableness*; that the accused is *satisfied* on *reasonable grounds* that the agreement was freely and voluntarily given? Is this objective approach appropriate or is a subjective approach to consent preferred?
 - v. In relation to the separate or combined effect of the above, what are the implications for the victim and the accused, including the human rights implications, such as the presumption of innocence?
4. What are the implications of the Bill in prosecuting sexual offences and conviction rates in the ACT?

5. In 2010 the Family Violence - A National Legal Response (ALRC Report 114) recommended:

Recommendation 25–4 Federal, state and territory sexual offence provisions should include a statutory definition of consent based on the concept of free and voluntary agreement.

Does the Bill successfully implement the recommendation of the ALRC and are there any preferred alternatives which may also implement the recommendation?

6. The Committee notes the Tasmanian model and the New South Wales model (and the current NSW Law Reform Commission Review into consent for sexual offences). What can we learn from other jurisdictions in legislating for consent?
7. What are the social implications of the Bill?
- i. What measures may be required to effectively implement the intentions of the Bill in addition to a change to the law?
 - ii. How will the Bill impact personal and sexual relationships?
8. Are there any other matters the Committee should be aware of?

August 2018

APPENDIX C – SUBMISSIONS RECEIVED BY THE COMMITTEE

Submission Number	Submitter
1.	Patricia Easteal
2.	Caroline Le Couteur MLA
3.	ACT Bar Association
4.	Greg Tannahill
5.	Lauryn Roberts
6.	Diane Call
7.	Alan Cory and Janet Gibson
8.	Joel Dignam
9.	ANUSA
10.	ACT DPP
11.	YWCA Canberra
12.	Aoife Herrick (Individual)
13.	Confidential
14.	Karen Blake (Individual)
15.	Rebecca Solomon (Individual)
16.	ACT AIDS Council

Submission Number	Submitter
17.	Civil Liberties Australia
18.	Women With Disabilities ACT
19.	Sexual Health and Family Planning ACT
20.	Rape & Domestic Violence Services Australia
21.	Sienna Aguilar (Individual)
22.	ACT Law Society
23.	Caroline Le Couteur MLA (Second submission)
24.	ACTCOSS
25.	Women's Centre for Health Matters
26.	Young Women Speak Out
27.	ACT Youth Coalition
28.	Advocacy for Inclusion

APPENDIX D – HEARINGS AND WITNESSES

28 September 2018

- Barry, Ms Erin, Director of Policy, Youth Coalition of the ACT
- Chowdry, Mr Kieran, Policy and Development Officer, Youth Coalition of the ACT
- Crimmins, Ms Frances, Chief Executive Officer, YWCA Canberra
- Klugman, Dr Kristine OAM, Civil Liberties Australia
- Machalias, Ms Helen, Director, Communication, Advocacy and Fundraising, YWCA Canberra
- Mclean, Ms Elly, Civil Liberties Australia
- Moinkhah, Ms Zahra, Young Women Speak Out
- Nangrani, Ms Tanvi, Young Women Speak Out
- White, Mr Jon SC, Director of Public Prosecutions, Justice and Community Safety Directorate

2 October 2018

- Bavinton, Mr Tim, Executive Director, Sexual Health and Family Planning ACT
- Davidson, Ms Emma, Deputy CEO, Women’s Centre for Health Matters

9 October 2018

- Del Piero, Ms Natasha, ACT Law Society
- Hopkins, Dr Anthony, ACT Bar Association
- Kukulies-Smith, Mr Michael, ACT Law Society
- McIntyre, Ms Kajhal, Legal Researcher and Project Worker, Rape And Domestic Violence Services Australia
- Millen, Ms Bonnie, Policy Officer, Advocacy for Inclusion
- Moore, Ms Clare, Chief Executive Officer, Women with Disabilities ACT
- Salthouse, Ms Susan, Chair, Women with Disabilities ACT
- Thilagaratnam, Ms Renuka, Legal Adviser, ACT Human Rights Commission
- Watchirs, Dr Helen, OAM, President, ACT Human Rights Commission and ACT Human Rights Commissioner

