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

TRANSCRIPT OF EVIDENCE

CANBERRA

FRIDAY, 28 SEPTEMBER 2018

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 10.17 am.

WHITE, MR JON SC, Director of Public Prosecutions, Justice and Community Safety Directorate

THE CHAIR: Good morning, everyone. Today the Standing Committee on Justice and Community Safety is holding its first public hearing on the reference of the Crimes (Consent) Amendment Bill 2018. The bill is a private member's bill that 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 that 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. Today's proceedings are public, are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live.

Before we begin, I remind witnesses of the protections and obligations entailed with parliamentary privilege and I draw your attention to the pink privilege statement on your table, which is important. Can I ask you to confirm that you have read and understood the terms of that statement?

Mr White: Yes, thank you.

THE CHAIR: 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, and that 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 Jon White SC, the ACT Director of Public Prosecutions, and also your deputy, Margaret Jones. Before we go to questions, would you like to make on opening statement, Mr White?

Mr White: Yes. I would like to thank the committee for the opportunity to present our submission today. 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.

We really welcome the opportunity to talk about this issue of consent because consent is one of the issues that we, as criminal lawyers, deal with probably more than any other issue. In my office a large proportion of the matters that go to trial in the Supreme Court involve issues of consent in sexual offending. We pride ourselves in this jurisdiction that we have taken a very positive attitude to the prosecution of sexual offending, including cases that involve the issue of consent.

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.

However, there is an issue as to how that positive consent model really translates to the criminal law. The criminal law is, of course, about penalising conduct and penalising intention. As criminal lawyers we have to prove matters to a very high standard. It is one thing to aspire in societal relations to a particular way of interacting in sexual matters but it is another thing as to how that is translated into the criminal law. That is why we respectfully have taken the position that we have in relation to the proposed legislation. Unfortunately, although no doubt based on very good intentions, some of the concepts behind the proposed legislation are not as well thought through as they should be. We do say, however, that this is a great opportunity to consider the issue of consent and law reform issues in relation to consent.

THE CHAIR: Before I go to my first substantive question, I wish to follow up on your opening remarks. You mentioned that you are proud of the attitude that your office has taken in relation to prosecuting sexual offending. As we all know, in any workplace culture an attitude can be set by the leadership. Is there any risk that you see that, perhaps as time goes on and we have a new DPP, that attitude may change? Is that something that we as a community should be alert to?

Mr White: The culture in terms of the matters that are prosecuted and the attitude that is taken is very important and is inculcated by the leadership of the organisation. Certainly my deputy, Margaret Jones, who has been prosecuting in this area for many years and who has a deep appreciation of these issues, has inculcated in the organisation, as I have tried to do, the attitude towards sexual offending that I have outlined. Of course, any new DPP will have to come to terms with those issues themselves. One hopes that the positive attitude that we have taken towards the prosecution of these matters can continue.

THE CHAIR: On page 2 of your submission you submit that the bill conflates the elements of consent and recklessness. Are you able to provide a little more detail around that submission?

Mr White: Yes. The bill technically does not mention recklessness in its definition of consent, but it still retains, if one reads through the way the bill is meant to operate, within the offence-creating provisions reference to recklessness. Recklessness has become the fulcrum for common law developments in the area of sexual offending.

In other words, the common law has developed its concept of what constitutes reckless offending in this area and the law of recklessness in relation to sexual offending is different from the law of recklessness in other areas of offending. So

there is a fundamental difficulty with the way that the bill operates in ignoring, effectively, this issue of recklessness when recklessness is the fulcrum around which these matters are prosecuted.

MS CODY: In your submission you state that you feel there is no need for a statutory definition of consent from the point of view of the victim. I understand that you have outlined there that it is inherent in the meaning of consent.

Mr White: Yes.

MS CODY: But can you, in plain English for me today, broaden that a little as well?

Mr White: Yes, and bear in mind that these are essentially matters of fact, at the end of the day. 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.

Consent that is vitiated for the reasons put forward in section 67 is no consent; so those are specific examples where there is no consent. That section 67 provision, when it was introduced in the law of the ACT, was quite revolutionary, I think I can say. It was certainly very cutting edge. Other jurisdictions have caught up with similar provisions in the meantime. But we have then the common law understanding of what consent is, which is freely given. We have examples given to us by section 67 where consent which looks like consent in fact is not consent because it is vitiated.

Some of the examples in section 67 are the consent obtained by the affliction of violence and so on. That clearly would not be consent at common law as well. So not all of the provisions in section 67 do as much work as other provisions, but some extend this concept of where there will be no consent. That is all very clear. We have no difficulty explaining that concept of consent to juries.

MS CODY: This bill does not seem to set that out as clearly as is already prescribed in other forms of legislation?

Mr White: Yes. 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 section 67.

MS CODY: I guess that is why, in another point you have made in your submission,

you have stated:

> … the proposed legislation is at best unnecessary, certainly confusing, and probably regressive.

Mr White: Yes.

MS CODY: It backs up what you have just—

Mr White: Yes. That is the point I was trying to make there.

MR PETTERSSON: We have received other submissions that note that the same level of criminal culpability applies to both an accused who knows that consent is not given and to an accused who thinks he or she is acting reasonably. Is there an argument for differing levels of culpability?

Mr White: No, there is not. 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.

There seems to be some kind of suggestion that maybe there could be differential penalties applies to those scenarios. We would say that the ability to sentence will be an ability to sentence on the facts of the particular case, taking into account all of the nature and circumstances of the offending and all of the other factors.

There may be cases where this inadvertent recklessness is just as morally culpable as advertent recklessness. That would be a matter for a sentencing judge. What I am trying to say is that a sentencing judge can take into account any issue with the objective seriousness of the offending and reflect that in the ultimate sentence. That works very well at the moment and there is no need to change that.

THE CHAIR: Despite the concerns you have raised about the bill as currently drafted, you have said in your submission that there is scope for some reform in the area. Can you elaborate, for the committee and for the purposes of the public hearing, on what you think is the best way forward for the ACT, keeping in mind the Morgan defence that you raised in your submission? New South Wales, Tasmania and Victoria have legislated for reform in the area. Can you give us guidance in relation to where we should be heading in that regard?

Mr White: The issue really is the extent to which the doctrine of Morgan's case still applies in the ACT. Essentially Morgan stands for the proposition that an

unreasonable but honest belief is still sufficient in consent for the perpetrator to be found not guilty, and it is the unreasonableness of the belief that has attracted the attention of law reformists. In Morgan's case the belief was very unreasonable in the circumstances. We think there is scope for that finally to be put to bed by following law reform and issues used in other states.

I should say that there is a provision in the ACT—section 73 of the Evidence (Miscellaneous Provisions) Act—which allows a trial judge to direct a jury that, in deciding whether an accused person was under a mistaken belief in consent, the jury may consider whether that belief was reasonable. But that falls short of an injunction saying that a belief that is simply honestly held but is unreasonable is insufficient. So that is the area where we say reform is needed.

The one model that is particularly apposite to the ACT's situation is the model adopted in New South Wales, which is section 61HA of the New South Wales Crimes Act. That incorporates into the issue of consent from the point of view of the perpetrator knowledge, recklessness and a situation where the person has no reasonable grounds for believing the other person consents. That really gets rid of the issue of Morgan and essentially that means that in any one of those situations the Crown would be able to make out the consent from the point of view of the perpetrator. So Morgan's case, with its reliance on an honestly held but very unreasonable belief, would be abolished, effectively.

MR PETTERSSON: What is the difference between "reckless" and "no reasonable grounds"?

