LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

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

Members:

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

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 9 OCTOBER 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 2.03 pm.

HOPKINS, DR ANTHONY, ACT Bar Association

THE CHAIR: Good afternoon, everyone. Today the committee is holding its third public hearing on the reference of the Crimes (Consent) Amendment Bill 2018 to the standing committee. The bill is a private member's bill introduced into the Assembly by 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 the committee identified as the basis for its examination of the bill. The committee has received 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 live and broadcast live.

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 today, Dr Anthony Hopkins, representing the ACT Bar Association. Dr Hopkins, can you please confirm for the record that you understand the privilege implications of the statement?

Dr Hopkins: Yes, I do.

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

Dr Hopkins: I am aware that is the formal process. Having regard to the fact that I am representing the bar and coming along to answer questions in a follow-up to the appearance of the then president, Ken Archer, I have not prepared an opening statement. I am happy to take questions from the standing committee. I will discuss any matters in relation to the bill.

THE CHAIR: Obviously the Bar Association made a submission, and Ken Archer, who was the president at the time, gave in-camera evidence to the committee.

Dr Hopkins: I have read both the submission and the in-camera evidence.

THE CHAIR: One of the concerns the bar raised during the in-camera evidence was the potential, probably unintended, consequence of reversing the onus. Could you expand on the bar's concerns around that area?

Dr Hopkins: It is wrapped up in proposed section 67, the meaning of consent. Before I go to the concerns specifically in relation to that provision, I note that I cannot locate anything in the bill that indicates how it is designed to interact with the actual offence provision, which is section 54, and one of the relevant offence provisions, which is

sexual intercourse without consent. That offence provision sets out the physical and fault elements of the offence.

Section 67 purports to also set out or alter the fault element, although there is no clarity with respect to how that is designed to interact with section 54. That raises a general concern consistent with that raised by Mr Archer, which is that whilst reform in this area is very important and very significant, we need to be careful as we do it that we do it clearly.

Even though I did not make an opening statement, we have to be cognisant of the fact that New South Wales is currently undertaking an inquiry and is receiving very significant submissions directly on this issue of what should be the physical and fault elements and that other jurisdictions have undertaken significant reforms in recent history. For the ACT to progress in a way that lacks clarity and is perhaps out of step is highly problematic, in the bar's view, from the perspective of clear law reform and clarity in terms of application of that reform. That is a background to your question.

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

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

MS CODY: A lot of non-legal groups have spoken to us in the public hearings, and I understand some of the concerns they have raised on this issue. Is there a way we can have a positive consent terminology or definition and still be able to achieve legal verification and be able to ensure we are protecting women?

Dr Hopkins: I suppose the purpose of having a standard that might be referred to as a positive consent standard would be to increase the protection of women or those that might be victims of sexual assault.

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

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

Coming back to that point about the review being undertaken in New South Wales. That is precisely what is being discussed. In New South Wales there is an objective standard, so an objective way of proving the fault element or mens rea element, and yet there remain concerns about whether that is achieving its purpose.

It may be at the end of the day in that review that it is the practical considerations around the implementation of that law or perhaps the lack of clarity rather than the law itself that are seen as problematic. It is too early to tell, but it represents a step beyond where we are in the ACT.

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

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

MS CODY: Some of the concerns raised—a misunderstanding in some respects—have been around there being no reasonable definition of consent. As a lawyer, how would you go explaining that at a jury level, in plain English, for the person off the street?

Dr Hopkins: I would defer to those such as Ken Archer who appear in jury trials on a regular basis where the concept of consent needs to be explained. I am aware from having read the transcript that the current Director of Public Prosecutions takes the view that consent is defined clearly at common law as being freely and voluntarily given. I am not in a position to confirm a view of that. It does not accord entirely with my understanding of clarity and, generally speaking, other jurisdictions have chosen to be clear about that.

The disagreements or at least some of the tensions, which again I think will be in the spotlight in New South Wales, will be over things such as should it be "free and voluntary agreement" or "freely and voluntarily given". There are subtleties around that but, again, that goes to the idea of what is sexual intercourse? Is it an agreement to participate in an act or is there a problem with "agreement" in that it may bring in a whole set of legal concepts?

I think those are very important considerations, yet I do not think we should, firstly, jump to a determination of that. Secondly, I come back to the point about wrapping it all up into a definition that seems to pick up the mental or fault elements together with that. There is the potential to see that issue as how we define the physical element. Obviously there will be a relationship to the mens rea or mental element or fault element, but at the moment the proposal does not give clarity around that.

THE CHAIR: Keeping in mind what you said earlier about the bar's position being

that the subjective fault element is preferable—

Dr Hopkins: Sorry, I think it is a stronger position than that in the sense that the bar's position is that subjective fault should be a precondition of a serious criminal penalty. That said, there are examples, obviously, where serious criminal offences have aspects of objective fault within them.

THE CHAIR: And one of the comments you made earlier was that this proposed amendment goes beyond objectivity because it is essentially reversing the onus.

Dr Hopkins: It may not be the intention, but that is the wording of it.

THE CHAIR: This is part of the reason why we are having this hearing, to ensure that it does not have any unintended consequences. New South Wales has an affirmative communicative model of consent. I know that that is the sort of terminology that is being used at the moment. People have probably been concerned about the outcome of the Lazarus case, despite the fact that there has been that definition since 2010. For the everyday person, not the sort of legal theorists or the lawyers, what is the bar's view? Can you explain it in terms of specific issues that need to be looked at in that context with the case that has come out, despite the fact that there was an affirmative model?

Dr Hopkins: I will not speak directly of the bar's position in relation to that. But my understanding of the controversy that has arisen after the Lazarus case is that there are perhaps two ways of looking at it, and spectrums in between. One way may be that there is nothing wrong with the law but that what was misunderstood were the steps that have to be taken to constitute having reasonable grounds for a belief.

There is obviously a tension between what was decided by the trial judge and the court of appeal. One argument may be that it is not so much the law but the application of it and where the focus has been put. Perhaps that can be addressed by a refocusing of the law, simplification and so forth. We will see what comes out of that review in due course.

But the view that would have it that there is nothing wrong with the law suggests that perhaps what we need to do, in terms of the trial and the trial system, is to be looking at other innovations that can deal with those issues of prejudice and stereotype that may continue to creep into the decision-making process that hark back to older views of consent, outdated views of consent.

I think it is really an open question at this stage to be resolved—whether we are looking at targeted law reforms, perhaps even directions to juries or directions that would apply in judge-alone matters, but it is a jury trial in the ACT—

THE CHAIR: Yes.

Dr Hopkins: or some other reforms, including perhaps education. Even in New South Wales there are discussions about the specialist jurisdictions which would perhaps go with future considerations of intermediary trials and so on. So it is a large issue.

Perhaps the only thing I have not referred to that I think is worth referring to is that, insofar as the ACT intends to continue with the codification project, there is this question about whether or not we should be looking to put sexual offending within the Criminal Code after a full review, seeing that as the place where we move offences that have been considered and determined to be, if you like, an appropriate scheme or raft of offences within a particular area.

