

23 July 2021

Dr Marisa Paterson MLA
Australian Labor Party
ACT Legislative Assembly
196 London Circuit
Canberra ACT 2601

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

Dear Dr Paterson,

RE: CRIMES (CONSENT) AMENDMENT BILL 2021

The ACT Law Society (the Society) welcomes the opportunity to comment on the exposure draft of the Crimes (Consent) Amendment Bill 2021 (the Bill). We appreciate the extension of time provided to respond after belatedly becoming aware of the consultation, noting there was an error in the email address that your office attempted to use to notify the Society about this Bill. While we have sought responses from our specialist committees within the one-week timeframe we had to consider and respond, we were disappointed not to have more time to undertake a more thorough consultative approach with our legal practitioner members on such an important issue.

The Society acknowledges the ACT Government's commitment to introduce a positive definition of consent in the Parliamentary & Governing Agreement of the 10th Legislative Assembly. We had expected a formal consultation process on that commitment in due course with the involvement of the Justice & Community Safety Directorate. We note our understanding that the Bill is based on recommendations set out in the NSW Law Reform Commission Report 148: "Consent in relation to sexual offences" (the NSW Report).

We consider that this an important area of criminal law and would like to see a more considered approach to reform in this area to ensure that an appropriate balance is achieved to protect potential victims while also supporting the rights of the accused to a fair trial.

As a general principle, although we agree that the law should reflect community expectations, we consider that criminal sanctions are not the most effective tools to educate the public about community values. We consider that raising awareness about affirmative consent is better achieved through community education or jury directions and that criminal sanctions should only be reserved for conduct of serious culpability. Further, criminal sanctions must be framed with certainty in order to achieve a desired change in behaviour and should not leave parties unclear about whether they are in breach of a law or not.

We have sought input from several of the Society's specialist committees that have an interest in this area. A number of concerns have been raised with respect to the drafting of this Bill, which are discussed below.

General comments

In our view, the Bill in its current form is too broad and may criminalise many consensual sexual relations. Accordingly, we consider that the proposed reforms have serious consequences for the accused's presumption of innocence and right to a fair trial. The proposed changes also continue to put the focus on the conduct of the complainants, requiring them to prove that consent was not communicated, which does not resolve the current issues that sexual assault complainants face in court.

We note that, in the overwhelming majority of sexual assault cases heard in court, the issue often relates to a question of fact, not of law. There is usually a dispute of facts centred on a contest between whether the complainant's evidence can be accepted beyond reasonable doubt and whether the defendant's version can be excluded. In such cases, definitions of consent are usually irrelevant because, on the complainant's version of events, consent is clearly not present, whilst the defendant has given evidence that consent was clearly given. Law reform of the type proposed does not address this issue.

The Bill is also uncertain on the elements of sexual assault and we consider such uncertainties unacceptable considering the seriousness of this offence. The prescriptive nature of the Bill (particularly in relation to circumstances that negate consent) fails to take into account judicial discretion in giving jury directions. It may also affect sexual autonomy between capable and consenting adults.

We also note the proposed law does not address the issue of assisted decision-making and how that may interact with capacity. Whilst this issue is similarly absent from the current law, it would seem appropriate to address this issue as part of any reform to the current legislation.

Principles of Consent

The Bill proposes to introduce the following principles relating to consent into the Crimes Act 1900 (ACT) (the Act):

- Consent is based on “ongoing and mutual communication” and “free and voluntary agreement”;
- Everyone has a right to choose not to participate in a sexual act; and
- Consent is “not to be presumed”.

These principles are derived from the NSW Report and we understand that they are intended to be used as interpretive tools.¹ However, terms such as “presume” and “free and voluntary agreement” should be better defined as they may have the potential to cause confusion rather than aid interpretation.

Additionally, it is unclear how “ongoing and mutual communication” is anticipated to apply in practice, including in the case of consenting adults involved in more creative forms of sexual activity or how it will take into account the differences in human emotional and sexual behaviour, including a range of lawful sexual practices, such as bondage and discipline, sadism and masochism. Further, it is not clear in this context whether there is an ongoing duty on both parties to continuously seek positive assurance of consent, or at what intervals in the course of sexual activity that may involve more than one “sexual act”.