Mr White: Recklessness requires a form of advertence. The basic concept of recklessness at criminal law is the perpetrator adverts to something but continues nevertheless, as distinct from, say, negligence, where a person does not advert to something in circumstances where they should have adverted to it. I suppose reasonable grounds is a little bit more in that area.

That sets, if you like, a societal standard as to sexual interactions. It introduces an element of objectivity or positivity into the interaction in terms of consent. So if a perpetrator proceeded without reasonable grounds for assuming that the person was consenting, then that would be a basis on which they could be liable.

THE CHAIR: So is it bringing a bit of an objective standard to it?

Mr White: Yes. It brings an objective standard, which comes away from the Morgan problem that an accused person—bear in mind the Crown has to prove matters beyond reasonable doubt—simply asserts they had an honest belief even though it was incredibly unreasonable in the circumstances of the offending, and that is sufficient for them to be found not guilty.

THE CHAIR: In your experience, to what extent is the Morgan defence penetrating in the ACT system at the moment?

Mr White: It certainly looms large in those cases where there is an interaction where, if I can describe a typical case, people are out drinking and partying and people end

up back at someone's house. There might even be some kissing, cuddling, that sort of thing, and then the victim goes to bed—they might be well affected by alcohol, say—and then wakes up and someone is having sex with them. That is the sort of scenario where it is often said by accused persons, "Well, I thought she was up for it." It is that kind of scenario. The honest belief is said to arise by virtue of the interaction that took place before the sexual activity actually took place.

THE CHAIR: But in that scenario, if the person is sleeping, our current laws which go to what negates consent address that.

Mr White: Yes, they do in that situation. Quite simply, an accused person could not say they had a positive view of the consent of the victim if the victim was unable to give that consent because they were asleep. So in that particular scenario, yes. But as members of the committee will appreciate, these scenarios are often a lot more chaotic than that. Unfortunately, what I have just put to the committee is a very typical scenario, and we need to protect members of society in that situation—people who are not consenting.

MS CODY: I think yesterday's *Canberra Times* reported on these exact laws and other matters. The ACT Council of Social Service was said to suggest that without a yes means yes model the ACT laws fail to protect victims who were unable or felt too unsafe to say no. Is that a fault in our current system?

Mr White: I think this comes down to the point I was making earlier about 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.

I think we are talking about apples and oranges. If we talk about a positive consent model, that is a very worthwhile conversation to have in terms of the way in which men and women should interact and so on and so forth, but that is not terribly helpful in terms of how the criminal law will police these matters.

MS CODY: From what you said then, you are also pointing out that the proposed bill by Ms Le Couteur may not necessarily address all those factors either?

Mr White: No, it does not. One is not wishing to be critical because, as I have indicated, this topic should be spoken of in our community and should be the concern of the Assembly. But, nevertheless, there seem to have been a number of decisions made in the drafting of that bill that compromise its integrity. It seems to me it has lost sight of really where it really wanted to go. If I might say, the New South Wales provision seems to incorporate at least some of the concerns, particularly this concern about unreasonable but honest belief.

MS CODY: The New South Wales legislation is currently up for review, isn't it?

Mr White: It is. But there was a well-known case in New South Wales called Lazarus—I think we probably all know about it. The young man involved was found not guilty by judge alone, and the matter went to the Court of Criminal Appeal, because in New South Wales the Crown can appeal such matters, and the Court of Criminal Appeal found that the judge's approach was wrong even though they did not order a retrial.

So I wonder whether there is any particular doubt about the way those provisions operate. The judge got it wrong in that instance. Those of us who prosecute these matters on a daily basis, and knowing the evidence in that case, would have been very confident of obtaining a conviction on the facts as we knew them.

In the ACT we have a wonderful innovation, which is that all these cases are tried by juries. Why is that so good? Because issues of consent are really community standards, and so real people can bring their different experience of consent and different situations they have been in. I am sure we have all personally been in different situations with this issue of consent, and they bring that to the table and discuss it.

Although I am very proud of being a lawyer, lawyers do not have a full mortgage on common sense, nor do they have a full mortgage on experience of life. So those provisions involving juries making these decisions are working very well in the ACT. That is a very long-winded way of saying the New South Wales provision, although it is under review, is actually working well.

MR PETTERSSON: You have used the term "free and voluntary agreement". Are those terms defined?

Mr White: No.

MR PETTERSSON: Is that a problem?

Mr White: No, because the common law has a very clear idea of what consent is. As I have said before, it is inherent in the nature of consent that it has to be freely given. If there is any doubt about that, section 67 assists us in circumstances where there might be some doubt in showing that is clearly not consent. So with the combination of the common law concept of consent with our section 67 factors, our experience is that that is sufficient to define what consent is.

THE CHAIR: In terms of how consent is defined in the ACT, the starting presumption is that it is a free and voluntary agreement?

Mr White: Yes, that is right.

THE CHAIR: Because that is what "consent" means?

Mr White: Absolutely inherent in the nature of consent.

THE CHAIR: The bar has raised some concerns about the current bill and the risks it

may have for the fundamental principles of innocent until proven guilty and reversing the onus of the burden of proof. Is that something that concerns you as well?

Mr White: That was not something that particularly concerned me when I looked at the bill; the other issues with the bill were more prominent for me. I do not really want to enter into that debate because I think it would be better to have that debate in the context of another provision that might overcome some of the technical issues with the bill.

THE CHAIR: We will conclude here. Thank you very much for appearing before the committee today. When available, a proof transcript will be forwarded to witnesses to provide an opportunity to check the transcript and suggest any corrections.

CRIMMINS, MS FRANCES, Chief Executive Officer, YWCA Canberra
MACHALIAS, MS HELEN, Director, Communication, Advocacy and Fundraising, YWCA Canberra

THE CHAIR: I welcome the YWCA, represented by Helen Machalias, Frances Crimmins and Leah Dwyer. Can I confirm that you have read the privilege statement and that you agree to its implications?

Ms Crimmins: Yes, I confirm and agree.

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

Ms Crimmins: Yes, we would like to make an opening statement. I begin by thanking the committee for this opportunity to contribute to the consultation on the proposed amendments to the Crimes Act. We particularly extend our gratitude to Ms Le Couteur, who initiated the discussion in the Assembly.

Since our initial contribution to Ms Le Couteur's scoping paper, YWCA Canberra's position has not changed—we continue to support the inclusion of a positive definition of consent based on the concept of free and voluntary agreement in the Crimes Act 1900 ACT. The ACT is unique in that it is the only jurisdiction not to retain a positive definition of consent based on one of three approaches: a free agreement; a free and voluntary agreement; and consent freely and voluntarily given.

Roughly one in five female victims of sexual assault in Australia report the crimes, and in Canberra less than one-third of rapes reported to police progress to charges. Of those that made it to legal proceedings only a small proportion end in convictions. There are clear challenges in successfully bringing proceedings against sexual offenders in Canberra, and the capacity of the accused to justify their perception of consent is one of them.

There is no individual positive benefit when it comes from a woman claiming a colleague, friend, boyfriend or relative has raped her. Sex crimes, unlike many other crimes, can cause shame and embarrassment to the victim reporting the offence. Where a claimant proceeds with avenues to legal justice, the resulting scrutiny amplifies this. For too long survivors of sex crimes have been reluctant to report crimes against them because circumstances which could be construed to imply their consent would undermine their access to justice. Kissing, being on a date or flirting are some examples. None of these behaviours are indicative of consent.

The reality of under-reporting sex crimes and the lack of faith in seeing legal justice occur has led to the recent "why I didn't report" campaign. YWCA Canberra believes the existing legal framework in the ACT, which sets out circumstances where consent may be negated—for example, violence, intoxication or mistaken identity—conveys the message that submission can effectively be interpreted as consent.

