Rape & Domestic Violence Services Australia

Formerly NSW Rape Crisis Centre

14 September 2018

The Committee Secretary
Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
GPO Box 1020
Canberra ACT 2601

**By email**: LACommitteeJCS@parliament.act.gov.au

Dear Committee Secretary,

**Submission to the Inquiry into the into the *Crimes (Consent) Amendment Bill 2018***

1. Rape & Domestic Violence Services Australia (R&DVSA) thank the Standing Committee on Justice and Community Safety for the opportunity to comment on the *Crimes (Consent) Amendment Bill 2018* (the Bill).
2. R&DVSA is a non government organisation that provides a range of counselling services to people whose lives have been impacted by sexual, family or domestic violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW who have experienced or have been impacted by sexual violence; Sexual Assault Counselling Australia for people who have been impacted by the Royal Commission into Institutional Responses to Child Sexual Abuse; and Domestic and Family Violence Counselling Service for Commonwealth Bank of Australia customers who are seeking to escape domestic or family violence.
3. In this submission, we make comments in relation to the two key objectives of the Bill:
    a. To incorporate an affirmative definition of consent; and
    b. To protect young people engaging in consensual sexual activity from undue prosecution.

**<u>Affirmative model of consent</u>**

4. R&DVSA commend the ACT Greens on their efforts to introduce an affirmative model of consent into ACT law.
5. We strongly support the introduction of a positive statutory definition of consent based on the concept of free and voluntary agreement. This reform is long overdue and will bring the ACT into line with every other jurisdiction in Australia.
6. As noted by the Australian Law Reform Commission:

> *a definition based on agreement properly reflects the two objectives of sexual offences law: protecting the sexual autonomy and freedom of choice of adults; and reinforcing*

*both positive and communicative understandings of consent through use of the term agreement.*[1]

7. However, we do not support the Bill as it is currently drafted. This is because we do not believe the Bill will be effective at achieving its objective to implement an affirmative model of consent.
8. Instead, R&DVSA propose that the Government should create an advisory taskforce to conduct a comprehensive review of the criminal justice response to sexual offences.

<u>Ambiguity in section 67(1)</u>

9. Our key concern relates to the drafting of proposed section 67(1).
10. In this respect, we agree with the ACT Human Rights Commission who commented in response to the exposure draft of the Bill:

> *We are concerned that the provisions as currently drafted are likely to result in ambiguity and uncertainty, 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 [including NSW and Victoria], by setting out the meaning of consent ('free and voluntary agreement') separately to the objective fault test for belief about consent.*
>
> *... 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.*[2]

11. To illustrate these concerns, it is useful to have regard to the offence of 'sexual intercourse without consent' contained in section 54 of the *Crimes Act* as an example. To prove this offence, the prosecution must establish the following four elements beyond reasonable doubt:
    a. That the accused engaged in an act with a person; and
    b. That the act constituted sexual intercourse; and
    c. That the complainant did not consent to engaging in sexual intercourse; and
    d. That the accused was reckless as to whether the complainant consented to engaging in intercourse.
12. Element three is focused on the conduct of the complainant, ie. Did the complainant actually make a free and voluntary agreement to engage in sexual intercourse in her own mind?
13. In contrast, element four is focused on the conduct of the accused, ie. Did the accused know, or should he have known, that the complainant did not make a free and voluntary agreement to engage in sexual intercourse?
14. The apparent effect of proposed s 67(1) would be to combine elements three and four into a single definition of consent.
15. This is confusing given that each element requires a different and complex set of considerations. Element three requires the decision-maker to consider the credibility of the complainant's claim that she did not consent and whether the complainant had capacity to make a free and voluntary agreement in the circumstances. Element four requires the decision-maker to consider

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[1] Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC), *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010), 1150.

[2] ACT Human Rights Commission, *Submission to Caroline Le Couteur MLA, Member of Murrumbidgee in relation to the Exposure draft: Crimes (Consent) Amendment Bill 2018*, 26 March 2018, 3-4.

the credibility of the accused's claim that he did not know the complainant was not consenting and whether the circumstances were such that he *should* have known she was not consenting.

16. As suggested by the ACT Human Rights Commission, combining these distinct enquiries is likely to result in significant "ambiguity and uncertainty".

17. Moreover, while it appears that the intention of s 67(1)(b)(ii) is to incorporate an objective fault test, we have concerns that the provision will not operate as intended. The purpose of an objective fault test is to prevent a defendant from relying on an honest, but unreasonable, belief in consent. To achieve this purpose, the law must provide that a defendant may only rely on a belief that is both honest and reasonable.

