LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(Reference: Inquiry into the Crimes (Consent) Amendment Bill 2018)

Members:

MS E LEE (Chair)
MS B CODY (Deputy Chair)
MR M PETTERSSON

PROOF TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 2 OCTOBER 2018

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Secretary to the committee:
Mr A Snedden (Ph: 620 50199)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 20 May 2013

The committee met at 3.07 pm.

BAVINTON, **MR TIM**, Executive Director, Sexual Health and Family Planning ACT

THE CHAIR: Today the committee is holding its second public hearing on the reference of the Crimes (Consent) Amendment Bill 2018 to the standing committee. The bill is a private member's bill which was introduced into the Assembly by Ms Caroline Le Couteur.

The committee published a paper on the matters it wanted to examine in relation to the bill. This paper was published on the committee website in August 2018. Submissions to the inquiry have addressed the issues which the committee identified as the basis for its examination of the bill. The committee has received and published 28 submissions, all of which are on the committee website.

The proceedings are public, are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live. Before we begin, can I remind witnesses of the protections and obligations entailed by parliamentary privilege and draw your attention to the pink privilege statement which is set out on the table.

Before the committee starts the hearing part of our program today, on behalf of the committee I acknowledge that we are meeting on the lands of the Ngunnawal people, the traditional custodians. We respect their continuing culture and the unique contribution they make to the life of this area.

I welcome the first witness for today, Mr Tim Bavinton, from Sexual Health and Family Planning ACT. Can you please confirm for the record that you understand the privilege implications of the statement?

Mr Bavinton: I have read the privilege statement and I understand it.

THE CHAIR: Before we proceed to questions, would you like to make an opening statement?

Mr Bavinton: Yes, if I could make a brief statement. I would like to thank the committee for the opportunity to speak on behalf of Sexual Health and Family Planning ACT, or SHFPACT, as it rolls off the tongue so easily, to the issues set out in the inquiry. As you know, we are a non-government, not-for-profit community organisation. We have been working for over 45 years in the Canberra community, promoting reproductive and sexual health and the rights and wellbeing of people in the ACT and the region.

We are a prominent community-based provider of in-school education services to children and young people through our suite of age and developmentally appropriate programs. We also provide workforce development and training services for workers in the education, health and community services industries. In addition, we support parents and carers, as first educators of children, in areas of relationships, sexuality, reproductive and sexual health, and today I am proud to represent the work of our

staff over many years.

In appearing today I also speak as a health educator and community services professional who has worked in a variety of roles over the decades with young people, adults, parents and families on issues pertinent to the committee's inquiry. Prior to my work at family planning I worked at the Canberra Rape Crisis Centre, where I helped establish SAMSSA, the Service Assisting Male Survivors of Sexual Assault, a role which included a substantial commitment to schools and community education programs delivered in conjunction with Rape Crisis Centre workers. These addressed awareness and prevention of sexual violence.

I have also worked in other organisations and services with a focus on education, young people's health and wellbeing, violence prevention and work to improve the responsiveness of systems to victims of sexual violence and intimate partner violence.

I would like to offer my apology to the committee for having originally submitted a draft version of our submission rather than the final which has been rectified. Thank you to the committee's secretariat support for addressing that. I hope that you have got copies of both. I am very happy to speak to some of the detail in the other but am a little embarrassed that that would be the final representation from the organisation. I hope you have a tidier and a more succinct version in the final.

As stated in that submission, SHFPACT supports the intended principles of the bill that is under consideration and while our submission necessarily engages with some legal principles we have not asserted a technical legal expertise in the implementation or operation of the draft bill. Our submission does speak however to the very important role that laws play not just in addressing violence through the criminal justice system but in articulating a community standard of behaviour, and this is where our experience and expertise lie.

It is the experience of SHFPACT, as a longstanding provider of education and training in the areas of human sexuality and relationships, and our knowledge of our laws about sexual offences that can be an important component of respectful relationships and anti-violence education programs, that these must also be supplemented by a focus on positive skills and an ethical approach to sex and relationships.

There is every reason, we believe, to amend laws to include an affirmative and communicative model of sexual consent but it would be ignorant to assume that that step alone and in isolation would immediately change violence in our community. Sexual offence laws are not a prevention measure in isolation.