We believe this misinterpretation reinforces stereotypes about women's sexual passivity and creates assumptions about what is considered "real rape". In practice

this equates to a no means no paradigm, which assumes the claimant can say no and is sufficiently confident to resist an advance.

New legislation that accounts for the Lazarus findings, which led to the New South Wales Attorney-General referring the state's sexual consent provisions to the New South Wales Law Reform Commission, could create a shift to a yes means yes framework that accommodates trauma responses, such as freezing or submission, scenarios where verbal resistance may not occur. We believe this change also has the potential to positively recalibrate women's sexual roles into one where they are an active and enthusiastic participant in sex. YWCA Canberra believes positive consent can only strengthen relationships and individuals' undertakings of sexual communication and autonomy.

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

One component of our submission which does not form part of the committee's terms of reference but which we believe to be worthy of discussion nonetheless is the unique experience of those women who are targets of sexual violence, such as those with a disability, those from diverse groups, and young women. For this reason we urge that the reform is accompanied by consultation with Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, and women with disabilities to determine relevant communication methods and a legislative response.

On a final note we recognise this inquiry is taking place while consultation into the ACT charter of the rights of victims of crimes is occurring. We are particularly concerned by the constant, repeated references in public commentary on this issue that accusations of rape can ruin men's lives. These narratives silence the realities of women who live every day with trauma and a very real sense of shame, however misplaced, following a sexual assault or rape. Commentary about how positive consent legislation will open a floodgate to false accusations or the right to a fair trial is not reflected in the rates of reporting or conviction outcomes in other Australian jurisdictions where a version of positive consent is already in place—everywhere except the ACT.

THE CHAIR: Thank you. This morning we had evidence from the DPP in relation to how there can be a bit of a disconnect in the societal view of respectful relationships—I want to talk about the broad aspect of it and not just the consent part—on the one hand and how criminal law works and plays out in courts on the other. The DPP mentioned that consent, as it operates in the ACT at the moment in the legal sense, inherently has with it that it is a free and voluntary agreement and, therefore, that is the starting point. Do you have any comments on that?

Ms Machalias: It is unclear why the interaction of common law and criminal is a barrier to the implantation of these changes. It is important to note that these comments are out of step with legal peers in other jurisdictions, with sexual assault experts and even with the UN, which recommended in 2009 that member states should enforce positive consent legislation. The commentary surrounding the distinction between societal attitudes and what happens in the legal system is quite troubling because the two should be reflective of the other, and that, indeed, is the purpose of law reform.

We would see the interaction of positive consent legislation as setting really clear community standards around this, and the current interpretation of consent does not reflect current realities in the way that the DPP was arguing. For example, Ms Crimmins referred to common victim responses such as freezing; the legislation does not account for very common victim responses like that.

THE CHAIR: In saying that, I do not want to oversimplify what the DPP said. I know there are other aspects like recklessness and all sorts of issues.

MS CODY: Firstly, I note for the record that Leah Dwyer used to work in my office and I know her. I know her from a personal perspective as well. I wanted to pick up on something you were talking about then but also some of what you said in your opening statement, Ms Crimmins. I am assuming you heard the DPP's evidence.

Ms Crimmins: Yes.

MS CODY: I note the DPP also recommended that we need to have a conversation about positive consent and that it is a great place to start. Considering some of the concerns and issues they raised and that you have just rebutted, do you think there is a way positive consent can happen with this bill, possibly in a different format but still ensuring that we (a) reflect societal beliefs and (b) reflect the criminal justice system? Do you think having this bill out there will be a chance for everyone to be talking about it?

Ms Machalias: Absolutely. I think it is really positive that we are having a conversation about this. The bill is on consultation and that means some of the technical issues that have been raised can be worked. We are also in a very fortunate position in the ACT, being a little bit late to this party, if I can put it that way, in that so much precedent has already been established that will really assist us in drafting and implementing a very effective bill.

MS CODY: Ms Crimmins, you raised the New South Wales legislation in your opening statement. It is currently being reviewed because some legal areas believe it is not working as well as intended and that the system is not protecting women as well as it could. Have you heard the same thing? Can you expand on that and your opinions about that?

Ms Crimmins: The current New South Wales law still has a positive definition of consent.

MS CODY: Which they are new reviewing.

Ms Machalias: They are moving it into the direction of strengthening it. 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.

MR PETTERSSON: I note that in your submission you talk about any legislative reform needing to be followed with consultation with ATSI women and culturally diverse women. Is that adapting to a new framework or is that in respect of support services that are lacking in the ACT?

Ms Crimmins: It would be in the adapting to a new framework because, again, that is why consultation with them is very important in understanding communication around consent for those people that we have highlighted, particularly given that we know the levels of assault are higher in those communities.

THE CHAIR: In terms of the ACT being late to the piece and that we can learn from other jurisdictions, that certainly was one of the terms of reference that we had—what we can learn. Do you have a view on what would be the ideal jurisdiction that we in the ACT could look to? I know that there are slight differences in New South Wales versus Tasmania versus Victoria. Have you as an organisation got a view on which one you would think would be preferable?

Ms Machalias: New South Wales, because it has been done so recently, is obviously a clear place to start. Tasmania we know has looked at addressing some of the limitations that have been identified around the accused needing to take reasonable steps to ascertain the complainant's consent in order to raise a defence of a belief of consent. I think if that is a sticking point that is being raised by the legal community, we would do well to look at what Tasmania has done.

THE CHAIR: Certainly we are not trying to limit ourselves in terms of where we look, but it is good to know the starting points. In terms of your recommending that we look at New South Wales, the Law Reform Commission's inquiry is underway now. Do you think that it is prudent for us in the ACT to wait until that inquiry is done so that we can take some lessons from that discussion?

Ms Crimmins: I would be concerned, if it stalled and if it ended up based on arguments from lawyers, that we moved away from a yes position. I guess that, while we do need to wait, we need to be mindful that they still have a yes and a positive definition. I think we can still commence work on that framework. If there are any findings or learnings that can improve that, then again we could apply that.

MS CODY: Following on from that, you talked in your submission about implementation of a respectful relationships education program from kindergarten to year 12. We have currently got laws in place. Should we not be educating, full stop, about respectful relationships no matter where we go with the legislation?

Ms Crimmins: Yes. The short answer: yes, absolutely. Schools are the first point. We need to take this broader in the community. We need community campaigns on what consent is. When I go out socialising, I might be in a club. There will be a coaster reminding me about not drinking too much. What about a coaster reminding people of what consent looks like?

MS CODY: I guess that is my point. No matter which consent legislation we end up with, we should be having those conversations.

Ms Crimmins: Yes, that it is free and voluntary, and we should be enthusiastic in our public campaigns.

THE CHAIR: I have a follow-up on that. It is a societal thing. We are having this discussion, which is great. One of the issues that has come up is that if it is not enthusiastic then it is a no. Is there any concern at all that that might not take into consideration cultural differences? Sometimes we have people from different cultures where it is not a socially accepted thing to be enthusiastic when it comes to it. Does that place too much of an unfair burden on them? Are we are pushing them to do something that is outside of their comfort zone? You have raised the concern that you have with consulting with Aboriginal people, CALD people and women with a disability. Is that something that has come up or that you have considered?

Ms Crimmins: I guess we would say that these gender normative narratives still silence the ability of women to give free consent. We do have to be mindful of people's cultural heritage. But at the same time, women who are not able to give free consent are still impacted daily by the trauma of an assault and a real sense of shame. I think we need to be cognitive that sometimes this is used as power and control because the shame in those communities can be amplified within their cultural communities.