That is a side issue. I know that is not really one of the focuses. But it seems to me that this suffers a little by simply adding in a definition of consent that complicates things without perhaps adequately taking into account the reforms and reform processes elsewhere but perhaps also not taking into account that larger idea of clarifying, rather than complicating, a particular area of law.

THE CHAIR: I again want to go to this issue: obviously, there is tension between the honestly held belief of the accused on the one hand and then whether objectivity and reasonableness come into it. One of the factors that the DPP spoke about when he gave evidence was the extent to which the Morgan defence still applies in the ACT and whether that perhaps is where the room for reform may be. Do you have a view—keeping in mind, once again, the bar's position about subject fault element?

Dr Hopkins: Yes. Certainly this reflects some things that Mr Archer said in his submission. As the law currently stands, an honest, though mistaken, belief in consent would stand against a conviction. However, the reasonableness of the belief is something that gets taken into account in determining whether or not a belief is honest. So the more unreasonable a belief may be, the less likely it is to be considered that there is any doubt about the honesty of the belief held.

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

THE CHAIR: Yes.

Dr Hopkins: They are currently the only three ways, or mental states. But obviously reasonableness and unreasonableness bear upon the factual determination of each of those elements.

THE CHAIR: While we are on this, one of the other things that Mr Archer was concerned about was, I suppose, the different standards. There is the suspicion, there is the belief and then there is the satisfaction.

Dr Hopkins: Yes.

THE CHAIR: Given the way the bill is written, it actually requires a suspicion to be held. That was one of the concerns that he raised on behalf of the bar, that it is too

high a burden.

Dr Hopkins: Yes. I think that the focus of the concern, as I understood it, was this idea that it would have to be satisfied on reasonable grounds. On its face the bill seems to suggest that there will be a legal burden on the accused to prove that they were satisfied, which, as Mr Archer puts it, is a high standard. It is not completely unknown for legal burdens to fall upon an accused and for those to be, for example, on the balance of probabilities and so on. But this is setting the bar very high in relation to a very, very serious offence. As far as I understand it, it would certainly be setting us out on our own in Australia. So I think that is a very genuine concern.

MS CODY: I want to have a quick chat about the intimate image side of the bill.

Dr Hopkins: I am happy to have a chat about it. It may be that it goes beyond what I am very well prepared to discuss today, but I am happy to assist as far as I can.

MS CODY: I note that there was a small part of the submission that talks about that side of things.

Dr Hopkins: Yes.

MS CODY: Broadly, there seem to be some concerns that the Bar Association is raising.

Dr Hopkins: I think Mr Archer has indicated a lot of concerns that go to the formulation of some of those provisions and the potential unintended consequences of catching younger people, who we acknowledge are involved in sexual activity, and yet criminalising that conduct in ways that would be inappropriate and in ways that could destroy those young people's lives.

I note that some of the concerns he raised hark back to other submissions the bar made about the potential unintended consequences. Then, as I understood it, there was a concern about this, though well intended. I think it is hard to say. Certainly the bar does not support the inappropriate criminalising of young people on sexual conduct. It recognises that and would stand on all fours with the other organisations and people that have submitted in relation to concerns around that.

The concern that I think Mr Archer expressed on a number of occasions is that simply to put a consent provision in does not necessarily address the bar's concerns. Picking out one of the examples, if you have a provision that effectively means that it is illegal for one child to show another child something that depicts an area of the body that could be regarded as sexual and so forth—without going into the details of the sexual offence provision—there is no way that the child being shown that image could be said to consent to being shown the image, really, in the ordinary course of how that might happen within a school or private environment.

There is just a concern that that does not perhaps achieve the fix to the inappropriate criminality. But the bar does not want to be seen as speaking against provisions that would avoid the inappropriate criminalising of young people. I would again defer to Mr Archer, even though he is no longer the president, as someone who has focused on

those particular reforms in much more detail than I have before attending.

I do not know the technicalities. He notes the technicality and the technical aspects. But I note that idea that, if you put in an overarching provision, you have to look very closely at how that will interact with each of the different offence provisions.

MS CODY: As succinctly as possible, how would you describe to a first-year law student, for example, what the impacts of this bill are?

Dr Hopkins: I have to confess that I find it very difficult to understand exactly what this law means.

MS CODY: Okay.

Dr Hopkins: I think that that would be part of what I would say, because when I speak to first-year law students I do not pretend to know what I do not know. I would say that that is not the case for other provisions elsewhere that I have looked at, some of which are very simple. We may agree with them or not agree with them from a policy standpoint, but we can interpret them quite easily. I think that is what I would say.

THE CHAIR: We have received a lot of submissions. One of them—I think it was from the Human Rights Commission, but I may be confused—talked about how their concern was that it seemed to conflate the two issues—on the one hand, the affirmative model of consent and on the other hand bringing into that definition clause 67(1)(b), which requires that the other person knows. Would it fix the concerns that the legal fraternity has if that were to be separated in any way? I am just thinking out loud in terms of—

Dr Hopkins: In terms of clarity, this was, I suppose, the project of the code as well, the idea of being very clear about what the physical elements are for an offence and what the fault elements are. That deals with the issue of clarity and the way it should operate. Then also being very clear about the burdens can be very effective. That would potentially draw that out and deal with the issue of clarity. That is then a separate issue to precisely what are we trying achieve and what does the ACT wish to criminalise in terms of conduct. But I think it is useful to keep those separate.

Start with, "What do we want?" but also then be very clear about how we achieve that. That allows us, for example, then to say to the first-year law student or the high school student in the educative project around this, in the communicative model, "This is rape; this is sexual assault; this is what consent means." I think clarity is essential.

THE CHAIR: One final follow-up: the Law Society has raised concern that the words that have been used in other jurisdictions as well—the free, the voluntary or the agreement—are all at risk of being ambiguous terms in themselves.

Dr Hopkins: I think there is always that risk. Again, I am aware of the director's submission that that is essentially the way the common law stands. As I have indicated, I am not in a position to say that that is correct or not correct. But it does

not appear to me clear. I think we should be open to the definition of consent being something that is expressed rather than simply being negated—negated in this situation or that situation. But I also think it is very useful to draw that out from precisely what has to be proven with respect to that consent under the fault elements. Yes, I have read that submission.

I do note also that their submission indicates that it is their strong view that the ACT should wait until the outcome of the New South Wales reform. I am on all fours, and I think the bar is on all fours, in relation to that. That is not to say that we should not move. That is a separate question. It is just about the process and how we achieve this.

Perhaps the only thing I have not added—I know time is short—is that the reality of a small jurisdiction is that we draw upon other jurisdictions for judicial interpretation of provisions. To go our own way is sometimes appropriate, but in other situations it means that you cannot then draw upon the judicial developments elsewhere. Essentially, you will have decisions needing to be made based purely in relation to that and there may be some unknowns. Even in respect of the idea about whether consent should change across the board, we need to be thinking about these things. If you go to Queanbeyan, does that suddenly change?