APPENDIX E – CRIMES (CONSENT) AMENDMENT BILL AND EXPLANATORY STATEMENT

2018

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Caroline Le Couteur)

Crimes (Consent) Amendment Bill 2018

A Bill for

An Act to amend the *Crimes Act 1900*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 **1 Name of Act**

2 This Act is the *Crimes (Consent) Amendment Act 2018*.

3 **2 Commencement**

4 This Act commences on the day after its notification day.

5 *Note* The naming and commencement provisions automatically commence on
6 the notification day (see [Legislation Act](#), s 75 (1)).

7 **3 Legislation amended**

8 This Act amends the *Crimes Act 1900*.

9 **4 Grooming and depraving young people**
10 **Section 66 (5)**

11 *omit*

12 It is not a defence

13 *substitute*

14 Subject to section 66A, it is not a defence

15 **5 New section 66A**

16 *insert*

17 **66A Consenting young people—exception to s 64, s 65 and**
18 **s 66 offences**

19 (1) This section applies to an offence under the following provisions:

20 (a) section 64 (1);

21 (b) section 64 (3);

22 (c) section 65 (1);

23 (d) section 66 (1);

24 (e) section 66 (3).

- 1 (2) The provision does not apply to a person if—
- 2 (a) the child or young person the subject of the offence was
- 3 10 years old or older at the time of the offence; and
- 4 (b) there is not more than 2 years difference in age between the
- 5 person and the child or young person; and
- 6 (c) the child or young person consented to the act constituting the
- 7 offence.
- 8 *Note* For offences against s 64 and s 65 (1), the defendant has an evidential
- 9 burden in relation to the above matters (see [Criminal Code](#), s 58).

10 **6 Section 67 heading**

11 *substitute*

12 **67 Meaning of *consent*—sexual offence consent provisions**

13 **7 Section 67 (1)**

14 *omit everything before paragraph (a), substitute*

- 15 (1) For a sexual offence consent provision, *consent* of a person to an act
- 16 mentioned in a sexual offence consent provision by another person
- 17 means—
- 18 (a) the person gives free and voluntary agreement; and
- 19 (b) the other person—
- 20 (i) knows the agreement was freely and voluntarily given; or
- 21 (ii) is satisfied on reasonable grounds that the agreement was
- 22 freely and voluntarily given.
- 23 (1A) Without limiting the grounds on which it may be established that
- 24 consent is negated, the consent of a person to an act mentioned in a
- 25 sexual offence consent provision is negated if that consent is
- 26 caused—

1 **8 Section 67 (2) and (3)**

2 *substitute*

3 (2) For section 54 and section 55 (3) (b), a person who does not offer
4 actual physical resistance to sexual intercourse must not, by reason
5 only of that fact, be regarded as consenting to the sexual intercourse.

6 (3) If it is established that a person who knows the consent of another
7 person to an act mentioned in a sexual offence consent provision has
8 been caused by any of the circumstances set out in subsection (1A)
9 (a) to (j), the person is taken to know that the other person does not
10 consent to the act.

11 (4) In this section:

12 *sexual offence consent provision* means any of the following:

13 (a) section 54;

14 (b) section 55 (3) (b);

15 (c) section 60;

16 (d) section 61 (3) (b);

17 (e) section 66A (2) (c).

18 **9 Consent—pt 3A**
19 **New section 72F (1A)**

20 *before subsection (1), insert*

21 (1A) For this part, *consent* of a person to the distribution of an intimate
22 image of the person by another person (the *offender*) means—

23 (a) the person gives free and voluntary agreement; and

- 1 (b) the offender—
2 (i) knows the agreement was freely and voluntarily given; or
3 (ii) is satisfied on reasonable grounds that the agreement was
4 freely and voluntarily given.