18. However, proposed section 67(1)(b) does not fulfil this purpose. This is because it provides that a defendant may rely on either subjective <u>or</u> objective knowledge of consent in order for consent to exist. In other words, a defendant may rely on either an honest *but unreasonable* belief under s 67(1)(b)(i) or an honest *and reasonable* belief under s 67(1)(b)(ii). Thus, s 67(1) does not create any additional burden on the defendant to take reasonable care to ensure that consent is present.

19. Thus, while R&DVSA strongly support the introduction of an objective fault test, we do not believe this Bill would be effective at translating this policy into practice.

<u>Inconsistent provisions</u>

20. R&DVSA are also concerned that the Bill retains several provisions that are inconsistent with an affirmative model of consent.

21. First, the Bill retains in s 67(1A) a list of circumstances in which "the consent of a person ... is negated". This language implies that consent can be assumed as a starting point and is only reversed where some vitiating circumstances arises. In order words, the provision continues to reflect a model of consent defined in the negative, by the absence of any negating circumstance.

22. The primary goal of the affirmative model of consent is to reverse this assumption such that consent becomes characterised in the affirmative, as the positive act of communicating 'yes' rather than the mere absence of a communicated 'no'.[3] Under this model, each party is obligated to communicate in order to reach a free and voluntary, mutual agreement before engaging in sexual conduct.

23. R&DVSA recommend that the language in s 67(1A) be amended to reflect this shift in starting point. For example, the equivalent Victorian provision in section 36(2) of the *Crimes Act 1958* provides:

> *Circumstances in which a person does not consent to an act include, but are not limited to, the following—*

24. The Victorian Department of Justice and Regulation highlight the implications of this language in their report introducing the 2014 reforms. They state:

> *The Act does not 'deem' these to be circumstances in which consent is absent, if 'deeming' is taken to be the creation of a 'legal fiction', a matter of making something a legal fact that is not an actual fact. Instead, this provision fleshes out the definition of 'consent' as 'free agreement' by identifying some of the circumstances where there is in fact no free agreement. These circumstances usually fall into one of the following general*

[3] E. Craig, 'Ten Years After Ewanchuk The Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent' (2009) 13 *Canadian Criminal Law Review* 248, 250.

*categories: mere physical submission without free agreement, incapacity to give consent, and mistaken belief about a central fact that vitiates any apparent consent.*

25. R&DVSA believe the Government should amend s 67(1A) accordingly.

26. Another provision retained by the Bill that R&DVSA consider may be inconsistent with an affirmative model of consent is s 67(2). This provision states:

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

27. While this provision appears to be intended to support a communicative model of consent, R&DVSA contend that it may have the opposite effect. This is because the provision fails to emphasise the need for a positive act of communicated consent. Instead, by specifically eliminating lack of *physical resistance* as an indicator of consent, the provision implies that lack of *verbal resistance* may in fact be sufficient to establish consent. Thus, it fails to fully displace the presumption that submission may equate to consent.

28. R&DVSA recommend this provision be amended to specify that:

    *a person who does not offer actual physical resistance* ***or verbal resistance*** *to sexual intercourse must not, by reason only of that fact, be regarded as consenting to the sexual intercourse.*

Opportunity for broader reform

29. Finally, R&DVSA believe the Bill overlooks a valuable opportunity to bring the ACT into line with broader trends of law reform occurring around Australia and the world.

30. As acknowledged by the Explanatory Memorandum, in recent years there has been a cultural shift that has created significant momentum to address sexual violence. In response to this pressure, governments in various jurisdictions have enacted wide-ranging reform agendas designed to reorient the criminal justice system to better meet the needs of people who have experienced sexual violence.

31. In 2014, the Victorian Department of Justice and Regulation embarked on a comprehensive review of Victoria's sexual offences. As a result of this review, Victoria implemented major reforms including:

    a. a clear, simple and consistent drafting style for the offences of rape and sexual assault

    b. a new fault element in rape and sexual assault: the accused does not reasonably believe that the complainant is consenting

    c. making jury directions in rape and sexual assault trials better tailored to the specifics of each case, and

    d. a new 'course of conduct charge', which will assist in the prosecution of people who engage in repeated and systematic sexual abuse over a period of time.[4]

32. In 2016, Victoria made additional amendments to further strengthen their sexual offence laws.[5]

[4] Victoria Department of Justice and Regulation, *Victoria's New Sexual Offence Laws: An Introduction*, Criminal Law Review (June 2015), 1.