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.

I would like to affirm that I believe sexual violence is a gender crime. I spent decades working in our community with the goal of making this complex and feared subject easier for people to engage with. This is because I primarily believe our response to victims of sexual abuse and other forms of sexual violence is hindered while we continue to treat it as exceptional, feared and anxious.

Complexity can be understood but not with simplistic understandings and explanations. Unless we do this, our community will remain easily confused about the line between control and violence and sexual desire. And our laws, however perfectly designed, will be imperfectly applied to the detriment of those they are supposed to protect.

I do confidently describe myself as pro-feminist. I have committed in my working life to demonstrating that supporting men is not a zero-sum game that must necessarily be to the detriment of women and children. I do not subscribe to a simplistic model of men as perpetrators and women as victims. Reality is infinitely more complex and it tells us that abuse and victimisation occur in multiple contexts, relationships and roles.

However, data on sexual violence going back decades does consistently tell us that the majority of sexual offences are committed by men against women, children and other men and that the use of sex and sexuality as a weapon absolutely invokes gender, gender identity and gender roles. Men's sexual violence towards men is a gender crime.

Finally, a firmly communicative model of consent embodied in laws about sexual offending is only one piece of the puzzle but it is an obvious piece to ensure that we have in place.

THE CHAIR: I must say that Mr Pettersson and I have just been handed the proper submission. Thank you for that. In saying that, I think we both prepared using the draft.

Mr Bavinton: That is fine.

THE CHAIR: I hope you do not mind if some of our questions might be on that and if you can clarify in that regard that would be very helpful. The question that I want to start off with—and this might have come out of the draft and not into the final—is: in the draft that was submitted you said that the bill might benefit from the expertise of JACS and also the ACT Government Solicitor to ensure that there are no unintended consequences. Was that more of a general comment from you in terms of, "I understand that there are some legal implications," or was that a little more pointed in that you identified some shortcomings in the bill from your perspective that you thought might deserve a closer look by lawyers?

Mr Bavinton: It is a general comment that I think the resources of our systems should be brought to an important issue like this. I understand, although I cannot attest to, that there are certain limitations or implications in the drafting of legislation that I am concerned about because I would like to see law reform in this area achieve its purpose and not get derailed into areas with perverse outcomes that were not intended.

THE CHAIR: In terms of perverse outcomes that were not intended, can you elaborate on those?

Mr Bavinton: I saw the committee's interest was largely around the operation of a broad definition of consent with specific kinds of sexual offences. I think, again as a person without legal expertise, that that deserves the attention of people who can bring legislative drafting expertise and who can reflect on the operation of laws in our criminal justice system. We want the best of our community's minds, I think, brought to this issue. It is a general comment but I reflect that I have read, seen and heard that there are some concerns that we might see perverse outcomes if it is not well drafted.

THE CHAIR: You also stated—and again I am not sure if it made it into your final version—that there is a need perhaps to delay this legislation until the New South Wales review, which is currently underway, has been completed. Do you have any thoughts generally about the current New South Wales review that is happening and some of the lessons that maybe the ACT could take from that?

Mr Bavinton: I note that many submissions and a lot of the conversation around this area point to other jurisdictions and my comment, specifically in the submission, was: to the extent that we are relying on another jurisdiction's experience as a guidepost or to inform our own, we should probably wait until we have a thorough review of the operation of those laws. If it is about in principle all the other Australian legal jurisdictions having moved in this particular area then I hark back to the Law Reform Commission report of 2010 and say that this is something that has a longstanding recommendation that all jurisdictions should take some kind of approach to an affirmative, communicative model of consent.

If we are looking to New South Wales as an example of what it looks like in practice then yes, my comment is: I think we should wait and see. I do not have specific concerns around or knowledge of the operation of the New South Wales laws. I just observe the point.

THE CHAIR: I think in New South Wales the reform came out in 2007 and that obviously was before the 2010 report came out but, from your experience having worked in this area in the ACT for over 35 years, do you think there is a reason why the ACT has not quite had this discussion already? Is there something either socially or policy wise or is there any reason why perhaps it has taken this long for the ACT to get this conversation underway?