THE CHAIR: Yes.

Dr Hopkins: These are relevant considerations for all jurisdictions, I think—to have regard to the developments happening elsewhere.

THE CHAIR: Given the time, I will call an end to it here. 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 bar today.

Dr Hopkins: Thank you for the invitation to appear.

KUKULIES-SMITH, MR MICHAEL, ACT Law Society
DEL PIERO, MS NATASHA, ACT Law Society

THE CHAIR: I welcome today's next witnesses, Michael Kukulies-Smith and Natasha Del Piero from the ACT Law Society. Can you confirm for the record that you understand the privilege implications of the pink statement on the table?

Mr Kukulies-Smith: Yes, I do.

Ms Del Piero: Yes. I have read it and understood it.

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

Mr Kukulies-Smith: I appear as chair of the ACT Law Society's criminal law committee. In terms of the proposals in this bill as they relate to changes to the laws of consent, the society is strongly of the view that at the present time it would be premature to make the changes, particularly in light of the large-scale law reform project that has been announced in New South Wales essentially addressing or at least overlapping with, largely, that issue. The reality is that a small jurisdiction like the ACT is not going to be as well resourced as the New South Wales Law Reform Commission in terms of the scale of that project.

Also, we are a jurisdiction wholly contained within New South Wales in a geographic sense. Obviously people from the ACT routinely cross the border and go to Queanbeyan and the like and, similarly, people come from Queanbeyan to here. When that law reform project is in the wind, the view of the Law Society is that we should wait and see what is happening in relation to that before commencing with significant reform of our own law. The proposed reform in some ways moves our law towards where their law now is, but in circumstances where it is clear that their reform is about moving their law from there to somewhere else, it would be prudent to wait, rather than rush ahead at this time.

THE CHAIR: Ms Del Piero, do you have anything to add?

Ms Del Piero: No. What Michael said is great.

THE CHAIR: You just mentioned that we are looking toward moving to where New South Wales are, and they are looking at moving elsewhere. But the proposed bill is not quite that, is it? The bill we are inquiring into now goes beyond a—

Mr Kukulies-Smith: It does. The first limb of the test—the "freely and voluntarily" or "free and voluntary"—although using slightly different words is the same concept in that the consent is free and there is voluntary agreement. But the second limb of the test in terms of the fault element and the knowledge in the mind of the accused is certainly different in the bill. In terms of the onus it creates upon a defendant or an accused, it goes beyond the position currently in New South Wales.

THE CHAIR: Could you expand on the society's view in relation to those two elements being contained in the same clause.

Mr Kukulies-Smith: It is difficult to explain to juries. Going through all the materials that have been put out variously in support of the bill, starting with Greens' position paper in February of this year—which I assume the committee has as part of the materials—one of the things noted is that jury attitudes are very influential in relation to the verdicts in sexual assault cases. As a practitioner with 15 years experience in that area, I echo that. That is really where the issue is.

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

Adding more law and adding more complexity is not simplifying that process. I would suggest, and the society would suggest, that it is in fact making it more likely that they will fall back on their own prejudices, their own gut instincts in relation to the case, rather than the legal tests being espoused. That is particularly significant in the ACT, where there is no ability to have a judge-alone trial for sexual offences. It is one of the categories of offences that is precluded from judge-alone trial. The Legislative Assembly has seen fit to take that step, but that means that in many ways it would be desirable that the tests be simplified rather than made more complex.

Having two separate issues dealt with in the one apparent test is going to be very hard to unpack for a jury. It is going to be very hard for a judge to explain that to a jury. I heard the earlier evidence of Dr Hopkins, on behalf of the bar. He was asked how he would explain it to a first-year law student and he struggled with that answer, and rightly so, I think. The question is: how is a judge going to explain this to a jury and how is a jury going to understand? If the jury cannot understand then it does not matter what the test is. If it becomes too convoluted for a jury to understand, the test becomes irrelevant and the jury go and do what the jury want to do.

Of course, we do not know what the jury are doing. We have to presume they follow what they are told, but if it is difficult to understand, can we reasonably presume that is what they are doing or are they, in fact, just taking a best stab at it? That comes down to jury prejudice, which comes down to some of the issues around this bill appearing to be a normative attempt to change attitudes to consent in the community. The Law Society questions whether the laws of sexual assault are the right way to make that normative change.

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

In relation to laws of consent, I suspect that is not the case in the same way. Yes, penalising and criminalising activity does have an effect, but getting down to the nuances of how consent plays out in a bedroom is not something which is likely to be changed effectively by changes to the criminal law. Ultimately it is educative

programs in the community that the Law Society feels are a better place to make such changes than tweaking the criminal law as it applies in the courtroom scenario, which is probably not considered by defendants or accused at the time that they are in a bedroom situation, thinking of engaging in sexual activity.

The first time they think about it in those details is when they are in a lawyer's office, having been charged. That is probably the truth. I query whether they ever actually will understand those nuances in the way the test sets out. That is a concern the Law Society has about overcomplicating the test. The rationale for complicating the test seems to be to effect normative change in relation to the model of consent and attitudes to consent in society. But we would suggest that those changes can be better made in other ways outside of the criminal justice system and that the criminal justice system should be not used as the primary vehicle for that reform.

THE CHAIR: This proposed amendment has the risk of making things more complicated and, hence, explaining it to juries more difficult than the current system?

Mr Kukulies-Smith: Yes. And there is another issue in relation to it which we have seen a little bit of jurisprudence on in New South Wales—that is, the freely and voluntary. "Freely" has been seen in cases such as Moore to be a problematic term; it carries with it its own nuances and understandings. It raises questions about whether, if initially a person was not interested in sexual activity then after some discussion agrees, that is free and voluntary or is that something else? It is clear that we can deal with in the law, and the law already deals with, circumstances where it is physical coercion that gets that change of heart.

The law already deals, in section 67, with that scenario as vitiating consent. So we are obviously talking about something less than physical coercion here, but if there is some negotiation and the person then changes from a no to a yes, the Law Society's position is that that is still consent at that point in time. But if you introduce the term "freely" it raises questions and we have circumstances then of: where is the jury going to draw that line? Because it is not a defined term, individuals will inherently define it differently between one to the other, and so that could lead to inconsistencies in application across a variety of trials. Obviously something we want to see in good laws is that they are able to be consistently applied across cases.

MS CODY: I note you were suggesting that the current legislation also has its difficulties.

Mr Kukulies-Smith: Yes.

MS CODY: Are there ways, apart from education and educative actions, which I completely agree with, that we could be helping the education process by looking at how we could simplify our laws?

Mr Kukulies-Smith: There is probably scope for simplifying the laws. As to where and how to do that, that is always the question. I suppose the easy answer for lawyers is, "That's not our job." We interpret the laws as they are. It is ultimately the legislature's role. But in terms of the tests as they now apply, ultimately they are applying retrospectively. That is really what the criminal law does. In a courtroom

scenario at least, the criminal law is interpreting recent history, trying to divine from that what happened and whether or not a person was guilty of an offence.