THE CHAIR: There are no easy answers.

Ms Crimmins: No.

THE CHAIR: If there were, we would have solved it by now.

Ms Crimmins: Yes.

MR PETTERSSON: In your submission you mentioned the United States of America, where yes means yes. Laws have been passed, followed by an education campaign. What would an education campaign look like? Would that include changing the curriculum?

Ms Crimmins: The national curriculum around respectful relationships is actually embedded. Our repeated calls are for what that actually translates to in classrooms in the ACT, in all of our schools, and how we support teachers in feeling confident about educating, particularly on consent. Yes, it is in the national curriculum. I do not think we need to change that. We just need to make sure that we are being holistic in our schools in how we teach that. Consent is one of the foundations, cornerstones of that.

But, again, I would say this can be extended to all the other institutions and the role we have in supporting universities in their educational campaigns on consent.

MS CODY: We had the report come out late last year about some of the consent issues, particularly on university campuses, and how different universities have reacted to that. That is in jurisdictions where there is positive consent legislation in place. Have you any comments on that?

Ms Machalias: I think that is a really good point. I think it is slightly incongruous that the ACT does not have positive consent legislation. In the report you are referring to, unfortunately the ANU was named as one of the worst institutions in Australia. So it should absolutely be a priority for governments at all levels that operate in Canberra to be making changes around this. I think all universities in Canberra are making some steps towards addressing this. We have made the point that best practice around consent is that it is done face to face and, as Frances said, in a holistic way; so things like a one-off module as part of orientation we would not see as addressing the root cause of the problem.

THE CHAIR: I have a follow-up on that. I think you started to address it. In response to those pretty horrific findings, universities have started to roll out education campaigns on consent. Ms Machalias, you mentioned that a one-off online module is not enough. What else would you recommend that universities do to ensure that consent is being spoken about, being addressed and being taught on campuses?

Ms Crimmins: I think it is then the next steps and the support for those people who report when an assault has occurred and an appropriate response to that. That has certainly been the feedback we have got from people. Again, it is this fear of reporting and what happens to the person who reports. I would recommend they need to establish trust in that, backed up with the procedures on how that person is supported. Again, if that does involve public commentary around sexual assaults and allegations of rape ruining the alleged perpetrator's life, we need to change that conversation to the impact on the person who has been assaulted.

I guess what we are trying to say is that we can do education on consent, but if there are no consequences for you and if the legal system does not support that, that will stop anybody who has been assaulted from reporting and trusting in the system. We see that through the campaigns that we mentioned. There is an inherent "nobody trusts the system" because of what occurs and the shame and stigma put on the person who reported.

Ms Machalias: I quickly add two points to the university piece. One thing we are also concerned about in Canberra is that international students are not part of that picture about the education around consent and what support services are available. That is something we would highlight. We also highlight that residential colleges are very much a part of the picture. We know that in other states there are very high profile colleges that have pushed back against any kind of accountability in this space. Universities really need to take responsibility at these residential campuses, regardless of the governance arrangements. They are part of the university and should be held to those standards.

MS CODY: Ms Crimmins, you were just talking about support for victims. There was something you mentioned in your opening statement as well about—

Ms Crimmins: The charter?

MS CODY: I know myself that sometimes women are afraid to report sexual assaults. Do you think that has to do with the current laws in the ACT or do you think it is a combination of everything—the stigma attached, the fear, the having to put yourself through some really arduous processes that can be quite daunting for any woman, for any man or for any person? Can you give your insights on that?

Ms Crimmins: Obviously, there is a combination. But what we see occurring in the ACT is that there is ambiguity in: was consent not given in the current negative definition? We note what the DPP was saying, that we are lucky to have a jury system. When a jury comes together, they come together with all of their biases and perceptions of what constitutes consent. For some of these people that might be kissing. Again, having a positive definition of consent would alleviate that confusion that was referred to by the DPP in their submission as well.

THE CHAIR: We asked the DPP about this. He mentioned that in addition to the common law definition of consent, which inherently has with it the free and voluntary agreement aspect, there are the directions made by a judge, including provisions in the Evidence (Miscellaneous Provisions) Act that make reference to "taking into consideration that honest belief must be reasonable". Are you not satisfied that that might be sufficient for a jury?

Ms Crimmins: No.

THE CHAIR: I suppose the crux of what I am asking is this: do you think that people are not being convicted in the ACT that would be convicted in New South Wales, for example?

Ms Machalias: I do not know if that is the case. The point I would make is that all those provisions you have mentioned would have existed in other jurisdictions prior to their introducing positive consent legislation. It appears that other jurisdictions have decided that that is not good enough. Unfortunately, the current situation is that our judicial system enables victim blaming, and until—

THE CHAIR: Is that unique to the ACT, though?

Ms Machalias: No. I agree; it is more widespread than that. But having in place a yes framework would go some way to alleviating, I think, the very justified anxieties that women have in coming forward, knowing that they are going to be submitted to questioning along the lines of, "How much were you drinking? What were you wearing?"

MR PETTERSSON: There are several submissions that are critical of the legislation as put forward. Do you have any recommendations for amendments to the bill as presented to us that you would like to see implemented?

Ms Crimmins: We recognise that the bill is in draft and that this is the opportunity to refine that. We are not here as lawyers. None of us are lawyers. This is the opportunity to refine that. There will be recommendations made, but we still do not move away from our position that we need a positive definition.

MR PETTERSSON: I understand that. I am asking whether you had any recommendations yourselves.

MS CODY: Apart from the positive—

Ms Crimmins: No.

THE CHAIR: Not from a technical point of view.

Ms Crimmins: Certainly not from a technical point of view.

THE CHAIR: Given the time, we will close. When available, a proof transcript will be forwarded to witnesses to provide an opportunity to check and suggest any corrections. On behalf of the committee, thank you for appearing today at the hearing,

MOINKHAH, MS ZAHRA, Young Women Speak Out
NANGRANI, MS TANVI, Young Women Speak Out

THE CHAIR: Welcome. Before we get started, can you please confirm that you have read the pink privilege statement and that you understand the terms contained in that in terms of the parliamentary privilege afforded to you?

Ms Nangrani: Yes.

THE CHAIR: Thank you. Would you like to make an opening statement?

Ms Nangrani: Okay.

THE CHAIR: Thank you.

Ms Nangrani: Good morning, committee members. Thank you for giving us the opportunity to speak from the perspectives of young people. We are both members of Young Women Speak Out. Young Women Speak Out is a Canberra-based organisation made up of five girls between the ages of 17 and 18. We are dedicated to challenging issues faced by young women. One issue that we feel incredibly strongly about is the protection of young women from sexual assault and rape.

We are living in the age of #MeToo. #MeToo was born out of a culture of men disrespecting and exploiting women. This phenomenon is not limited to the entertainment industry but extends to universities and workplaces. Young women are particularly in a vulnerable position as students or as young employees paving a path for their career.

Last year a disturbing report came out outlining the rates of sexual harassment at university campuses. Canberra's renowned university, ANU, disturbingly had one of the highest rates. In the period of 2015 and 2016, 1.6 per cent of national survey respondents reported being sexually assaulted in a university setting. ANU's rate was 3.5 per cent, double the national average; and 7.2 per cent of University of Canberra respondents said they had experienced being sexually assaulted in a university setting, compared to the 6.2 per cent nationally. Young women who are students are subject to sexual exploitation by some men in powerful positions for academic or economic favours. This power imbalance extends to workplaces, where young women's lack of experience and desire to succeed is often taken advantage of by people in power.

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.