Mr Bavinton: That is an interesting question. I will probably reflect a bit on it as I answer as well.

THE CHAIR: Sure.

Mr Bavinton: I think part of it is that we have had clearly a range of other areas of what would probably have felt like more pressing and urgent law reform about the victim experience in the court system, around extending the conditions where consent is negated or mitigated in terms of relationships of care, supervision and responsibility. We have seen, I think, our law reform effort in the ACT focus more heavily on those areas that were more apparent. As I said in my spoken comments, I think this is just one piece of the puzzle and I think it is an obvious and overdue piece of the puzzle to attend to rather than that there has been a particular block to moving on this particular issue.

MR PETTERSSON: There is something you brought up in your opening statement that I want to go back to. You talked about informing people of the law not working for people who do not want to follow the law anyway. Was that your point?

Mr Bavinton: Yes.

MR PETTERSSON: My question following on from that logic is: what will changing these laws accomplish for those individuals who intend to break the law? Will it do anything?

Mr Bavinton: In my view no, and certainly not in isolation. I think that what pointing to this kind of law reform can do is build the preponderance of expectation in a community that lessens the likelihood that someone feels confident to express views that are reckless or supportive of sexual violence. I think it narrows the number of people who feel they can confidently make assertions about other people that might support rape-supportive jokes or those kinds of things. I think we build a community culture that becomes less tolerant of that and, yes, that might silence them. No, I do not believe that it changes the mind of a person whose intention is to do something to someone else regardless of how they feel about it.

What I have observed over 20, 25 years is that often when government wants to communicate messages in this space the first thing people want to speak to is the law. We have got to tell people it is a crime as if somehow we are not already aware that there are laws in this area and that they are being observed in their breach by offenders.

I do not think we have encountered much in the offender research area that says that the offending occurs because of a lack of understanding of the law and that the moment that that is pointed out to them they go, "Oh my goodness, I'm sorry. I shouldn't have been doing that and I'll change my behaviour." That has not ever been my experience working in an education kind of space and it has not been my experience in the conversations I have occasionally had in those professional roles with people who are concerned about their offending behaviour or concerned that their behaviour might be offending, sexually offending.

MR PETTERSSON: That was a very good answer. Your submission talks about the common law formulation of consent and I understand that you do not want to come at this with a legal point of view but it touches upon your recent answer. Why should the definition of consent be moved away from common law formulation to being put in

the statute?

Mr Bavinton: I think that is a good question as well. I think it comes down partly to the split that you see in the submissions that this committee has received. You are getting technical advice from people with a legal perspective including, I note, the DPP's submission, which I read with interest. It says that by definition the common law position on consent is that it is freely given or it is not consent.

THE CHAIR: We are already there at common law, yes.

Mr Bavinton: We have that in place and yet you see a broad range of other support in the community that engages with the law in a very different way. They are looking to the law in terms of establishing a standard. They are not looking at its technical operation particularly in terms of the exercise of criminal justice. They are looking for: what does the law tell us about how our community expects us to behave towards one another?

I think what you see is that there is a very strong sense across the board from multiple perspectives that there is something missing here. But just leaving it as a read point that consent by definition means free and voluntary is not how people read the law when they are thinking about it as a person in the community. They are looking for something more affirmative than that.

THE CHAIR: Following on from that, you might be aware of the definition in Tasmania, which is one of the jurisdictions that we have been looking at as well, and that law has been in place for some time. There was a follow-up research paper by Helen Cockburn which actually stated that there has not been much of a change despite the fact that there is now an affirmative model of consent. When it comes to the judge and the direction given to the jury it has not changed. The law is still applying what the common law test was. Do you think that there is a risk that, if we put in an affirmative model that might be the same; essentially it will not change things?

Mr Bavinton: I do, if it is not accompanied by a focus. I think that is what Helen Cockburn's report stresses. If there is not a focus on professional education for those working within the legal professions and in the institutions that are involved in assisting the courts around criminal justice, if it is not accompanied by a continued and enhanced focus on education in the community, then yes, there is every risk that that is the case. It will probably be read by some just as a technical update rather than something that is intended to shape how our courts administer justice. I do share the fear. I think the Tasmanian experience actually is, as Dr Cockburn's report indicates, that without that extra resourcing it is again one piece of the jigsaw puzzle and not the most important.