It is also unclear to us how the “principles” will interact with the rest of the Act, including the definition of consent and the circumstances that negate consent. There may be unintended consequences such as the extension of criminal liability well beyond community expectations or

¹ New South Wales Law Reform Commission, *Consent in relation to Sexual Offences*, Report No 148 (2020) recommendation 4.3.

the legislative intent, or victims may be subject to even greater scrutiny in the trial process. Further consideration should be given to clarifying the intended purpose and effect of this section.

Meaning of Consent

The Bill proposes to introduce the following definition for consent:

Consent to an act means freely and voluntarily saying or doing something to communicate agreement to the act, at the time of the act

We note that the term “agreement” has been criticised by the Australian Law Reform Commission in report number 114 and we consider that the proposed definition lacks legal certainty and could capture conduct that is undeserving of criminal sanction. For example, an accused who persuades another person to give consent to a sexual act could be found criminally liable, even though consent is not negated by circumstances set out in section 67(1).

Of particular concern is the reference within the definition to the timing of consent, linking consent to the time of a “sexual act”. The proposed definition refers to individual “sexual act” as opposed to “sexual activity” as defined in section 61HE(2) of the Crimes Act 1900 (NSW). This can be problematic as there is no definitive way to determine when a certain sexual act ends or starts. There could also be a number of sexual acts being conducted simultaneously. We are also concerned that a focus on the timing of the giving of consent and the “ongoing” nature of this communication will lead to very detailed, almost second by second, cross examinations. This may further add to the traumatic experience complainants often already experience in court.

The reference to timing also precludes the possibility of making free and voluntary arrangements for future sexual activity, even in the context of a long-term relationship between consenting adults. Limiting the possibility for those in relationships to agree to have sexual intercourse in this manner (to “pre-consent”) does not seem justified. It may also lead to perverse situations, for example, in which couples agree to further sexual activity and participate in that activity without any further relevant communication at the time of the activity; this may be sexual activity that is regarded as both acceptable and fulfilling. However, subsequently they may separate and the conduct may be reported to police. On the current definition in the Bill, there would be a clear breach of the law without the opportunity to consider the context in which the sexual activity occurs as a whole.

It also raises the possibility that both parties to a sexual act could be rendered criminally liable for conduct they are both enthusiastic participants in, if neither does nor says anything to indicate consent. This is particularly problematic if the parties’ words or actions cannot be separately attributed to the giving of consent. For example, parties can get caught up in acts of sexual intercourse and expressions of pleasure may not equate to acts directed at conveying consent.

The proposed definition also views consent as mere “saying or doing something” and fails to contemplate situations where there may be free and voluntary agreement to the sexual activity regardless of whether the person communicates this agreement. This may result in a lack of consent being an irrebuttable presumption even if the person was in fact consenting. The definition also confines consent to “saying or doing something” and essentially vitiates any subtle signals about consent. We note that this is different from the current definition of consent in NSW where consent occurs when the person “freely and voluntarily *agrees* to the sexual activity”² and that the NSW Report recommended retaining the current definition.

For these reasons, we consider the proposed definition does not provide sufficient clarity as to whether a person provides consent. We also note that those matters currently in section 67(1)

² *Crimes Act 1900* (NSW) s 61HE(2).

place the ACT in a different position to that prevailing within NSW and which the NSW Report is addressing. Consequently, a more thorough consultation in the context of the ACT laws and decisions would be sensible.

Negation of consent

Proposed amendments to section 67(1) essentially broaden the types of circumstances that would negate consent. However, the effect of the changes seems to bring a presumption of “no consent” rather than the negation of consent as it currently stands.