It is not necessarily—it comes back to what I was saying before—the normative tool by which we effect the change of behaviour, because a lot of studies indicate that people are not thinking about what the criminal law is at the time they commit a crime. A view that that is what they are doing, I would suggest, is not an accurate view of an individual's decision-making processes. Really, it is about changing their attitudes in a more meaningful way than just: "If you do this, it's going to be criminal." I do not think that sticks in people's minds, particularly where we are talking about something more nuanced, rather than, as I said before, an easy example such as, "Drugs are illegal."

Also, in terms of definition, one of the purposes of this legislation purports to be to define consent, because there is no explicit legislative provision. We do not need to define every term in legislation to have an understanding of what the law means. The example would be common assault, section 26 of our Crimes Act. It is in terms of: "Whoever assaults any other person is guilty of an offence." So it is a very self-referential section. The word "assault" is not defined at all.

We know from case law—lawyers will tell you this—that that means causing a person to apprehend imminent violence, committing violence upon a person or applying force to a person. We can say it, but it is not defined. That is not defined in legislation. Similarly, consent is not defined, but that is not to say that consent is without meaning in a context.

MS CODY: But to define it, would that not give it more meaning? Would that not give it a punchier—people might actually think about it more? As you said, drugs are illegal. Everyone knows that.

Mr Kukulies-Smith: Yes.

MS CODY: It is really common sense. Maybe if there was a common-sense approach to consent in legislation, people would also understand—

Mr Kukulies-Smith: The difficulty is—this is the same reason I think assault is not defined; so it is not just sexual activity. Generally, physical violence et cetera are not defined for the reason that it is difficult to envisage every scenario that is going to arise. The test for consent or an approach to consent between two people in a long-term relationship might be a different test or carry different implications. The same test may carry different implications when applied to people in a long-term committed relationship where certain things are understood between those people about their own desires, as against people who have just met that night in a nightclub.

That is where sometimes limiting these concepts to small, punchy statements actually runs the risk of unforeseen consequences in terms of how those apply to the set of facts that was not predicted by anybody. And those sorts of facts do arise. It is for those reasons quite often that definitions are left open-ended or left to people's "common sense".

MS CODY: We have seen a lot, particularly over the last 10 months and over the last week, that consent is not always necessarily taken on board. We have seen in America that there is a whole bunch of stuff going on. The #MeToo campaign is happening.

Mr Kukulies-Smith: Yes.

MS CODY: It is always in the media what is and is not acceptable. Surely there has to be something that we should be doing to be helping. In my eyes, no means no, and it should be as simple as no means no. I guess what you are saying—you are the expert in this particular area of criminal law—is that it is not necessarily easy to define "no means no" in law.

Mr Kukulies-Smith: Well, it is. With respect, no does mean no in the ACT. Under the current law, if a person said no and the person continued to have sex, I would be very surprised if a jury did not convict in that circumstance. I would certainly be advising a client in that circumstance that they have very, very limited prospects of success at a trial. That is on the current test, which essentially is a formulation in line with the Morgan case from the UK. It is essentially the law that we follow in the territory in terms of the common law position of what is and is not consent and what is and is not knowledge, and recklessness being effectively a sort of species where it is not intended necessarily—it is not overtly a person setting out to commit sexual assault but they can be convicted because they are reckless as to the lack of consent of the other person, which has a variety of meanings at law.

THE CHAIR: If we accept that the current position in the ACT is no means no, is it correct to say that yes means yes, just to flip it, because we are looking at a proposal for an affirmative communicative model of consent?

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

I would suggest that under the model that is proposed nearly every case as to consent is going to be determined by reference to clause 67(1)(b)(ii). We are really going to get to subclause (1), but we are nearly always going to be in the territory of subparagraph (ii) of paragraph (b). Therefore, that is always going to require inferences to be drawn in relation to conduct—what did conduct convey?

Effectively, the test in this bill raises the standard. It goes beyond belief. It goes up to satisfaction or being satisfied. That raising the bar, effectively, I suspect, if enacted, would lead to trials being even more aggressive in terms of how the victim or the complainant is cross-examined in the trial. Necessarily, that is what the consequence is going to be in a trial room because there is a higher bar to get over.

Therefore, if it is not said—frequently that is the case; there are no actual words that

are in dispute; it is actions—then that means more aggressive cross-examination and the like, which does seem a little problematic in the circumstances where we have been reforming now consistently across a number of jurisdictions, including the ACT. We have consistently reformed over the last 20 to 30 years to try to reduce, so far as possible, that confrontation in sexual assault trials.

This runs the risk, by raising the bar, of necessitating an approach to the litigation by defendants that increases the amount of attack that will be necessary to get over that bar. It is a fact that sexual assault trials do not settle. I would suggest that they are—I do not have figures to support it; it is anecdotal—the most likely to run to trial of the indictable charges that we see in the territory.

Consistently, in the call-overs that the Chief Justice runs before each sitting of the Supreme Court for the trial periods as they are now run, there is a large percentage of sexual assault trials, and they are the trials that ultimately run. A lot of the other trials that are listed end up resolving. A lot of the drugs cases resolve. A lot of the assault matters resolve. But sexual assault matters tend not to resolve. You can point to a number of reasons for that, but one is the stigma and the near certainty that, if convicted, people are going to serve time in jail. Another is the fact that they are rarely supported by external evidence. It is usually a case of: "He said; she said." That is certainly still stereotypically true with the majority of trials in sexual assault areas.

But that means, when we look at sexual assault laws, that there has to be a real cognisance that these are going to end up being applied in courtrooms. That is ultimately the purpose of the criminal law. It is to determine guilt or innocence in a courtroom. Sometimes the criminal law gets used for other purposes or is purported to be used for other purposes for which it is not. It is an instrument to determine guilt or innocence in a courtroom. The criminal law is not an effective instrument to determine social policy or the like. There are other instruments available that are nowhere near as blunt in that regard.

THE CHAIR: One of the issues that the Law Society raised in its submission was the problem with clause 67(1)(b)(ii) bringing an objective test into it. It is that it will actually destroy the common law defence of honest and reasonable mistake of fact.

Mr Kukulies-Smith: Yes.

THE CHAIR: Does this defence not exist in other jurisdictions where there is still an affirmative communicative model of consent?

Mr Kukulies-Smith: It does. I am not sure in Tasmania how it works. But in New South Wales—

THE CHAIR: So it is possible to have an affirmative or a statutory definition of consent on the one hand and still preserve the common law defence?

Mr Kukulies-Smith: It is. It is definitely possible.

THE CHAIR: It is, yes.

Mr Kukulies-Smith: It is just not possible where part of the reason would be that it is desirable to separate—

THE CHAIR: Those two elements.

Mr Kukulies-Smith: those two elements out, yes.

THE CHAIR: Which is what you referred to in the beginning of your evidence.

Mr Kukulies-Smith: Yes.

THE CHAIR: I am not sure if you are aware of this. The DPP, who gave evidence last week, suggested that perhaps the area for law reform is not necessarily in the definition part of it but in terms of the extent to which the Morgan defence applies in the ACT and that perhaps there was some scope to bring in that reasonable standard. Does the society have a view on that?