[5] For a summary of these laws refer to Victoria Department of Justice and Regulation, *Crimes Amendment (Sexual Offences) Act 2016: An Introduction*, Criminal Law Review (June 2017), 1.

33. In May 2018, NSW followed Victoria's lead in announcing that the NSW Law Reform Commission would conduct a review of sexual consent laws. While this review is ongoing, preliminary submissions have raised a broad range of suggestions about how the law might better encapsulate a model of affirmative consent.

34. In our submission to the NSW review, R&DVSA argued that an enhanced response to sexual violence requires deep and structural changes to the criminal justice process. We made far-reaching recommendations including:

    a. Amend consent legislation to provide a clearer endorsement of affirmative consent.

    b. Amend consent legislation to better capture sexual violence that occurs within the context of domestic violence.

    c. Create specialist sexual violence courts that incorporate a trauma-informed approach and specialist judges and prosecutors.

    d. Consider eliminating the use of jury trials in sexual violence trials or implementing alternative reforms designed to improve juror decision-making.

    e. Support legal reform through community education and enhanced funding for sexual assault services. [6]

35. These issues of law reform are complex and require comprehensive consultation for effective implementation.

36. As such, R&DVSA recommend that the ACT Government establish an advisory taskforce to undertake a comprehensive review of the criminal justice response to complaints of sexual offences. The review should enquire into:

    a. All legislative and procedural matters relating to the prosecution of sexual offences;

    b. Alternative justice models including specialist courts;

    c. The provision of support services for people who have experienced sexual violence; and

    d. Access to behaviour change programs for those at risk of sex offending.

37. The taskforce membership should reflect the diverse stakeholders who have an interest in the criminal justice response to sexual offences. It should include both government and non-government agencies, legal actors, sexual assault service providers, academics and, if willing, those who have experienced sexual violence.

38. The taskforce should review national and international practices and evidence and put forward recommendations for a court model and laws that will improve the responsiveness of the NSW legal system to the needs of people who have experienced sexual violence.

**<u>Decriminalising young people engaging in consensual sexual activity</u>**

39. R&DVSA commend the ACT Greens on their efforts to protect young people engaging in consensual activity from prosecution under child pornography offences.

40. However, we believe that the Bill does not go far enough.

41. The Bill provides a defence to certain child sex offences where the child was consenting and there was not more than two years between the accused and the alleged victim.

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[6] Our full submission can be accessed at: http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Consent/Preliminary-submissions.aspx.

42. However, the Bill does not appear to resolve the possibility of prosecution where:
    a. A child under 16 years takes or sends an explicit image of themselves; or
    b. A child under 16 receives an explicit image of another child under 16 years, where there is more than two years between the accused and the alleged victim but there was no dynamic of abuse or exploitation.
43. In NSW, the Government has recently introduced several reforms designed to reduce the criminalisation of children for child sexual offences under the *Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018.*
44. The most relevant reform was the introduction of a limited defence aimed to decriminalise consensual “sexting”. According to the second reading speech, the offence is available:

> *where in relation to the offence of possessing child abuse material, where the person can show that the material depicts only themselves, and in relation to the offences of producing or disseminating child abuse material, where the person is under 18 and can show that the material depicts only themselves. This defence will cover the most common forms of this behaviour — taking sexual selfies when under 16 and having these in possession or passing them on to someone else. It will not affect the criminality of recording sexual images of another child, or in any way permit distribution or circulation of sexual images of other children.*[7]

45. An additional exception was introduced to protect the recipient of the “sexting”:

> *It provides that a person will not commit an offence of possession of child abuse material where they are under 18 and a reasonable person would consider their conduct in possessing the material acceptable, having regard to things like the nature of the material and how they obtained it. The exception will ensure that a child is not criminalised for possessing a sexual image of another child, in situations where there is no abuse or exploitation, such as where the image was provided consensually within a peer-appropriate relationship. Together, these defences and exceptions aim to recognise the reality of "sexting" behaviour by some older children while preserving the integrity and policy purpose of the child abuse material offences.*[8]

46. R&DVSA recommend that the ACT consider importing similar protections to reduce the criminalisation of consensual sexual activity by children.
47. We note that prosecution of children would remain possible under s 72C for the non-consensual distribution of intimate images. While we hold concerns about the prosecution of children under either section, the s 72C offence is preferable as it more accurately captures the nature of the wrong than those offences contained in sections 64-66: that is, the engagement in sexual activities without consent rather than child exploitation.

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[7] Second Reading Speech, *Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018,* Legislative Council Hansard, 20 June 2018, accessible at: https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-76894'.

[8] Ibid.