It is beyond comprehension why changing the law is such a problem. In fact, it would be simpler if the law said, "Only yes means yes. If there is no clear yes verbally or physically, freely or voluntarily given, it is a no, and no means stop." It would remove any confusion and grey areas in the law. The current law allows for the notion, "They didn't exactly say no," which supports the notion that rape only occurred if it was violent and repeatedly refused. This may take place in some movies, but in real life rapes are taking place every day silently in our homes, universities and workplaces, where powerful offenders are exploiting victims by exerting various pressures.

The current law of consent protects perpetrators and fails victims, particularly young women. As young women, we are entitled to our bodies, our sexuality and our right to say yes or no. Consent should be recognised by its presence, not by its absence. As young women we deserve better and demand that the law in the ACT recognise affirmative consent. Changing the consent law is not the entire answer, but it is an important step in the right direction.

Ms Moinkhah: Thank you very much for having us today. Yes means yes. It is as simple as that, and that is how it should be recognised. In other aspects of life an absence of no, or silence, does not mean yes. So this should not be any different. Affirmative consent is extremely important to protect the members of our society and help them get justice if they have been wronged.

The committee has sat here and listened to complex discussions on legal technicalities when we should also be talking about pain and human emotions. The law is put in place for humans, and we are all humans. We have all been subjected to pain and cruelty, and we know how hard that can be to recover from. When somebody we know or care about is in pain or hurting, we do everything we can to make them feel better. So why is it that we are here questioning whether we should move forward and help the young women of our society? The law is put in place to protect the citizens and let them feel safe, but no young woman can feel safe when the defenders of the law are arguing to keep it outdated instead of moving forward and promoting safety.

I am a strong believer that actions speak louder than words. We can educate young people over and over again, but until we take action our words will not be enough and the message will not go through to them.

I am here so that young women no longer feel unprotected by laws that should have been put in place to protect them, so that if a loved one of mine is hurt she will be able to speak up and get the justice she deserves with the help of the law that is put in place to support and value her. If there is a single young woman in your life who you care about, there should be no question as to your supporting this change.

THE CHAIR: Thank you very much for your opening statements. The committee has heard evidence that, as the law currently stands, "consent" actually means free and voluntary agreement. So it is not a case of the law not having that definition; it just has not been put into legislation. Do you have any response to that?

Ms Nangrani: I know the current law accounts for some things, but affirmative consent really homes in to the fact of only yes means yes. I do not see a real acknowledgement of silence as a possible response to rape or sexual harassment that

might result from rape freeze or things like that. I understand that there are things the consent law has, but it could definitely be improved to account for more affirmative responses.

Ms Moinkhah: I agree. I think it should be a lot firmer and it should be a lot more affirmative.

THE CHAIR: One of the things you mentioned in your submission was under-reporting. Do you think if the definition was changed in statute that that would address that issue?

Ms Moinkhah: I believe it would because that way everyone has a clear idea of exactly what the definition is. People will then be more able to speak up because they will not be questioning, "Will my voice be heard or not?"

Ms Nangrani: The proportion of women who do not come forward may be due to the fact that they are not entirely sure of what took place, whether it actually constitutes sexual harassment and whether the legal system will even give them a chance because they did not say no or they did not show as much physical resistance as the consent law expects them to. The current law has a grey area that allows perpetrators to get away.

MS CODY: Thank you both for coming today; it is really good to hear points of view from young women. I want to touch on some of the things in your submission. Firstly, you talk about false allegations and raise a point that the ACT is expecting far too little around consent, that the current consent laws are not effective and do not address the problem with prolific sexual violence. Can you expand on that? Is that anecdotal evidence you have from being young women in Canberra? Have you got facts and figures to back that up or is it just what you believe?

Ms Nangrani: The definition around what a false allegation constitutes can sometimes be quite varied. It is sometimes quite difficult to gather specific statistics of how many false allegations there are. But I think it is reasonable to make the assumption that the actual numbers of false allegations versus the actual numbers of victims of sexual assault and rape are quite disproportionate.

Ms Moinkhah: If we changed the definition so that there was a clear definition, there would not be any room for false allegations.

MS CODY: That was going to be my next point—changing the definition gets rid of that false allegation.

Ms Moinkhah: Yes, because everyone knows exactly what the definition is and it is very clear and concise, so everyone understands it. I believe that would take away the false allegations because there would be no uncertainty about it.

THE CHAIR: Leaving aside the legal aspects—correct me if I am wrong, because I am a lawyer so I think about the law in a different way—most people do not sit there and go, "Legally this is what it means." Do you that think currently, in real life in the community, there is confusion about what consent actually means?

Ms Nangrani: I believe so, yes.

THE CHAIR: Where does that confusion come from? What is contributing to that confusion and ambiguity?

Ms Nangrani: The laws we have in place inform our culture. If we have a law that is not as clear as it could be, then why do we have it if it is not going to really make a difference? Of course, education and other factors are important things about consent, and schools have to do a good job of implementing that. But how can we expect that if the law is not up to the standard that I hope for it to be?

THE CHAIR: So is it your submission that, despite all the education coming through about yes means yes and consent is sexy and all of those campaigns, there are young women out there with a fear that unless they scream and shout and say no, then that is to be seen as consent?

Ms Nangrani: I believe so, yes.

MR PETTERSSON: Why is changing to a yes means yes model so important to young people?

Ms Moinkhah: I think it gives a clear definition. As I said, in other aspects of life an absence of no, or silence, does not mean yes. So when yes means yes it gives a clear definition to everyone and everyone knows exactly what counts as safe sex and what does not.

MR PETTERSSON: Are there factors that affect young people differently to how they affect older, more mature individuals that make this more pertinent?

Ms Nangrani: The law is going to apply to everyone; we are just speaking from the perspective of young women and from what we know and what we see. But there are a proportion of young women that are affected a lot by this, so we are trying to highlight that.

Ms Moinkhah: If we start with the young people, in later generations this will be less of a problem for the older people because it has started with the younger generations and followed through.

MS CODY: No matter what the legislation says, do you think there should be more education about consent?

Ms Nangrani: Yes. I know there was education in year 10 in high school and I know some of the people staying at university lodges have to complete quizzes and get some education. But I feel there should definitely be more education.

MS CODY: You were talking about—and I agree—when you educate the young it carries on into generations. But I am of that odd generation where my parents are from the hippie days and it was all love and peace and freedom. Then I came along and you start to get into those conversations about, "Well, you know, yeah, you

probably should just do what you're told," and then, "Oh, no. You should have a voice." Now we are coming into a generation where no means no and yes means yes, and that is as simple as it is. Do you think an education campaign that targets all those different generational gaps and changes would be worthwhile?

Ms Moinkhah: Definitely. And if the law is changed then people will start talking about it and those conversations will be open, and that can lead to people researching it more or having opportunities to get educated about it more.

Ms Nangrani: I think an educational campaign would be quite good. The new law would have a lot more clarity, which could then inform the educational campaign and then inform society as a whole. They are both things that need to interact with one another.

THE CHAIR: The recommendation in your submission is that we move to the affirmative model, ideally the Tasmanian model. What is it about the Tasmanian model that you believe is the optimal law reform direction in which the ACT should be going?

Ms Nangrani: An affirmative model that makes it clear that yes means yes is good. I know California also has a similar thing. Clarity around the definition is helpful. With any of the concerns people are bringing up around this model, I think it is important to look at places like Tasmania to see whether that is actually happening there.

Ms Moinkhah: Definitely clarity would help a lot because everyone would then be on the same page and everyone would have the same understanding. There would not be any confusion because there is clarity. It is very simple.