5 **10 Section 72F (1)**

- 6 *omit*
7 another person (the *offender*)
8 *substitute*
9 the offender

10 **11 Dictionary, new definition of *consent***

- 11 *insert*
12 ***consent***—
13 (a) for sections 54, 55 (3) (b), 60, 61 (3) (b) and 66A (2) (c)—see
14 section 67 (1); or
15 (b) for part 3A (Intimate image abuse)—see section 72F (1A).

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 11 April 2018.

2 Notification

Notified under the [Legislation Act](#) on 2018.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

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2018

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES (CONSENT) AMENDMENT BILL 2018

EXPLANATORY STATEMENT

Presented by
Caroline Le Couteur MLA
Member for Murrumbidgee

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CRIMES (CONSENT) AMENDMENT BILL 2018

OUTLINE

This explanatory statement relates to the Crimes (Consent) Amendment Bill 2018 (“the Bill”). It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly. The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

Purpose of the Bill

The Crimes (Consent) Amendment Bill 2017 provides amendments to reform the *Crimes Act 1900* in relation to consent in sexual offences, intimate image abuse offences, and child sex offences.

The Bill will amend criminal laws to make key improvements to the criminal justice system to clarify the law of consent and provide better outcomes for victims and the community. These changes will define consent in the *Crimes Act 1900* (giving effect to an outstanding recommendation from the Australian Law Reform Commission’s 2010 Report, “*Family Violence - A National Legal Response*”), and incorporate a further *affirmative* definition of consent - more in line with modern community standards and reflective of innovations in the law.

The Bill will also correct a discrepancy between sections 68 and 72D(2) and sections 64 to 66 of the *Crimes Act 1900*. This discrepancy means that, while young people under 16 undertaking consensual sexual activity are protected from prosecution for some offences (by operation of sections 68 and 72D(2)), these same young people remain vulnerable to prosecution for the same or similar activities elsewhere in the Act.

In summary, the Bill will:

1. clarify child pornography offences to ensure that images consensually shared by young people will not result in their prosecution, similar to the 2-year rule for sexual offences;
2. give effect to recommendation 25-4 of the Australian Law Reform Commission’s 2010 Report, “*Family Violence - A National Legal Response*”;

The recommendation reads:

Recommendation 25–4 *Federal, state and territory sexual offence provisions should include a statutory definition of consent based on the concept of free and voluntary agreement.*

3. clarify and expand the definition of consent for both intimate image abuse and sexual offences by creating an *affirmative* definition of consent, modelled upon the “reasonable belief” construction of section 273.2 of the *Criminal Code* (Canada) R.S.C., 1985, c. C-46; and
4. implement further technical and procedural amendments to ensure an efficient and clear criminal law.

Background

In 1999, the ACT agreed to adopt the Model Criminal Code which was, at the time, being rolled out nationally as part of law harmonisation efforts. While the ACT did not fully implement the Code and the national harmonisation project did not eventuate, the draft Code incorporated two relevant recommendations:

1. to create “similarity of age” defences or exclusions to prevent young people engaging in consensual sexual activities from undue prosecution; and,
2. to create a clear definition of consent for inclusion in the relevant criminal legislation.

The first recommendation was partly implemented by the ACT Government (at section 68 of the *Crimes Act 1900*), but has not subsequently been expanded to cover other sexual or peripheral offences created since then, including child pornography offences.

The second recommendation was not adopted by the ACT Government.

In 2008, the Federal Government commissioned the National Council to Reduce Violence Against Women and their Children to draft a national plan to reduce violence against women. This plan of action was released as the 2009 report “Time for Action” which included a number of legal reform pathways, and highlighted serious concern over the lack of uniformity or progress across Australian jurisdictions in relation to consent in sexual offences.

The Australian Law Reform Commission (ALRC) reviewed the 2009 report and reported back on the status of the law in each state and territory and at a federal level, and on what reforms should be undertaken to implement the action plan. In 2010, ALRC returned their final report into family violence. In chapter 25, the ALRC report explored consent reform in detail, and made recommendations to harmonise laws in each jurisdiction.