Mr Kukulies-Smith: The society would consider any position that was put. Certainly, at the moment it has not seen compelling evidence as to why there should be a change. It would certainly consider it if there was a proposal put forward along those lines. It would be happy to provide comment on it. But at the moment it does not see a compelling reason advanced for change in the territory.

THE CHAIR: So the society's position currently would be similar to what the bar just gave in terms of evidence, which is that the subjective fault element is what they would say.

Mr Kukulies-Smith: Yes, and in relation to issues of recklessness et cetera being the way that should be taken into account—

THE CHAIR: Yes, which is currently what it is.

Mr Kukulies-Smith: and criminalised. Yes; correct.

THE CHAIR: Which is currently what it is.

MS CODY: I have a follow-on from that. I guess we also need to look at what comes out of the review that is happening in New South Wales and how that impacts on our legislation?

Mr Kukulies-Smith: Yes; correct. It is one of those issues always with territory law, I suspect, that often exercises members of the Legislative Assembly's minds and certainly exercises criminal lawyers' minds who practise in both Queanbeyan and the ACT—the extent to which it makes sense that something could be illegal if it happened in Queanbeyan but legal if it happened in Majura or vice versa. There are only a few kilometres difference.

In respect of people's understanding of these concepts, obviously we do not want huge inconsistencies necessarily as to the overall meaning of these or the obligations they place on people to get consent. That is one of the concerns here, that this model

goes so much further than New South Wales. One of the concerning aspects is that even in the discussion paper—in fact, the explanatory memorandum—it is expressed that it is not certain how much this abrogates and affects the presumption of innocence. If those moving the change cannot be satisfied, is it really time for change? Should we not wait until we can be satisfied? That is what the society would say.

THE CHAIR: Given the time, we will call it there. When available, a proof transcript will be forwarded to you to provide an opportunity to check and suggest any corrections. Thank you for appearing on behalf of the ACT Law Society.

MOORE, MS CLARE, Chief Executive Officer, Women with Disabilities ACT
SALTHOUSE, MS SUSAN, Chair, Women with Disabilities ACT

THE CHAIR: I welcome today's next witnesses, representing Women with Disabilities ACT, Sue Salthouse and Clare Moore. Can you confirm for the record that you understand the implications of the privilege statement before you?

Ms Salthouse: Yes.

Ms Moore: Yes, thank you.

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

Ms Salthouse: Yes, thank you. Our submission presents a very different perspective to the two presentations you have just heard. The last statement was looking at people who arrive by casual sex into a situation where the first time they think about what they are doing or what they have done is when they are in the lawyer's office. That is a very narrow set of cases, and we come at it from the perspective where perpetrators have sought to exploit somebody who is not in a good position to exercise their consent to a sexual act or sexual exploitation.

Even though we know there is a dearth of data on the levels of violence and abuse experienced by women with disabilities—particularly we have been thinking of that cohort with cognitive impairment—the high levels of sexual assault mean we really should do something in the law that will make the situation clearer so that when it comes to trial they will be able to have their side of the case understood.

We put in our submission the extremely high levels of sexual abuse against women with disabilities, and much of that comes from a situation of grooming. In relation to the Crimes (Consent) Amendment Bill we are looking for sexual offence consent provisions which serve to clarify what is meant by consent. We think it does, in fact, clarify the situation so that sexual assault crimes which are premeditated and in which women with disabilities are exploited can be more clearly prosecuted.

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

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

Ms Moore: We acknowledge that some work has also been done in this area by the Australian Law Reform Commission and the New South Wales Law Reform Commission. In looking at submissions to the latter, we found that Rape and Domestic Violence Services Australia—which I believe is appearing later—outlined several issues that concern us.

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

We have suggested, based on that submission to the New South Wales Law Reform Commission, that section 67(1)(a) be amended to read that, for a sexual offence consent provision, consent of a person to an act mentioned in a sexual offence consent provision by another person means that the person gives free and voluntary consent and communicates this agreement to the other person—potentially that could be amended to state "actively" communicates that to the other person—and that that person is satisfied on reasonable grounds that the agreement was freely and voluntarily given.

We realise the implementation of the Crimes Act 1900 or future implementation of this amendment bill has significant limitations for women with cognitive impairment, and for that reason we have drawn your attention to article 12 of the Convention on the Rights of Persons with Disabilities, which deals with equal recognition before the law.

The section puts an obligation on state parties to ensure that people with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and that appropriate measures must be taken to provide access by persons with disabilities to the support they may require in exercising their legal capacity. We look forward to other mechanisms being put in place in our justice system which provide women with disabilities with the appropriate supports in courts—for example, Victoria's independent third-person program.

WWDACT further acknowledges that education is needed to give women with disabilities the confidence to know their rights in the area of forming relationships and consenting to sexual activity. Similarly, education is needed for all stakeholders in the justice system to ensure the rights of women with intellectual disabilities are upheld in their access to justice. We also want to be clear that WWDACT supports the rights of women and girls with disabilities to form consensual relationships and that they have access to the right supports to do so safely. I will hand back to Sue.

Ms Salthouse: In conclusion, we agree with section 66A, dealing with the consent of young people and which confirms exceptions to consent specified in sections 64 and 65, which deal with the exploitative material you have discussed more today, and especially section 66, concerned with acts of grooming.

We confirm, too, the suggested new wording for section 67(2), that a person who does not offer actual physical resistance to sexual intercourse must not, by reason only of that fact, be regarded as consenting. In the context of women with cognitive impairment or who are non-verbal that is particularly important.

Because women with disabilities are susceptible to threats or actual infliction of force, we further agree that if a perpetrator knows the consent of another has been given as a result of circumstances perceived as threatening, as outlined in detail in section 66(1)(a), then we are very glad to see that under those circumstances consent is negated.

We commend further consideration of the wording in 67(1)(a) to the effect that consent must be actively communicated to the other person for consent to indeed have been given.

THE CHAIR: I turn to your proposed changes to the wording of clause 67. You state that Women with Disabilities ACT see it as preferable to add in a requirement to have that consent communicated.

Ms Salthouse: Yes.

THE CHAIR: You said earlier that obviously there are some women with disabilities who may not be in a position to communicate consent verbally. However, I think Ms Moore mentioned that it may not always be satisfactory to rely on a nod. At a practical level, what other behaviour does a potential accused need to make sure they have consent?

Ms Salthouse: I think that when we get to that matter of people having capacity, what is commonly accepted is that the women have not consented. But if it is a consensual relationship, even a person who has very little ability to articulate speech can articulate their willingness when asked to do something. But we do want that to have to be a really positive gesture of consent, whether it is through wording or through a gesture of consent being given. Otherwise, a nod from a person who is very compliant does not constitute consent.

I think the current situation in the courts is not nearly strong enough in that direction. This lay jury that we have heard about today would accept the accused's testimony that consent was given when it can be clearly obvious from the actual demeanour of the person who has been sexually exploited that they did not give consent, that they were just compliant.