MS CODY: If there was no change to the legislation, do you think there are things that we (a) as government but (b) as a community could be doing better to put consent at the forefront of everyone's thoughts and opinions?

Ms Moinkhah: There definitely could be. As a community we could be raising more awareness about it, but I feel people are not going to listen as much unless the law is changed and it affects them.

Ms Nangrani: Yes, I agree. Law informs our culture and our society. We should not expect society to completely evolve on its own without our laws having the same standards. If there is a disparity between them, why not try and equalise it.

THE CHAIR: The committee has heard evidence from legal experts that the legal definition is currently what I think you are trying to say it should be. Is it a matter of legislation playing catch-up? If that is the case, is the question really that there is not enough awareness and education out there?

Ms Moinkhah: Even if we have a lot of education and awareness, actions speak louder than words. I believe the legislation would also have to catch up.

MR PETTERSSON: Are there any changes you would like to see to the bill as

presented?

Ms Nangrani: No.

THE CHAIR: I call this part of the hearing to a close. When available, the proof transcript will be forwarded to you to provide an opportunity to check and make any corrections. I thank Tanvi Nangrani and Zahra Moinkhah, on behalf of Young Women Speak Out, for appearing before the committee today.

BARRY, MS ERIN, Director of Policy, Youth Coalition of the ACT
CHOWDRY, MR KIERAN, Policy and Development Officer, Youth Coalition of the ACT

THE CHAIR: Welcome. Can you confirm that you have read the pink privilege statement and understand the rights and obligations of parliamentary privilege afforded to you today?

Ms Barry: Yes, I have.

Mr Chowdry: Yes.

THE CHAIR: Would you like to make an opening statement?

Ms Barry: Yes, please.

THE CHAIR: Thank you.

Ms Barry: To give you some background, the Youth Coalition is the peak body for youth affairs, representing young people aged 12 to 25 and those who work with them.

We participated in the earlier consultation this year with the ACT Greens and followed up with a further submission to this inquiry. I would particularly like to acknowledge my colleague Kieran Chowdry, who led the work around both of those submission processes. Kieran worked closely with ACTCOSS and the Women's Centre for Health Matters during both processes, and we add our support to the issues that they raised in their submissions as well.

The Youth Coalition broadly supports the proposed amendments to the Crimes Act and sees these changes as providing a legislative framework to inform sexual activity, to help determine if an individual has engaged in non-consensual sexual activity, and as an opportunity to potentially support cultural change and attitudes around consent and respectful relationships. In particular, we express our support for both elements proposed in the bill: to extend the two-year rule defence for consensual intimate image distribution for those under the age of 18, and the introduction of a definition of consent.

In relation to extending the two-year rule for consensual intimate image distribution, we feel that this offers some protection to young people who choose to consensually share images from potentially facing punishment for engaging in activities that adults can already legally engage in. This is especially important in a modern environment where technology has become more embedded in relationships and the ways that people express intimacy.

We do note, however, that the two-year rule defence is rigid and therefore criminalises image sharing between young people with a greater age difference than two years. Where such cases arise, it may be of benefit to have an independent third party involved in judgement resolution, such as the Children and Young People's Commissioner. We also note that the Women's Centre for Health Matters raised an

important point in their submission about the proposed legislation being inconsistent with commonwealth legislation, in which it remains an offence for young people to use the internet or a mobile phone to share their intimate image with another person.

In relation to legislating for a definition of consent in the ACT, we feel that this bill will bring the ACT into line with other Australian jurisdictions and place greater onus on the steps taken by a defendant to obtain consent, rather than relying on the factors which potentially negate consent and placing the burden on victims to prove that they resisted. The proposed legislation places responsibility on individuals to take positive steps to ensure that they have actively obtained and understood that the other party has provided consent.

In our submission we also identify that the State University of New York's explanation of affirmative consent prior to consensual sexual activity does not constitute future consent. Consent may be initially given but withdrawn at any time. When consent is withdrawn or can no longer be given, sexual activity must stop. We felt that the Women's Centre for Health Matters well represented and discussed this issue of ongoing consent and withdrawal of consent in their submission in relation to both sexual activity and the sharing of intimate images.

Our central message to the committee is that, while the proposed legislation is a crucial step forward in promoting mutual and respectful relationships, it alone will not be enough to drive cultural change and attitudes relating to sexual violence.

In relation to the sharing of intimate images, we believe that the legislation needs to be accompanied by a step-by-step guide on how to approach the revoking of consent for possession of an image that was previously shared consensually. For the legislation more broadly it is essential that it is supported by policies and resources that seek to challenge a culture that enables and excuses sexual violence, to prevent the likelihood of its occurring in the first place and to support individuals, including young people, to develop respectful relationships.

As such, long-term educational strategies are required, targeted across general and specific populations, including to children and young people. These strategies should be delivered in a range of settings, such as schools, universities, workplaces, and health, youth and community services. Primary and secondary prevention education is to be community wide, well planned and resourced, and effectively implemented and evaluated. We also support the recommendation from ACTCOSS that education needs to be provided to police and others within the justice system.

In summary, the Youth Coalition believes that the bill will help to assert the importance of mutual respect in relationships if well supported by universal and targeted education strategies, and that it provides a critical opportunity in the ACT to establish a framework for influencing cultural change and supporting young people to develop positive attitudes and behaviours.

THE CHAIR: Ms Barry, page 5 of your submission outlines the key elements to achieving an affirmative model for consent in the ACT. Of all of those elements that you have set out, what is missing in the current ACT law?

Mr Chowdry: Fundamentally what is missing from the legislation at the moment is an affirmative definition of consent. Right now we have six, seven or eight factors which negate consent. This is especially confusing from a jury's perspective. If you are a jury member in a rape trial and you are asked to come up with a guilty or not guilty verdict based on a non-definition, a negative definition basically, to work out from there if consent was present is very confusing. It has proven to be quite confusing in the past in jury trials.

THE CHAIR: Have you got examples of—

Mr Chowdry: R v Agresti—those sorts of cases have shown that it can be quite confusing for juries trying to understand, especially without a legal background. It has taken me and Erin and members of the community sector a while to fully comprehend the legal intricacies of the legislation around sexual assault. So for jury members who are introduced to that concept and then almost immediately asked to make quite a critical, life-changing decision for a person, it can be quite an enormous task. It is a lot to ask of somebody to comprehend what is essentially a very complex piece of legislation in a short amount of time.

THE CHAIR: If you compare the ACT and the way the law is currently with, say, New South Wales or Tasmania, where they do have an affirmative definition of consent in the legislation, are you saying that in the ACT the way that those types of cases play out results in a vastly different outcome?

Mr Chowdry: Not necessarily. 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.

THE CHAIR: From a social perspective and in terms of education campaigns that we have all seen—which is a good thing, because we want people to know about them—the fact that the ACT does not have an affirmative definition of consent has not stopped that happening. There are campaigns out there going "yes means yes", "consent is sexy" and all of those campaigns. So it is not like the definition has stopped the education campaigns from happening. Is that still a concern?

Ms Barry: It is important for us to note that we are not legal experts, that our take on this is not really a legal one and that we are not necessarily best placed to make judgments on that.

THE CHAIR: The question was more about the education aspect of it. The definition itself has not stopped campaigns pushing on a community level for positive consent.

Ms Barry: I think that having a legislative framework that sets out a definition of affirmative consent does establish a framework by which we as a territory determine what we consider to be reasonable and expected behaviour. That can inform young people who engage in sexual activity so that they understand what the framework is and what is expected of them to take active steps to obtain the consent of the other party. But that then raises the importance of ensuring that it is backed up by education in a really systematic way that looks across the community, across schools and across the life course, in a sense, to identify how we can best provide really consistent messaging about respectful relationships and what is expected of people when they are engaging in sexual activity, and how that it is supported by the legislation.