The ACT has thus far failed to fully implement the recommendations in chapter 25. This Bill gives effect to recommendation 25-4 of the ALRC report, and to the “similarity of age” recommendation outstanding from the 1999 Model Criminal Code implementation.

This Bill reflects a number of changes proposed in Caroline Le Couteur’s Crimes (Invasions of Privacy) Amendment Bill 2017, and resolves several of the reforms left outstanding from that Bill following the passage of the Crimes (Intimate Image Abuse) Amendment Bill 2017.

Human Rights Considerations

We recognise this Bill will have human rights implications. Based on feedback from the Human Rights Commission and other stakeholders to an earlier Crimes (Invasions of Privacy) Amendment Bill 2017, the approach taken in this Bill has been refined over the course of two previous consultations.

As a priority, this Bill intends to address parts of the ACT law where the following rights are lacking or where improvements could be made:

- Protection of the family and children (section 11) - “every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind”.
 - This Bill seeks to provide greater protection to young people than under existing legislation. The reforms to the child sex and pornography offences will ensure that young people are not unfairly prosecuted for consensual activity.

Pursuant to section 28 of the *Human Rights Act 2004*, this Bill engages and places limitations on the following rights:

- Rights in Criminal Proceedings (section 22)
 - There was concern raised by the Human Rights Commission in a previous consultation that the particular construction of the new definition of “consent” would have placed the burden of proof on the defendant to prove they received consent from the other party and would thus be incompatible with the right to be presumed innocent. A number of submissions wrote in support of placing the burden of proof on the defendant, but it was recognised there was a construction that could be adopted that would, on balance, satisfy this right while also bringing about the policy intent of this Bill. The definition of consent was revised accordingly and this Bill reflects the amended definition.
 - Engaging with the limitations framework at section 28(2) of the *Human Rights Act 2004*, human rights are impacted in these ways:

a) the nature of the right affected

Section 22(1) of the *Human Rights Act 2004* reads “everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law”. Further, section 22(2)(a) reads “anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else - to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge”.

Rights in criminal proceedings are not considered non-derogable and are capable of being subject to reasonable limitations, demonstrably justified in a free and democratic society, pursuant to section 28 of the *Human Rights Act 2004*.

b) the importance of the purpose of the limitation

Section 67(1)(b) of the Bill engages with the right to be presumed innocent. The new definition of consent varies the fault element of the offences it engages with, to the extent that it may impact or change the evidential burden upon the accused.

This limitation upon this right is to prevent a greater injustice of allowing the continuation of “implied consent” in sexual offences - where, merely because one of the negating factors was not engaged or that the accused was in effect reckless about seeking it. In fact, in the ACT, the common law defence to “honest belief” in receiving consent does not need to be reasonable.

c) *the nature and extent of the limitation*

By adopting an affirmative, communicative model for consent, and, in establishing consent, needing to prove that the accused either knows or reasonably believes that the consent was given, the nature of the burden of proof may change. In practical terms, knowledge of or reasonable belief of consent is not a provable fact, and its existence is ensconced entirely in the mind of the accused. How a prosecution might prove this is difficult to determine without close interrogation of evidence law in the ACT, and therefore, the extent of limitation is difficult to ascertain at this stage.

d) *the relationship between the limitation and its purpose*

The objective of the legislation is to institute an affirmative, communicative model of consent, and the construction adopted by this Bill is the least restrictive upon the rights of the accused while achieving that purpose.

e) *any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve*

The overriding objective of this Bill is to introduce a stronger, affirmative, conversational model of consent in the ACT. This change is in line with community expectations and follows considerable public discussion on the nature of sex, consent and criminality in our community after the #MeToo Movement rose to prominence over the past two years.

Other jurisdictions approach fault in consent either through recklessness provisions or common law defences to belief (as is the status quo in the ACT). This model perpetuates the idea that non-consent needs to be expressed - either through physical resistance or verbal instruction -, and ignores the reality that many victims of sexual violence feel unsafe or unable to resist in such ways.