THE CHAIR: One of the witnesses who appeared before the committee last week—and I cannot remember which one—was talking about the vast number of educational campaigns out there in terms of letting people know that yes means yes. In terms of what is actually being communicated through education publicly there certainly is, as you say, the societal norm and expectation, which is yes means yes, as opposed to what might be missing technically in the law.

What else do we need to do in that space, in the education space, to get that message out? It does not matter what the law says, we are already educating people in the affirmative communication model. What else do we need to do?

Mr Bavinton: There are a couple of answers, I think. One is about the consistency of the education approach. We know as an organisation that in the broader sexuality and relationships area we have a wide continuum of practice in ACT schools from leading gold-standard practice right through to nothing at all. And I believe that that is true in education around sexual assault and the relationship skills that I referred to earlier as well.

We have got some schools doing a very good job and we have got some who are not doing a very good job. We have some schools that did a very good job two years ago and have not answered the question around the cohorts of students who came through in the two years subsequent. We have a hit-and-miss kind of approach that depends a lot on having champions within the school community who focus and promote this as an important part of the education agenda.

Our submission also draws attention to the fact that schools are often the place that we focus on around this kind of education but in our view they are a location of convenience more often than they are the best place necessarily for something to happen. That has something to do especially with adolescence in that everyone is at a different stage of development and the time we most need to learn about respectful relationships and negotiating consent might be 13 for one person, it might not be 23 for another person. This idea that once in year 9 we can land this and it will have been the right time for every one of those students, if you reflect for a moment on lived experience, we know that that is not the case.

Sorry, I had another response to your question about education. Apologies, I have distracted myself.

THE CHAIR: That is okay.

Mr Bavinton: I think, yes, schools are an important location but not the only one; that is one of the really important points to make there. The other is that I think we have got the headline messages largely right. Again in our submission we draw attention to the fact that we are testing some of these evolved social stances and expectations in a context where most young people these days are forming their sense of a sexual script around how sexual encounters occur in the context of readily available, sexually explicit content online. In some cases that is not the kind of modelling we want for people around how you actually conduct a real-life sexual relationship, how you negotiate consent. In fact, frequently I think lots of people would say that that is not the model that they are looking for.

As an organisation we try to take a more pragmatic and feet-on-the-ground view, which is that there is a large amount of this material available. People are looking at it. 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.

MR PETTERSSON: Do you have any suggestions as to how this bill can be improved?

Mr Bavinton: I think the intention behind our submission is to say, "Please ensure that a focus on getting this bill right progresses." We think that there are some important things here and we would defer to the technical legal expertise on how they can be framed to ensure that those outcomes are achieved. I do not have specific advice from that point of view around legislative drafting. But we do want to signal that we, and many other people and community organisations, are interested in seeing this affirmative model of consent incorporated in our laws.

THE CHAIR: And finally, following on from that—and I am not asking for a technical answer—there has been some concern raised by the lawyers that perhaps there is a risk that the bill goes too far in that it might even turn the onus of proof on its head a bit. Do you have any response to that concern?

Mr Bavinton: I have considered that in formulating our response. I appreciate where the question comes from. I think it is worth acknowledging that that is a longstanding legal consideration that we want to respect. It is not our view that this approach, or this legislation, actually does that. We do not believe that, in principle, an affirmative and communicative model of consent inherently reverses the burden of proof or the onus. We think it actually embodies an expectation that many people in the community have, if not most people, that all of us should be able to account for how we knew that consent was present in our interactions with others.

This is not inconsistent with how consent is treated in other areas of law. Again I go back to my comments at the start. We have got to stop treating this area as if it is somehow exceptional, too complex to understand. It is not too complex to understand. It just requires persistence and patience and a willingness to deal with complexity.

I think that as a community—and I wonder out loud if some of the testimony we have heard from overseas in the past week might have sounded very different if there had been an expectation that an accounting for the presence of consent should have formed part of the testimony—we have a very clear picture of how things could look different if people came to the public space, including our courts, with an expectation that: "I will be able to tell you how I knew consent was present," and not just with an honest or reasonably held belief that it was present.