I think we are talking about a different situation from people who are verbal and who have an ability to clearly show their willingness to do something. In these situations we would require—we think this proposed act helps—that the person would have to go to some considerable means to get consent, to have actively communicated consent. That means that cases of sexual exploitation would be much harder for people to get away with.

MS CODY: In your submission to the committee—I note you said this in your opening statement as well, Ms Moore—you refer to a more specific definition. But

you also mention the New South Wales and Tasmanian legislation. As you are probably aware, the New South Wales legislation is currently under review.

Ms Moore: Yes.

MS CODY: Is that something that we should be looking at as well during these reforms?

Ms Moore: Given what I said in the submission about the difficulties around explaining it to juries, as was put in the previous testimony, I think that that may help to give some more definition to how we can do this better. It may be prudent to see what comes out of that review because it is sort of unchartered territory in terms of defining the law. It is certainly quite complex. I think that perhaps it would be worth waiting to see what comes out of those submissions, which is why I referred to submissions to that reform.

MS CODY: The other major part of this amendment is the intimate image side of things. Do you have comments about that part of the bill?

Ms Salthouse: Again, we did not look in our submission particularly at that part of the bill on intimate images. But I think that we have commented previously on the high prevalence of the sharing of intimate images of people who are non-consensual and who are from the disability community. I think that the degree to which the bill includes those and strengthens them in the consent issue is very important. We do not disagree with what is in the bill regarding intimate images.

MS CODY: I also wanted to touch on the education side. As you said, we have heard from the two legal experts this morning. They were talking about education probably being something that needs to be strengthened, not just changes to the law. In fact, I think they were saying that education was the key thing. Would you agree that there is a lot more that could be done around educating the general public?

Ms Salthouse: Yes.

Ms Moore: Even before someone gets to the position where they might be on a jury, having a better community understanding of that. It has been noted elsewhere that there are difficulties in explaining that and juries may fall back on their preconceptions. If those preconceptions have been questioned elsewhere beforehand, that culturally will change the outcomes in court.

MS CODY: I think what was also very interesting for me was the non-verbal communication. I definitely would hope that you would see that as something that the general public needs to be more aware of. How does that help people with disabilities, particularly women?

Ms Salthouse: I think that is why we think it is so important to mention the education component in this context. That is intrinsic to the disability justice strategy. That looks at an education program both with stakeholders in the justice system as well as with people with disabilities and particularly women with disabilities. We look particularly to young women with disabilities to see that they have the tools to advocate for

themselves and to be able to speak for themselves, which up to date has not been generally the case.

THE CHAIR: The time is up. When available, a proof transcript will be forwarded to witnesses to provide an opportunity to check and suggest any corrections. Thank you, Ms Salthouse and Ms Moore, for appearing on behalf of Women with Disabilities.

MILLEN, MS BONNIE, Policy Officer, Advocacy for Inclusion

THE CHAIR: I welcome our next witness, Ms Bonnie Millen, who is appearing on behalf of Advocacy for Inclusion. Thank you for appearing today. Can you confirm for the record that you understand the privilege implications of the pink statement before you?

Ms Millen: Yes, I do.

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

Ms Millen: No, not at this time, thank you.

THE CHAIR: In your submission you talk about the fact that this bill may have the impact of reversing the onus of proof but that you might be supportive of that. Can you expand on that?

Ms Millen: Being somebody who is not from the legal profession, I went on the judgement that when it comes to the onus of proof we need to be really careful when considering evidence from people with disabilities in terms of offenders or perpetrators. If somebody cannot verbally or physically state their non-consent, what in terms of the onus of proof are we affording for the offenders? That is what I mean.

I am not stating that I support the swing towards a different onus of proof but I am making the point that the legislation as currently proposed requires careful consideration regarding those who cannot verbally or physically consent or even fight back.

THE CHAIR: The current definition in the ACT defines consent essentially by the negating factors. One of those factors is in relation to the person's physical helplessness or mental incapacity to consent. Do you feel that the current position is not sufficient to protect people with a disability who are not in a position to express their non-consent, if you like?

Ms Millen: No. I feel the current legislation is very ambiguous in terms of how it will protect somebody of intense vulnerability. When I say "intense vulnerability" I mean those with very severe disabilities who cannot verbally consent or fight back.

If we look at it from a free and voluntary concept, I feel like we would be heading down a difficult path in order to determine somebody's impairment—ability, capacity—to be able to defend themselves and also to be able to report. One of the areas of difficulty we find at Advocacy for Inclusion is that people with disabilities—not only women and girls with disabilities but all people with disabilities—have difficulty reporting crimes of a sexual nature. Did I answer the question fully? Feel free to clarify.

THE CHAIR: What I got from that is that you feel the current law is a bit ambiguous.

Ms Millen: I think it is ambiguous. When we consider a person's capacity to be able

to participate in the legal process I feel that this law is very ambiguous in terms of thinking about those who may be more vulnerable in our community. I feel it is clear in terms of no means no or yes means yes verbally, but it does not actually articulate whether there may be members of the community who may not have that power to be able to be verbal. So are we considering those in a separate section of the act, or what can we do to protect those people more?

THE CHAIR: Do you think the proposed amendments will help with that?

Ms Millen: I think that the proposed amendments can be worded much more effectively. I think the current wording of the amendment is a little bit ambiguous and vague. I refer in my submission to section 55(3)(b) where a person who does not offer actual physical resistance to sexual intercourse must not by reason only of that fact be regarded as consenting to sexual intercourse. For somebody in the community who does not study law, that comes across as very vague.

For me to work out that from a policy perspective I actually had to ask my colleagues, "What do you interpret this to mean?" And people struggled. People went, "I interpret it to be this," but other people struggled to understand it. The "by reason only of that fact", confused people in terms of what is that doing there, why is that there, can it be more simplistic and more modern in terms of losing legal jargon, so to speak, and what does that mean for the actual member of the community.

MS CODY: Just a quick one, because you have basically asked everything I was going to.

Ms Millen: I do not feel I started off well.

MS CODY: No, it is fabulous. The whole reason we hold these hearings is because we want to hear from everyone that this impacts on. A change to legislation impacts on everyone, so it is great to have you here.

Ms Millen: Thank you.

MS CODY: I want to talk about it from an educative perspective. I know I keep going on about this, but it has been highlighted a lot over the past little while, particularly over the past couple of days. Do you think we can be doing more around consent from an educative perspective, particularly for people with a disability?

Ms Millen: I feel there is. I was not able to hear the comments of my colleagues from Women with Disabilities ACT on this, but I feel that education and awareness of consent are particularly important for everybody. I did not echo this in the submission because I focused very much on the technical side, but I feel very much that the community really needs an increase in awareness.

I feel that there is a lot of confusion, particularly among young people, about what consent can mean, especially when you consider cyber and imaging. Whilst that is not my expertise, when it comes to the disability context I find that there needs to be really modified education resources.