As a result, there is no less restrictive means to effectively achieve this Bill's overriding objective than the model proposed therein.

The substantive improvements to human rights this Bill affords, combined with the mitigation of the limitations on sections 22 detailed above, should ensure that this Bill is compliant with section 28 of the *Human Rights Act 2004* (ACT).

Consultation Process

The exposure draft of the Crimes (Consent) Amendment Bill 2018 was listed on the ACT Legislation Register on Monday, 19 February 2018, along with the original explanatory statement and the consultation arrangements.

Simultaneously, the accompanying Discussion Paper went online at:

<https://www.scribd.com/document/371619585/ACT-GreensDiscussion-Paper-on-Consent-in-Sexual-Violence-Laws>

The consultation period was between 19 February 2018 and 23 March 2018.

The exposure draft, and supporting materials, of the Crimes (Consent) Amendment Bill 2018 was presented to the Assembly on Wednesday, 21 February 2018.

As part of the consultation process, an email was sent to 69 stakeholders inviting them to contribute and drawing their attention to the Discussion Paper, Exposure Draft of the Bill and the accompanying Explanatory Statement. The stakeholders contacted were across all relevant sectors - legal academics and peak bodies, community services, and privacy and domestic violence reform advocates. A list of stakeholders contacted is available on request.

Submissions closed formally on Friday, 23 March 2018, however an extension was granted until Wednesday 28 March 2018 to allow more time as requested by several stakeholders.

A number of stakeholders provided feedback that their views on consent are unchanged from the earlier consultation on the Crimes (Invasions of Privacy) Amendment Bill 2017. A comprehensive report on how consent is addressed in the 17 submissions to that Bill are available here:

http://www.legislation.act.gov.au/es/db_56609/current/pdf/db_56609.pdf

Submissions Received

The consultation process returned 9 written submissions.

We thank the following for their submissions and for their time, effort and contribution to the final draft of this Bill:

1. Professor Patricia Easteal
2. ACT Council of Social Services, in consultation with:
 - a. Women's Centre for Health Matters;
 - b. Youth Coalition of the ACT;
 - c. Sexual Health and Family Planning ACT;
 - d. the ANU Women's Department; and,
 - e. Legal Aid ACT
3. Women's Centre for Health Matters
4. ACT LGBTIQ Ministerial Advisory Council
5. Women With Disabilities ACT

6. Youth Coalition of the ACT
7. ACT Human Rights Commission and co-signed by:
 - a. the Human Rights Commissioner;
 - b. the Victims of Crime Commissioner ;
 - c. the Public Advocate and Children & Young People Commissioner; and,
 - d. the Discrimination, Health Services, Disability & Community Services Commissioner.
8. YWCA Canberra
9. Georgia O’Dea

Copies of the written submissions are available by request to the office of Caroline Le Couteur MLA at LECOUTEUR@parliament.act.gov.au.

Key Issues Arising from Consultation

All submissions noted the need to define consent in the Crimes Act of the ACT and all submissions supported the proposed changes to the current legislation to incorporate an affirmative definition of consent based on free and voluntary agreement. All submissions were equally supportive of the need to extend the “2 year rule” to apply to the amended legislation.

Submissions 2, 3, 4, 5, 6, 7, 8 and 9 also strongly referenced the need to provide a comprehensive community-wide education campaigns to ensure young people, in particular, were aware of the changes enacted by this legislation and what they mean. Specifically, submission 7 states;

“...it will be important to ensure that these reforms are accompanied by education initiatives about what is and is not acceptable behaviour, and that a person should take steps to ensure the other person is consenting of that behaviour.”

In addition, submissions 2, 3, 4, 5, 6, 7, 8 and 9 asked for specific examples of how the proposed definition of consent would apply. It is more appropriate to address the need for specific examples through targeted community education initiatives, and an effective implementation plan for this Bill would require dedicated funding for education.