THE CHAIR: Do you have anything to add, anything that was a burning desire for you that we have not asked?

Mr Bavinton: No, thank you. I think I said everything at the start.

THE CHAIR: If that is the case then thank you very much for appearing before the committee today. When available, a proof transcript will be forwarded to you to provide an opportunity to check and suggest any corrections. Thank you for appearing today, much appreciated.

Mr Bavinton: Thank you very much for the time.

DAVIDSON, MS EMMA, Deputy CEO, Women's Centre for Health Matters

THE CHAIR: I welcome today's next witness, Emma Davidson, from the Women's Centre for Health Matters. For the record, can you confirm that you understand the privilege implications of the statement?

Ms Davidson: I do.

THE CHAIR: Before we proceed to questions from the committee, would you like to make an opening statement?

Ms Davidson: Yes. Thank you very much for giving me the opportunity to come here today and talk to you about this very important piece of legislation. The Women's Centre for Health Matters is a community-based, not-for-profit organisation which works in the ACT and surrounding region to improve women's health and wellbeing. And we do that through a number of different ways: research and advocacy, health promotion and education and social research. I do not really want to rehash the things that are in the written submission but I do want to provide a little additional information about why this matter is so important to us.

One of the things that we need to accept is that young people are sexually active. The Australian Research Centre in Sex, Health and Society's national survey of Australian secondary students and sexual health in 2013 found that 69 per cent of students in years 10 to 12 had some form of sexual experience that would qualify for the need for consent under these kinds of laws. Thirty-four percent of young people in years 10 to 12 had actually had sexual intercourse already, 23 percent of them in year 10. That means that by the time they are getting to year 10 they are already doing these kinds of things. Making sure that they have an understanding of what is okay and what is not legally is quite important. And it is unrealistic to think that they are not going to be doing these things.

Our own survey of 510 ACT women in 2017 found that 94 per cent of women aged 19 to 29 had had sexual activity with another person in the past 12 months. And of the 12 young women aged 17 to 26 years who participated in focus groups, eight of them said that consent was a really important education issue for them during high school and that they really needed to understand what consent is and how that works. Young people themselves are telling us that this is something that they need to know about.

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.

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.

A quote from one of those women is that most of the men that she has been involved with "just want to have sex for their benefit, not for mine" and "it's a selfish experience on their part". And that was from a woman who was in that over 40-age group. I think that really highlights that it is not just young people who need to know what is okay and what is not.

There were some great points made in the ACTCOSS submission about the fact that consent cannot just be assumed and that Aboriginal and Torres Strait Islander women are 12 times more likely to experience sexual assault than non-Indigenous women. I think what that highlights for us is that sex without consent is not just bad sex, it is actually someone abusing their power over another person. And that is evidenced by the higher rates of sexual assaults that we see in our most vulnerable population groups who have the least power: children, young women, Aboriginal and Torres Strait Islander women and people with disabilities. The massive rate of sexual abuse that they experience is completely unacceptable.

Sexual assaults result in mental trauma, and this has a health impact. If we can get to a point where we have a legal definition of affirmative consent then that will recognise that a crime has occurred. And then, even if there is not enough evidence to convict or the victim does not want to report it, they have to name that as a crime and support the victim in healing from that mental trauma and help change what is considered acceptable behaviour.

Getting the right information is not easy for everyone. We have found that 27 per cent of women in the ACT did not find it easy to find reliable and relevant information about their sexual and reproductive health. There was a school health nurse trial, which was fantastic, but it was only for a limited number of ACT public high schools. Not everyone was getting access to that program. One of the quotes we had from a young woman was, "You don't know what you don't know". They are not even aware that there is important information that they might be missing out on if no-one is actually offering that to them.

What we would like to see is good information provided to everyone. We would affirm what Youth Coalition said in their submission about the need for consent education in schools and the need for measures to address sexual violence in society. What we need is a diversity of resources across a range of settings, not just in schools, not just in public schools, not just one age group and not just assuming that everyone who is going to be needing this information is someone who does not have a disability.