MS CODY: Following on from what you have been talking about with Ms Lee, this morning we heard evidence from the ACT Department of Public Prosecutions, and they were saying that the bill as it currently stands is quite confusing and actually does not necessarily back up the support that you are talking about for positive consent. Have you had a chance to review the bill from your own perspectives? Have you got any thoughts about that side of things?

Ms Barry: I have. I have to say that as a non-legal layperson I do find the terminology quite confusing, particularly in relation to the implications of the two-year rule and the ramifications of that for our young people of different ages, for young children under the age of 16 versus young people aged 16 to 18. For me, that raises the importance of how we translate that to different community groups and also how we address the discrepancy between that and commonwealth legislation, which means that young people may find themselves quite confused about what they are and are not allowed to do. So, yes, I certainly think it raises the importance of translation to the general community and how we interpret that.

Mr Chowdry: I completely agree. Again, we both do not have legal backgrounds, so a lot of this we are approaching from a more social perspective. While the wording of the bill can seem quite confusing and it takes a while to deduce what the intention is, what we got from the bill was an overwhelmingly positive movement in terms of trying to create a more fair and just system.

With regard to the introduction of the definition of consent and "free and voluntary agreement", which would align it with every other state and territory in the country, we saw that as for the most part being a movement towards a very mutual and respectful relationship which emphasises the importance of both or all individuals having an equal say and equal standing in the relationship.

On the two-year rule, we did note that it is quite prescriptive. What we do not want to see is young people unfairly criminalised for behaviour which is fairly normative in today's society. We have become a more digital society where relationships are evolving. Intimate image sharing is quite commonplace in young people's relationships and, if done consensually and safely, there is no reason why we would want a young person to be unfairly prosecuted for that.

We have been alerted to some of the concerns around the legal terminology but we have, as we mentioned in our submission, left responsibility for the specific legal wording in the bill to the legal entities involved. That being said, what we understood from the bill is that it has a very progressive and socially beneficial outcome.

MR PETTERSSON: I am piecing together a couple of different things you have said here. I want to lead with the question of what exactly is going to change. You stated that in jurisdictions that have introduced affirmative models conviction rates do not change. You also stated that the legislation itself is confusing and a layperson cannot read and understand it. So is this about changing how the wider society talks about sexual assault, or is it actually going to change anything occurring within society?

Ms Barry: That really depends on how it is implemented. Something came out of the model being implemented in Tasmania. A lady named Helen Cockburn did a thesis in 2012 which reviewed the shift to an affirmative model and found that the reforms were not implemented as intended and that judges and counsel tended to rely on pre-reform notions of consent. She found that there was general reluctance or inability to engage with the new concept, which needed to be addressed by providing education about the meaning and effect of the amended legislation. So to that extent there are learnings for the ACT from Tasmania. Having said that, I am aware that her thesis was published in 2012, and I am not sure what the state of play is now and how it has changed since then. It shows that it needs to be part of a package.

I think legislation is critical in setting a foundation for how we expect people to behave in the ACT and that it needs to be supported by a suite of other policies, initiatives, programs and training to support the cultural change to happen. It sets a benchmark, essentially, which we should be aspiring to achieve.

Mr Chowdry: One of the things raised in that thesis was the treatment of and the way in which we view victims of sexual assault in society. There has been a tendency, from a historical perspective, to view the victim as having to substantiate their claims, when the onus should be on the prosecution to prove guilt beyond a reasonable doubt. It can be quite intrusive, quite demoralising, for victims or alleged victims of sexual assault.

What that thesis was highlighting was that, despite the legislative change, there had not been a meaningful change in the way the courts had dealt with victims of sexual assault: that they still saw them as essentially making it up unless they could prove otherwise. In her thesis essentially what she is trying to articulate is that the legislation was meant to have the effect of not putting the onus on the perpetrator but actively asking the accused what steps they took to obtain consent, rather than focusing on the steps that the alleged victim took to not consent. So it is about shifting not the legal onus but the social onus away from the victim to the perpetrator. What I think her thesis wanted to show is that, despite the change in legislation, that had not occurred.

But that was ultimately the goal of the legislation. It was to provide victims with a bit more reprieve, a bit less fear that, if they come forward with their claims, they will not be chastised and ridiculed and their professional lives will not be broadcast on a global scale, which is what occurs in a lot of legal cases. A lot of victims are scared to come forward because their entire lives will be broadcast for the world to see. All

their flaws and all their characteristics will then be a headline issue. So it is about changing the way we see acts of sexual violence and focusing on steps to obtain consent, rather than steps that the victim took to not express consent.

THE CHAIR: Thank you. We will have to close it there. When available, the proof transcript will be forwarded to you so that you can check it and suggest any corrections. On behalf of the committee, thank you very much for appearing before the committee today.

KLUGMAN, DR KRISTINE OAM, Civil Liberties Australia
McLEAN, MS ELLY, Civil Liberties Australia

THE CHAIR: I welcome Ms Elly McLean and Dr Kristine Klugman, who are appearing before us on behalf of Civil Liberties Australia. Can I confirm for the record that you have read the pink privilege statement and understand the obligations and rights afforded to you by parliamentary privilege?

Dr Klugman: Yes, I have.

Ms McLean: Yes, I have.

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

Dr Klugman: Yes, Elly will make it on behalf of Civil Liberties Australia.

Ms McLean: As a new member of Civil Liberties Australia and a first-year law and finance student at ANU, I have had a chance to review, and be a part of supporting, the ACT Greens' proposal. We would also like to support what was said by the Youth Coalition and brought up by the women's groups. There needs to be a clear and unequivocal change to the definitions in the consent act. We would like to move from what we find to be quite a troubling and difficult definition to have and to change that to a positive and affirmative movement forward. Civil Liberties Australia are involved nationally in lobbying for and supporting positive social and legislative movements, and we would like to be involved again.

THE CHAIR: Thank you. On pages 2 and 3 of your submission, you try to rebut some of the arguments that have been made by some of the lawyers in respect of problems that they see in this law reform area. You say:

> There already exists common and statutory law structures in Australian jurisdictions, and across the world, that provide tested and reliable processes for the ACT to mirror this positive reform!

Can you give the committee examples of what you mean by that?

Ms McLean: It was brought up before that Tasmania has a very strict and very positive affirmative consent model that could be implemented. It really is the main argument against all the rebuttals that we have had in that it is operating and it is functional. To take it on does not seem to have any negative effects. I cannot bring up an international example off the top of my head, but I feel that we would likely find one with European models. I could offer that to the committee at a later time.

I made a point when producing the submission that there should be a look into the papers and submissions that were made and the letters about concerns being voiced by the community. I felt that was a stand we should take more from a social and community perspective. It seemed that most of the ones surrounding unenforceability and being difficult to bring in were negated by the fact that Tasmania does have really

positive, strong consent laws. Victoria does recommend to juries to treat it in a positive sense and New South Wales, obviously, is doing the same reform at the moment.

THE CHAIR: You have brought up Tasmania as an example of where it is working well. Leaving aside the fact that we just had the discussion with the Youth Coalition about some of the issues that were raised in the thesis by Ms Cockburn, there is an aspect that I want to go to. I know that you are a law student—

MR PETTERSSON: First-year law student.