Submission 1 highlights the importance of the gendered nature of sexual violence and the problematic mainstream understanding of and difficulties in prosecuting Intimate Partner Sexual Violence, in spite of its high prevalence, including the inherent inequalities of the criminal justice system.

Submission number 5 referenced the importance of viewing these changes through a disability lens, as well as the sociological, criminological and gendered lens already present. This issue will need to be specifically addressed through targeted education initiatives. Also, noting the particular reference to the high incidence, yet low reporting, of sexual assault on women with disabilities and of image-based abuse of people with disability compared to non-disabled people.

Submissions 2 and 6 asked that the ACT Government advocate for the Commonwealth to change legislation to bring the civil penalties regime for intimate image abuse into line with the States and Territories, with specific reference to the “2 year rule” for young people aged 16-18 years.

Submission 4 raises two key issues for future reform - clarifying informed consent in the context of medical decisions, and the potential for existing section 67(f) to be used to discriminate and criminalise trans- and gender-diverse individuals. Both of these reforms should be considered seriously, however are outside the scope of this Bill.

Submission 6 identifies the need to include, in the judgement of cases which concern the consensual distribution/possession of intimate imagery and young people, an independent third-party mediator such as the Public Advocate or the ACT Children and Young People’s Commissioner. This would ideally be addressed in the implementation plan for this Bill.

Submission 7 is concerned that this Bill’s construction of consent is a departure from other jurisdictions consent clauses as it includes the “reasonable belief” requirements as part of the definition. This advice has been noted. The construction in this Bill was adopted based on the overriding objective to have a clear definition of consent that is capable of being communicated to and understood by members of the wider ACT community. The other constructions raised by the submission obfuscate the “reasonable belief” provision, which might be more acceptable to the legal community, nonetheless leaves the common understanding of consent out of step with the legislation - something this Bill seeks to address.

The further concerns raised regarding that the offences in section 66 be treated in the same way as sections 64 and 65 in the Act have been addressed in light of recent changes to this section in consultation with the Attorney-General.

CRIMES (CONSENT) AMENDMENT BILL 2018

DETAIL

Clause 1 - Name of Act

This is a technical clause that names the short title of the Act. The name of the Act would be the *Crimes (Consent) Amendment Act 2018*.

Clause 2 - Commencement

This clause provides that the Act commences the day after it is notified.

Clause 3 - Legislation Amendment

This clause identifies the legislation amended by the Act.

Clause 4 - Grooming and depraving young people - Section 66 (5)

This clause is a consequential amendment resulting from the extension of the “two-year rule” under clause 5 to section 66.

Clause 5 - New section 66A

This clause inserts an exception to certain child sex offences to address concerns from family violence and human rights advocates relating to the risk of young people who consent to the sharing of sexual material between each other but are nonetheless under the age of majority being prosecuted under child pornography offences, being (per subsection (1)):

- section 64(1) (Using child for production of child exploitation material etc)
- section 65(1) (Possessing child exploitation material)
- section 66 (1) (Grooming and depraving young people)

“Child exploitation material” is defined as “anything that represents (a) the sexual parts of a child; or (b) a child engaged in an activity of a sexual nature; or (c) someone else engaged in an activity of a sexual nature in the presence of a child; substantially for the sexual arousal or sexual gratification of someone other than the child”.

On a plain English reading of this clause, the definition of “child exploitation material” could include intimate images consensually shared between two young people, who, for example, may be in a sexually-active relationship. This change seeks to ensure that young people consensually engaging in this behaviour are not at risk of prosecution.

Likewise, while section 66 addresses inadvertent criminalisation of young people undertaking consensual sexual activities - particularly relevant to this section being the sexual script and “sexting” behaviours - through the “without reasonable excuse” clause at section 66(1)(a), the section does not directly address the issue of consensual activity

among young people. For consistency and to ensure the maximum clarity, the “two-year rule” was extended to section 66.