Consent is not that hard to understand. There is a fantastic video about going for a bike ride with someone that is a great example of doing a fun, shared physical activity in which a sensible person would say, "Would you like to do this?" If the other person says, "No I don't," you cannot just throw them up on the bike and tell them to start pedalling. You actually have to make sure that the person you are going for the bike ride with wants to go for that bike ride. Really, sexual activity should not be any different.

There are many ways to communicate consent. They do not always have to be verbally articulated but it does have to be clear.

THE CHAIR: In your submission there are two avenues I do want to explore, and we can take them in turn. One is when the victim freezes, and that is one of the reasons why you say that it is important to have that affirmative model of consent because it cannot always be relying on the fact a victim is going to say no, that there are times where the victim will freeze. How will this bill, do you think, assist those victims who may have been victims of freezing in that situation?

Ms Davidson: 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.

There are still going to be situations where people will go out there with a thought in mind that they want to do something that they know is a crime. But what it will reduce, hopefully, is those things where something has happened and someone thought that they were doing the right thing and did not realise that the person they were doing this with was not consenting and this was not okay. If we can make it clear to people that you need consent first, that will be a very good step.

THE CHAIR: The DPP gave evidence and also said in its submission that the law, as it currently operates in the ACT, is that, despite the fact that it might not be in statute, the common law test basically, by virtue of the fact that there is consent, means that it is freely and voluntarily given. And if it is not then consent is not there, full stop. Is it more a lack of education of how the law operates, do you think, in how the society understands it?

Ms Davidson: People look to our Crimes Act as a clear, written, simple list of here are all the things that you are not allowed to do. Because we do not actually have a definition of consent in there, other than what negates consent really—we do not have that clear, affirmative consent definition in there—it means that people feel like they are entitled to debate, "Was this okay or was it not? Should she have fought back? Should he have done this, that and the other?"

In actual fact if there is an affirmative consent definition in the law then it is clear. There can be no argument. Did they get a yes first? No they did not. Then it is not okay.

MR PETTERSSON: I was wondering if you could tell me how, in practice, our current consent laws work in regard to young people and intimate images.

Ms Davidson: It is complicated. I did give a bit of a complicated example in our submission. Our difficulty with young people and intimate images is that there is a federal law that basically means that if they are sharing those intimate images via their mobile phone, which is what the vast majority of them are doing when they are sharing intimate images, then it is illegal under that commonwealth law.

Even though we intended in the ACT to not criminalise behaviour that young people are doing when they are just working out what they can do and do not want to do, we have got a problem there with the commonwealth law. What it means is that police will have to make some subjective decisions about whether to charge someone with a crime and under what section of what act.

There are situations that could arise, that actually are not that uncommon for young people, where police would have options. It could be a crime under this section but maybe not. It depends on how you view it. If we had some examples for them to go on that would help guide them in making those subjective decisions, that would help a lot.

MR PETTERSSON: And I was wondering if you could touch upon the idea you put forward about being able to withdraw consent of the intimate images someone shared.

Ms Davidson: Sometimes young people do things that seem like a really good idea at the time and then a few years later they realise actually that that is not something that they really want anymore.

THE CHAIR: It takes a few years. Sometimes it is much quicker.

Ms Davidson: Sometimes yes, sometimes they do realise very quickly. And that is great when they do because it is a lot easier to fix things straight after than years down the track. Yes, there are times when a young person might think that something is a good idea and then later realise it actually was not. It would be great if we could have a clear way for young people to say, "You know what? I actually don't want that image out there anymore. I want the person whom I shared it with to delete it. And I do not want it to go any further". They need to know that they are entitled to do that.

There needs to be a way to address that simply so that we do not have people accidentally finding that they are doing something that is against the law when actually it was just a case that they did not know. We should make sure that young people understand their rights in that area and know how to enforce them, know how to ask clearly for it to be deleted, and what to do if the other person says, "No. I have already shared it to all my mates."

MR PETTERSSON: Do they have rights in that area at the moment?