THE CHAIR: I hope this is going to be okay; it is a bit of a technical discussion. I say this as a former law lecturer, by the way. The Tasmanian definition goes on to talk about consent meaning free agreement. The proposed wording in the bill in the ACT that is before us goes on to say that it is a person who gives it by free and voluntary agreement and the other person knows that the agreement was free and voluntary or is satisfied on reasonable grounds that the agreement was free and voluntary. I understand that you are saying that Tasmania is a good one to look at, but what we have being proposed in the ACT is different. Do you have any comment on that?

Ms McLean: Whilst the wording is different, and that could bring up issues in the future, it is likely that it would still lead to a progressive step brought into place so that it was treated almost the same, in that if someone was able to show that they brought forth positive consent, it would generally be treated as understood by the other party. I believe that whilst—

THE CHAIR: Is that not happening now under the current ACT law, do you think? Is that your submission?

Ms McLean: That is our submission: that it is not at the moment.

THE CHAIR: This morning we had evidence from the DPP to say that it might not be in the legislation but the reason that it is not is because consent in itself inherently must mean that it is free and voluntary agreement.

Dr Klugman: I am not sure that is valid, actually. I think basically, as the alliance was saying, the onus has been, in the past, on the woman to prove that she was not molested. This legislation goes some way towards reversing that balance, if you like. For many years the onus has been on the woman to state that, yes, it did happen. It is a very difficult area. What Civil Liberties would consider is maybe a five-year sunset clause so that we will see how in fact it acts in principle and in practice and then have a chance to review it, with more community consultation, at the end of, say, five years.

THE CHAIR: Right.

Dr Klugman: This would say how it does work in the ACT. The ACT society is different from Tasmania. I think it is more informed. But we would see how it did work out and then an evaluation could be done as to its effectiveness.

THE CHAIR: Dr Klugman, you mentioned just now in respect of what I said to you about what the DPP's submission was that you do not think that is valid and that the onus has always been on the woman—I am just repeating your words—to show that she was molested. Are you suggesting or submitting that that should change?

Dr Klugman: I think the balance has been wrong in the past. As I said, it is an extremely complex question, but the balance has been against the woman, as it usually is, in the past. This legislation tries to redress that balance, in our view.

THE CHAIR: How do we as a committee deal with the fact that in the criminal law system we have a fundamental principle, on the one hand, of innocent until proven guilty? The second is that in criminal proceedings the onus must be beyond reasonable doubt. Are you saying that we have got that balance wrong?

Dr Klugman: I think sexual assault is a particular case. I mean, it is being played out now in the US, with a Supreme Court judge. We have seen that it is a very topical thing for us to be discussing.

THE CHAIR: No doubt, and that is why the committee is looking into this, which is a good thing.

Dr Klugman: It is a good thing. It is extremely difficult. If Kavanaugh was drunk and he literally does not remember that he assaulted somebody, drunkenness is no defence against assault. But it is a very complex area. As I say, I think that this legislation is a step in the right direction. I think that if it were reviewed in five years to see what the practical implications had been in the courts, that would be a step in the right direction.

MS CODY: I want to touch on your submission. Well done for reading through the whole bill as a first-year law student; good job! In your submission you talk about the arguments opposing the bill or the reforms being "malignant, unevidenced and damaging to Canberra and the country moving forward". Could you expand on that a little?

Ms McLean: I can. The first time I had this brought up with me was when we proposed to make a submission. Perhaps it was a more emotive than necessary in my submission. But the first three months of my move to university were spent being taught through pillar sessions, especially following the red zone report, that if you say yes you are safe and if you do not say yes there will be legislation and there will be people there to protect you.

Perhaps I did go a bit far, but it was very tough finding that the legislation and the bodies that were supposed to protect us, and that we were being told specifically would do so, were not actually going to be there for us in the cases that we were shown. Reading through some of the letters that were submitted and trying to get into contact with some of the people to understand where they were coming from, it seemed that the only responses that I met with were a fear of change.

What was produced was not really arguments more than, "It's different from what we've had. How will we know it's actually going to be able to work? It has a negative impact. What can we do against it?" I believe that all of those arguments could be met

with, "There is evidence of it operating in a supportive sense. There should be a sunset clause if anything did go wrong with it and there is enormous support in the community for it to change."

Speaking to my peers over the last few weeks after producing this submission, it felt that we needed to bring a bit of emotion into it to show that. I understand that, being a first-year law student, I do not have as many credentials or the legal understanding to offer that, but I felt that I could bring this perspective and put it to the committee.

THE CHAIR: That is important. The terms of reference for this inquiry are broad on purpose to make sure that we are getting the community's views; so do not apologise for being a law student.

Ms McLean: Thank you very much; sorry.

MS CODY: I also think it is great that you have done a lot of research. Did you have a chance to read the DPP submission to our inquiry or hear his evidence today?

Ms McLean: Unfortunately not; sorry about that.

MS CODY: Do not be sorry; that is fine. In his submission he talks about the fact that the current proposed bill is quite confusing and actually does not necessarily set out positive consent as is meant by what you are trying to say we need. Are there things in the bill—I am stealing Michael's lines now—that you think need to be changed to make it even better? You said in your submission you are quite in favour of the bill and you have urged all MLAs to support the Greens' bill. But looking at some of the other evidence that we have seen, they are saying that the bill is not quite as positive as it could be or should be. Are there things you would like to see in the bill that are not currently in there?

Ms McLean: Not being particularly intimate with the bill, I would like to see a short sentence or something—a small statement—along the lines of consent being the presence of a yes or consent being the presence of positive action, rather than the absence of no or a negative action. I would like to see a clear statement like that, not only for the clarity of the bill itself but for those reading it, for jurors and for the community as a whole. I believe that a statement along those lines to summarise what had come before would have a really positive impact on the bill's construction.

MS CODY: Do you think the current bill could benefit from minor tweaks such as those you have just discussed?

Ms McLean: Indeed I do.

MR PETTERSSON: I want to follow up on something that you said, Dr Klugman, when you talked about the onus of proof being on accusers leading to low conviction rates. Is that what you were implying before?

Dr Klugman: Not necessarily low conviction rates. Again, it is a culture; it is intertwined with women's reluctance to come forward when they are faced with these situations because it is so hard and there can be derogatory things. Slut shaming is

something is a reality. It can damage people's whole lives. I think that it is a very difficult thing.

Civil Liberties is in favour of balanced rights. We are very aware of the rights of men, of wrongfully accusing a man, because it can also have very detrimental effects on men. We are quite cognisant of that. It is a very difficult situation, but we think that this legislation is positive. It may do with some clarification, but that is why we would advocate a sunset clause to see how in fact it does operate in practice.

As the alliance said, it is to do with education; it is to do with culture; it is to do with attitudes. It is about making women more prepared to come forward when there are legitimate claims of sexual assault and not being scared that making a claim will be detrimental to their entire lives.

MR PETTERSSON: Following on from my original question, do you think that shifting the onus of proof to the accused in cases of sexual assault would help remedy some of those societal ills?

Dr Klugman: I think it might. I am not sure how it would work out. That is why I think a sunset clause would be a good thing. I know that the onus of proof is a very important, basic, fundamental premise that the law is based on. It should not be thrown over lightly.

THE CHAIR: Given the time, we might close there, unless anyone has any burning desire for further questions.

Dr Klugman: Do you have anything else to say, Elly?

Ms McLean: No.

THE CHAIR: Any final comments?

Dr Klugman: No. We are very pleased to see this initiative for the legislation and we urge MLAs to support it.

THE CHAIR: Thank you. When available, a proof transcript will be forwarded to you both to provide an opportunity to check and to make any corrections that you might need to make. On behalf of the committee, I thank Elly McLean and Dr Kristine Klugman for appearing on behalf of Civil Liberties Australia. Thank you for your evidence.

The committee adjourned at 12.25 pm.