The exclusion operates in a similar manner to the “similarity of age” defence at clause 5.2.17 of the *Model Criminal Code*. The Australian Law Reform Commission investigated these similarity in age provisions at length in part 25 of the ALRC Report.

5.2.17 Defence—similarity of age

- 1) *A person is not criminally responsible for an offence against this Division in respect of an act if, at the time of the act, the child concerned was over the age of [no defence age] and:*
 - a) *the person was not more than 2 years older than the child, and*
 - b) *the person was not more than 2 years younger than the child.*
- 2) *An offence of incitement under Part 2.4 is committed by a person who urges another person to engage in an act of sexual penetration or indecent touching or an indecent act even if the other person does not commit an offence by doing so because of subsection (1).*

Recent research from the Queensland Sentencing Advisory Council suggests that nearly half of all those prosecuted for child pornography offences are under the age of 17. The exact breakdown of those caught nor the proportion that were causing real harm with exploitative material is not known.

Feedback from the ACT Government indicates that it is not aware of any prosecutions under comparable offences in the ACT that have been against consenting young people. A number of human rights and justice advocacy groups have raised concerns that the status quo is too reliant on the discretion of Government executives and on making subjective moral decisions, over a coherent legal construction that prevents the prosecutions ever happening. This exclusion addresses this issue before it becomes a problem in the ACT.

This clause protects young people engaging in consensual behaviour and/or sharing consensually-produced and consensually-shared images. It is important that our criminal law focuses on wrongdoing and the potential for harm rather than on what consenting young people do regardless of their age.

Existing sections 68 “Sexual intercourse—people not to be presumed incapable by reason of age” and 72D(2) protect young people engaging in consensual sex and consensual distribution of intimate images of another young person.

Clause 6 - Section 67 heading

This clause changes the heading for section 67 from “Consent” to “Meaning of consent—sexual offence consent provisions”.

Clause 7 - Consent - Section 67(1)

This clause inserts a definition of consent with respect to sexual offences.

The current section 67(1) defines consent only by what would negate consent (for example, intoxication or the threat of violence), rather than defining consent by what it is and then listing negating factors.

Subsection 67(1) - Definition of Consent

This clause would define consent by these elements:

For a sexual offence consent provision, consent of a person to an act mentioned in the provisions by another person is—

- (a) the person gives free and voluntary agreement; and*
- (b) the other person—*
 - (i) knows the agreement was freely and voluntary; or*
 - (ii) is satisfied on reasonable grounds that the agreement was freely and voluntarily given.*

This definition would help protect victims of sexual offences by ensuring that the communicative aspect of consent is relevant to a prosecution, and removing the possibility that consent can be “assumed”.

Subsection 67(1A) - Factors that Negate Consent

This clause is a consequential amendment to rectify numbering due to these new provisions.

Clause 8 - Section 67 (2) and (3)

This clause is a consequential amendment to rectify numbering due to these new provisions.

Subsection 67(4)

This clause inserts a definition of “sexual offence provision” to enumerate which offences clause 7 subclause (1) affects, being:

- section 54 (sexual intercourse without consent);
- section 54(3)(b) (reasonable belief defence to sexual intercourse with a young person between the ages of 10 and 16);
- section 60 (act of indecency without consent);
- section 61(3)(b) (reasonable belief defence to acts of indecency with young people between the ages of 10 and 16);
- section 66A(2)(c) (exceptions to offences for consenting young people).

The previous section 67(1) enumerated those offences by an in-text list being “For sections 54, 55 (3) (b), 60 and 61 (3) (b)”. This drafting was not aligned with plain English drafting principles.

This clause creates a clear list of offences to which the definition of consent applies.

Clause 9 - Consent---part 3A - New section 72F (1)

Sections 72F(1A) replicates the definition of consent from sections 67(1) and 67(1A) for “distribution of an intimate image”.

Clause 10 - Section 72(F) (1)

This clause is an amendment to convert a phrase to plain English.

Clause 11 - Dictionary, new definitions

This clause inserts references to the new definitions created by this Bill.