Ms Davidson: Yes. It is a little complicated because they have given consent. And if a few years down the track they realise that actually they do not want that image out there, but they have not communicated that to the other person, then how is the other person meant to know that they should not still keep that old photo on their phone of their girlfriend, or boyfriend from years ago?

We need to be able to make sure that young people know that they are entitled to contact someone down the track and say, "Can you please delete that because I am not cool with that anymore?" And if the other person says, "No, I don't want to delete it," they know what they can do about it, things like going to the eSafety Commissioner and getting help.

MR PETTERSSON: That is the course of action? You go to the eSafety Commissioner?

Ms Davidson: The eSafety Commissioner is pretty good at helping people navigate these complex things. You can just go to the police. If you go to the eSafety Commissioner and they can give you advice that is pretty cool.

MR PETTERSSON: I guess I am trying to burrow down to this suggestion of withdrawing consent of shared intimate images after the fact. At the moment is there a recourse? You are saying, "Go to the eSafety Commissioner." Are they doing anything at the moment?

Ms Davidson: The eSafety Commissioner is dealing with a lot of cases. I do not know if they have got one that is similar to the example that I gave in my submission. But they are certainly dealing with a lot of cases of young people who have shared an image and then realised that they do not want it out there and someone else is abusing that by sharing it on or refusing to get rid of it. They do have a lot of experience working with young people on that issue.

MR PETTERSSON: But are they remedying that situation by utilising laws that are about sharing images of young people or are they utilising laws that are based on consent of those images being out there?

Ms Davidson: That is probably a question better asked of the eSafety Commission, as to what percentage of their cases they address under which act. The ACT one has been there for only 12 months. We have not had a lot of time to have a lot of cases.

But the recent one we had with the uni students, to me, looked like a good example if only there had been some more examples of what this law was intended to do; that this actually is not about revenge porn; this is about people abusing power and it is actually fundamentally about consent.

THE CHAIR: I want to go to the submission where you talk about ongoing consent. I know that in your opening you also talked about it as well. If this affirmative model of consent were to come in, practically, how will it play out? We know the starting point is that it is never black and white. We know that. That is just the reality of it. If you have got two people who are consenting to engage in sexual activity and, as you say,

there comes a point where someone does not want to anymore and they do not say no or indicate no, where do you draw the line and say you have to continue to keep asking for consent? How do you see that playing out practically? I am just trying to think, realistically, how it plays out in a situation where you think you have done the right thing, you think you have gone, "Okay," and asked them verbally, "Do you consent to this?" They have said, "Yes". You have started. How do you—

Ms Davidson: One of the things that this particular bill does not go into detail about is the difference between ongoing consent and having given the initial consent. But this is a situation where someone might be experiencing that freeze response because they do not want this to happen anymore.

THE CHAIR: They cannot quite say no.

Ms Davidson: Yes. They have gone into a freeze response rather than a push-back response. And if they had initially consented then that is going to be very difficult. I think one of the things there is about education for the community about understanding that a healthy, respectful relationship means that if the person that you are doing something with is not giving you feedback as the activity continues that they are happy with this continuing then a sensible person would check in with them and go, "Are you still having fun? Do you still want this to happen?"

That can be a good opportunity for someone who is really uncomfortable but does not know how to express it or might be experiencing a freeze response, to go, "Actually, no I don't". Or it might just be a case of yes, they are not just very expressive. But at least you are checking in. That is very much about education.

THE CHAIR: And just as important as acknowledging that no does not necessarily come from a verbal response, the same with the ongoing?

Ms Davidson: That is right. Yes.

THE CHAIR: It does not come from a verbal response either?

Ms Davidson: That is right, particularly given that a lot of this activity may be occurring within existing relationships with someone that they already know. They may have had some activity with this person previously. There may be less need for conversations about things and more just responding to activity, yes.

MR PETTERSSON: Currently our formulation of consent comes through common law. Why do you think that how we define consent should be put in statutory law?

Ms Davidson: It is a lot easier when you are having to provide some education to someone within a very short, limited time frame, to be able to point to a law, a statute law, and say, "This is illegal. You can't do this." That is a lot easier than saying, "We have got hundreds of years of case law that establishes that this is the precedent and this is how we do things."