In many of the specified circumstances, there is a low threshold for consent to be presumed absent, without any opportunity to rebut this presumption. We note that recommendation 6.1 of the NSW Report provided that the “list of circumstances should be simplified and modernised”. We consider that the list proposed in this Bill is more complicated than the current list. We make the following specific comments on this section:

- Section 67(1)(f) – Overborne because of force or fear of something else:
We consider this overly broad and would potentially capture instances of consensual sexual intercourse. The replacement of the term “caused” with “overborne” adds an additional element of the weight of the factors involved, which seems less certain than the current provision. Further, the term “fear of something else” is an extremely low threshold for consent to be presumed absent. This “fear of something else” may also be completely unrelated to or by no fault of the accused. We note that this is not a recommendation in the NSW Report.
- Section 67(1)(g) – Intoxication:
We note that intoxication is defined as “intoxication because of the consumption of alcohol, a drug or any other substance”. We consider that intoxication and level of intoxication should be clearly defined to avoid preventing people who have consumed any alcohol (or other substance) from lawfully consenting.
- Section 67(1)(h) – Mistaken about any element of the act:
We are unsure as to what “element” means. Previously this provision addressed mistaken identity, but this has been removed and in its place the element of mistake is attached to the act itself. Recommendation 6.9 of the NSW Report refers to mistakes as to the nature or purpose of the sexual activity, the identity and marital status of the accused. The Society is concerned that these mistakes may arise by no fault of the accused, in circumstances where it would not be appropriate to hold the accused accountable for such mistaken beliefs.
- Section 67(1)(k) – Capacity:
Enduring guardianship consent should be considered.
- Section 67(1)(l) – Unconscious:
We note that it can be difficult to determine level of consciousness. For example, in *Agresti*, the complainant was considered to be “in and out of consciousness”.³
- Section 67(1)(m) – Asleep:
Similar to unconsciousness, it can be difficult to determine whether a person is fully asleep. This subsection also fails to contemplate cases where consent may be provided prior to sleeping or cases where consent has been given on being woken by sexual activity, including as part of an understanding between consenting adults in a long-term relationship.

³ *Agresti v The Queen* [2017] ACTCA 20.

Extension of Section 67(2)

The Bill proposes an extension of the current provision, so that a person does not consent to an act only because the person:

- *Does not say or do something to resist the act; or*
- *Consented to:*
 - *Another act with the same person;*
 - *The same act with the same person at a different time or place;*
 - *The same act with a different person; or*
 - *A different act with a different person.*

We note that this is similar to recommendations 5.5 and 5.6 in the NSW Report and the Society supports this proposal.

Reasonable Belief and the Duty to Ascertain Consent

We note that an objective test as to knowledge of consent is proposed:

A person is taken to know that another person does not consent to an act if any belief that the accused person has, or may have, that the other person consents to the act is not reasonable in the circumstances.

A duty to ascertain consent is also proposed as:

Belief is taken to not be reasonable if the accused person did not say or do anything to ascertain whether the person consented.

The Society considers that the proposed amendment is too broad. A crime may be committed even if consent was given just because the accused did not know consent was given or did not take reasonable steps to ascertain consent. Actual knowledge and recklessness tests are more appropriate to capture serious criminal conduct.

The duty to ascertain consent also inappropriately places the onus of proof on the accused to prove reasonable steps that have been taken. Such an approach will also render the defence of honest and reasonable mistake as meaningless. This adversely affects the accused's presumption of innocence, right to silence and right to a fair trial.

The proposed objective test may also give rise to interpretation issues. Decisions such as *R v Lazarus* illustrate the difficulties faced by trial judges in determining the accused's knowledge about consent.⁴ A combination of subjective and objective tests may further complicate interpretation. Similarly, the decision of the Victorian Court of Appeal in *Hubbard* highlights that models of affirmative consent are not instant fixes to the problems identified as motivations for this Bill.⁵ They do not of themselves change the trial process in the manner that appears intended.

We recommend that a more thorough consultation is taken on the current Bill, perhaps in conjunction with the current work surrounding sexual assault and family violence reforms which the Society is already engaging in.

⁴ *R v Lazarus* [2017] NSWCCA 279.

⁵ *Hubbard v The Queen* [2020] VSCA 303.

We welcome the opportunity to provide further input if that would be of assistance.

Yours sincerely,

A handwritten signature in blue ink, reading "Simone Carton". The signature is written in a cursive style with a large initial 'S'.

Simone Carton

Chief Executive Officer