At Advocacy for Inclusion we very much advocate for plain English versions of materials. We advocate for more substituted settings, group settings, to ensure that things are simplified so that more people with disabilities can be included and so they are able to articulate what they believe consent is to them and what they believe is wrong in terms of current consent understanding.

Also the type of population I am referring to in my submission is those in institutional settings and group homes. Those are the very people that Advocacy for Inclusion cannot reach properly. When I say "properly", I mean that behind closed doors we are not really sure what kind of education they are receiving and what kind of community participation they might have with programs such as SHFTPACT or other health awareness programs.

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

THE CHAIR: Thank you for appearing today on behalf of Advocacy for Inclusion. When available, the proof transcript will be forwarded to you so you can check that and suggest any changes.

WATCHIRS, DR HELEN, **OAM**, President, ACT Human Rights Commission and ACT Human Rights Commissioner
THILAGARATNAM, MS RENUKA, Legal Adviser, ACT Human Rights Commission

THE CHAIR: Today's next witnesses are from the ACT Human Rights Commission. Dr Helen Watchirs and Ms Thilagaratnam, thank you for appearing on behalf of the Human Rights Commission. Can you confirm for the record that you understand the privilege implications of the statement before you?

Dr Watchirs: Yes.

Ms Thilagaratnam: Yes.

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

Dr Watchirs: Yes, I would. Thank you for the opportunity to appear today. I will make a brief statement. I begin by acknowledging the traditional owners of the land on which we meet today, the Ngunnawal people. I respect their continuing culture, the oldest in the world at 65,000 years, and the contribution they make to the city of Canberra and the ACT region.

The commission provided a formal submission in March 2018 signed by all four commissioners in respect of a draft version of this bill. The committee has seen that. Ms Le Couteur appended that to her submission. Our submission was also taken into account in the scrutiny report of this committee on 25 September 2018. I would like to highlight a few matters.

The starting point for the commission is whether the proposal is compatible with human rights and reaching the right balance between the rights of the victim and the accused. In the first instance, in relation to similar age defence, clause 66A, we are very supportive of this. We do not want to see people unnecessarily criminalised where young people engage in consensual, non-predatory, non-exploitative behaviour. It actually protects their freedom of expression and still having the protection of being a child in things like sexting peers.

In respect of the kinds of things it covers—possession of and production of pornographic material and intimate images and the defence of there being no more than two years age difference—we do have a concern. Although it is clear that there is an evidential onus only in relation to clause 64 and clause 65 offences, that is not the case with clause 66.

It appears that there could be implied a legal burden for grooming and depraving offences. So in our view, to be compatible with a right to a fair trial and the presumption of innocence, this should be consistent with clauses 64 and 65 offences and fit into the whole code structure and be treated similarly. That is one concern.

In respect of the main substance of our submission in relation to the definition of

consent, we certainly welcome the introduction of a statutory definition and having a communicative model. It is very long overdue. The Law Reform Commission recommended it back in 2010. I believe even the ACT Law Reform Commission made a recommendation back in 2001.

I think what is really important is the community discussion about respectful relationships that will accompany this type of law reform, even if the reform does not happen, in terms of looking at the issues and discussing what law reform we want. It is very important. The Australian Human Rights Commission did a recent report last year called *Change the course.* It was about sexual harassment and sexual offences at universities. There has been a lot of work in relation to consent training. We would like to see respectful relationships rolled out in schools as well, not just wait until young people are 17 or 18 at university and colleges.

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

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

Our Watch and ANROWS have done a lot of work on gender inequality being the key determinant of violence against women. I think this law reform is incredibly important in that respect. If drafted correctly and accompanied by appropriate education strategies for the general community and targeted vulnerable communities, particularly women with disabilities, Aboriginals and Torres Strait Islanders, culturally and linguistically diverse people and the LGBTIQ community as well as the legal profession, we believe it could improve on the current combination of statutory and common law formulation. I am not sure what the effect is going to be in terms of more convictions but I think there will be a lot more reporting and possibly prevention of sexual offences by effecting deep cultural change and the views of the community about sexual violence.

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

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

In drafting I think it would be prudent to rely on criminal law expertise, not just human rights expertise, because whatever happens will impact on the whole framework of the Criminal Code. The Justice and Community Safety Directorate may be helpful in that.

In relation to the definition of free and voluntary agreement, the Law Society has stated that it is ambiguous and lacks legal certainty. I do not agree. I think actually it is well defined. All jurisdictions have a positive definition: free and voluntary agreement and consent freely and voluntarily given. This is what the ALRC recommended. They also recommended a list of circumstances where agreement may not have been reached. That is already in clause 67(1) in the circumstances where consent is negated.

I know that the DPP said that a lot of this is inherent in the nature of consent under the common law, but I actually think it does the community a service to make this explicit in legislation. It draws a line clearly so that people know what behaviour is criminalised and what is not and gives further protection to vulnerable communities to know that their consent actually means something.

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

As I said with respect to the first issue in relation to young people, it explicitly says it is an evidential burden for two but nothing for the third, which implies it is legal. Here I think it is clear that we are not reversing that burden. But that conflation issue is the biggest problem and that, therefore, gives rise to the incompatibility with human rights.

THE CHAIR: Thank you for your statement. One of the issues that the Law Society in their evidence gave was that, given the wording in clause 67(1)(b)(ii), which requires a satisfaction as opposed to a suspicion or a belief, this raises the bar too high, which may have the unintended consequence of defence lawyers perhaps having to go a little more aggressively in cross-examination of the victim. Is that a concern for the commission?

Ms Thilagaratnam: I think our view is that the real concern about whether or not that provision is imposing a legal burden is the way it has been drafted. The fact that there is uncertainty there is not a good thing. But if the provision were to be redrafted to actually more accurately reflect an objective test, then there is actually not a concern about any sort of imposition of a higher standard of proof. The prosecution would still have to prove all the elements beyond a reasonable doubt standard.

I think the difficulty with this current construction is that it is unique. I do not think that we have seen an example of that in any of the other legislative schemes that we have looked at. I think to our mind it is a drafting issue and I think it probably will

need fairly significant redrafting because I think the intention of the bill is not necessarily matched with what is on the page of the bill.

THE CHAIR: You would agree with the Bar Association, who earlier gave evidence. They say that objectivity is one thing but this bill actually, perhaps unintentionally, goes beyond that, which essentially is to reverse the onus?

Ms Thilagaratnam: Yes, potentially that is one interpretation. I think it is not clear what that provision is actually doing. That in itself is a problem.

THE CHAIR: In terms of perhaps providing a little advice about how this bill could be redrafted to ensure that it meets the intended purpose, do you have some recommendations about what steps might need to be taken? For example, you mentioned perhaps separating the actual affirmative consent definition from the recklessness and the satisfaction of the accused. Are there any other pieces of advice or recommendations you could provide?

Ms Thilagaratnam: I think the commission's position is that it would be prudent not to reinvent the wheel. There are actually provisions out there in other Australian jurisdictions that have been in operation for a long time. They all I think follow a fairly standard model where they sort of set out that consent is free and voluntary, or some combination of that. That is followed by a list of circumstances where consent might be vitiated. Then they set in a separate provision the objective fault test. I think something that follows that construction, that formulation, would be a good starting point.