If you take another example out of the image-sharing stuff, if you were to talk to a lot of young people in the ACT who have been educated at school about intimate images,

they will tell you that they have been educated about what the law says. They are talking about the commonwealth law. The commonwealth law says, "You are not allowed to share intimate images when you are under 18. If you do, you might get arrested for child porn." That is what kids are being told.

This is a similar sort of thing, if we can clearly define this is what consent is. And if you do not have it, what you are doing is illegal, then it makes it a lot easier to explain it to young people in a very quick way.

MR PETTERSSON: Surely people get the understanding of consent not from reading the law—my golly, no-one reads the law, and I say that with Hansard listening—no-one actually gets the legislation and reads up. People are educated. They either come across a campaign about it or they read their school text books, they listen to their teachers. Surely the way we talk about consent is far more important than what the law says?

Ms Davidson: This is actually part of the difficulty. A lot of young people are getting their information about what is acceptable behaviour, what to expect from sexual activity and what is going to be considered normal, either from friends of their own age at school or from online material, some of which is not actually great.

If we can have a definition of affirmative consent then at least the conversations that they are getting from their teachers at school or from a visiting school health nurse, if they are at one of the schools that are lucky enough to have that or from that kind of setting, if what they are getting in this setting is, "The law says that consent is this and if you do not have consent then that is sexual assault," then they are very clear on it. And it helps them to then filter some of that information that they might be hearing from their friends about it is okay to do this, that, and the other or the stuff that they are seeing online that might normalise certain sexual behaviours that are actually not okay and not great portrayals of consent. It helps them put it in context.

THE CHAIR: You addressed the burden of proof aspect of it. You probably overheard me asking the previous witness about some of the concern that has been raised about perhaps lifting it to too high a standard. I note that you gave a very clear no in your submission. Did you want to elaborate or expand on that?

Ms Davidson: We would take advice from the experts on how to word the legislation itself. We are not experts on that.

THE CHAIR: And for the record, I was not asking a technical question.

Ms Davidson: Yes. But we certainly do think that it is really important that we have an affirmative definition of consent. We do not think it is too much to ask that people check that something is okay before they do it.

As the previous witness was saying, like any other shared physical activity you would ask before you go and do whatever it is that you want to do. And if the person that you are with is not clearly saying, "Yes, I want to do that," then you do not try to force it on them. We do not think it is that difficult really.

It might mean that some people have to take a look at their own past behaviour or past behaviour that they have experienced, been on the receiving end of, and look at that in a different light and go, "Actually, social standards have changed and we don't do that that way anymore." That is actually not such a bad thing. The world does move on and change, and we should move with it.

MR PETTERSSON: Are there any ways you would like to see this bill improved?

Ms Davidson: Yes. I think I did mention in the submission that having some examples in something like the explanatory statement that goes with it can be very helpful for the courts when they are having to then interpret that legislation. When those first cases start to come through, they are trying to work out, "Is this a clear communication of affirmative consent or not? What is acceptable?" That would be really helpful.

I think, though, the biggest thing that needs to happen is that there needs to be a range of education resources made available not just to young people but to the community in general: people who are working in our courts, our police force who are then having to make decisions about whether something needs to be done, to teachers and parents and also to people who are not young themselves but are not going to come across this education at school but are out there and are dating and are in relationships and are having this activity. And they need to understand what is okay and what is not.

THE CHAIR: Did you have anything else to add at all or maybe perhaps questions that we did not ask?

Ms Davidson: No. I think I have covered everything there.

THE CHAIR: When available, a proof transcript will be forwarded to you to provide an opportunity to check and suggest any corrections. On behalf of the committee, thank you for appearing on behalf of the Women's Centre for Health Matters.

Ms Davidson: Thank you.

THE CHAIR: I do not think the witnesses undertook to provide any further information or took any questions on notice but, if they did, whilst the committee has not set a deadline for receipt of responses, answers to these questions would be appreciated within two weeks of the date of this hearing. The proof transcript will be forwarded to witnesses to provide an opportunity to check and suggest any corrections. The committee has now completed today's hearing program. The committee will adjourn until 2 pm on Tuesday, 9 October.

The committee adjourned at 4.03 pm.