As Helen has mentioned, the Victorians probably represent the latest cab off the rank, if you like, in refining those provisions. I think two years ago was when they had their last set of amendments. I think that, along with Tasmania, the Victorians have a more complete set of circumstances that would negate consent. That might be a good reference point.

THE CHAIR: Do you think that the negating factors that we have in our legislation currently are not sufficient?

Dr Watchirs: They are non-exhaustive, but I think adding more examples is useful in terms of guiding behaviour.

Ms Thilagaratnam: Yes, I think this goes to the issue that has been raised in some of the previous evidence before the committee as to whether there is a clear enough indication in the legislation about consent, that there is no consent if the person does not communicate by action or by word that they are consenting to that action.

Dr Watchirs: There have been a number of submissions talking about rape freeze. That would cover that situation where, irrespective of whether or not a person had incapacity, they can still as a result of trauma have that reaction.

Ms Thilagaratnam: Yes, in the ACT that sort of issue is currently addressed through jury directions. The court, the judge, has the ability to direct the jury in those types of circumstances. I think pre-2016 Victoria had a similar provision under their jury

directions legislation. They decided to move that into the actual definition of consent itself because that is a clearer injunction, if you like, to say that there is no consent in those situations, if someone has not actually done or said anything to indicate their consent.

I think that might also pick up some of the concerns that were expressed earlier today about how, particularly for vulnerable people or people with a disability, it has to be beyond just a verbal communication. I think those sorts of additions to the list could be useful.

MS CODY: Dr Watchirs, I want to briefly touch on what you were saying about your belief that the proposed Greens' paper and exposure draft is a more clearly articulated version of consent. Am I paraphrasing you accurately?

Dr Watchirs: Sorry, more clearly?

MS CODY: It articulates consent more clearly than the current status? Did I understand that correctly?

Dr Watchirs: Yes, it is just that by conflating the two the problem with human rights compatibility arises.

THE CHAIR: So would be okay, for example, with clause 67(1)(a) if it were a provision by itself?

Ms Thilagaratnam: We would probably say that it would be preferable to look at redrafting it in a more comprehensive way than just simply pulling apart those two elements. Because even as they stand they do not necessarily reflect what you see in the other jurisdictions. I think there needs to be some care that we are not moving in a completely different direction just by inadvertently using a different combination of words or a different formulation.

Dr Watchirs: In Victoria section 36 talks about the circumstances in which a person does not consent, and they include but are not limited to: force or the fear of force; fear of harm of any type, whether to that person or someone else or an animal; the person is unlawfully detained; the person is asleep or unconscious, the person is so affected by alcohol or another drug as to be incapable of consenting; the person is so affected by alcohol or another drug as to be incapable of withdrawing consent; the person is incapable of understanding the sexual nature of the act; the person is mistaken about the sexual nature of the act; the person mistakenly believes it is for medical or hygienic purposes; if the act involves an animal the person mistakenly believes it is for veterinary or agricultural purposes; the person does not say or do anything to indicate consent to the act—that is the issue the last two witnesses referred to—and, lastly, the person withdraws consent. So Victoria is very comprehensive in that respect.

MS CODY: So you are saying that the current legislative terminology could be strengthened and there is definitely room for improvement—not necessarily exactly what has been proposed in the bill—in our current consent legislation?

Dr Watchirs: Yes, that is correct.

Ms Thilagaratnam: Absolutely. We are very much behind the eight ball in the definitions we have in our Crimes Act. I understand that there is an argument to wait and see what happens with the New South Wales review. But, equally, that is not comparing like with like because all these jurisdictions already have an objective test in their legislation; we have not even got to that point.

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

Dr Watchirs: It could be amended in light of the New South Wales review, but I do not think there is a point in waiting a long period of time for that. The evidence is clear that the current law is not optimal and that we can improve it, and we can further improve it as a result of what comes out of the New South Wales review.

MS CODY: Do you think as part of any reforms an education process needs to be undertaken?

Dr Watchirs: Absolutely. As I said, Patricia Easteal's submission shows that it may not have a big effect on the actual number of people found guilty of sexual offences but it probably will have an impact on the number of people who report it and, therefore, has a preventative impact. Underlying all this are community attitudes to consent to sexual activity, and if that can be changed that is a very good thing.

THE CHAIR: Going back to the subjective fault element versus the objective test, the society said that, despite the preference of the bar and the society to retain the subjective fault element, currently there is still a requirement that the subjective element be tested by reasonable grounds, as in the more unreasonable it becomes the greater the impact on whether it actually was an honest belief. Do you think that balance is currently not sufficient?

Dr Watchirs: I think it could be strengthened to be an objective test. But, of course, the subjective impacts on the objective where it becomes so unreasonable.

THE CHAIR: And vice versa. If we were to bring in an objective test, does that have an impact on the common-law defence of honest mistake?

Ms Thilagaratnam: Yes, because what would happen is that you have codified that in statute. I think the DPP said that that would effectively put Morgan to bed. So, yes, it would be effectively introducing an honest and reasonable test in that your belief has to be honest and reasonable and not just honest.

Dr Watchirs: Morgan is a 1976 case. We have moved so far beyond that.

THE CHAIR: In terms of the New South Wales Law Reform Commission review,

obviously there is some incentive for us to keep an eye on what it is happening, given that we are an island within New South Wales. But I am just confirming your view that that should not stop us from what we are doing now in terms of visiting this topic; it is just we need to be mindful of what they do.

Ms Thilagaratnam: Yes, absolutely.

Dr Watchirs: I do not think it is worth waiting and seeing. I think it is worth proceeding and then modifying if necessary.

THE CHAIR: And it is very hard to know because we do not know when they are going to finish, there is no reporting date.

Ms Thilagaratnam: And then you would probably have to wait and see how that plays out and that then pushes it out into quite the distance.

THE CHAIR: The Lazarus case is the controversial case that I suppose was the catalyst for the review. The society gave evidence that it is possible that it is not actually the law in the way it is written in New South Wales that has caused this controversy but, rather, the way it was applied, and that certainly seems to be given credit by the fact that on appeal there was a finding that the judge had erred.

Dr Watchirs: And also it was judge alone whereas in the ACT there is a jury.

THE CHAIR: Yes, and I know the DPP was quite confident that it would have happened quite differently in the ACT, even with our current law because of that reason.

Dr Watchirs: Patricia Easteal has good reference to an article in her submission talking about all the contexts around that case—it occurred in Kings Cross, an area of dodgy dealings, and that that was emphasised and that all the media surrounding the case was in sympathy for the accused and there was not much about the impact on the victim. It was more about the impact on him as a result of the notoriety. So a lot of surrounding factors make that not a good case.

THE CHAIR: So we cannot look to that as the beacon of what has gone wrong with the law in New South Wales.

Dr Watchirs: Yes.

THE CHAIR: Thank you, Dr Watchirs and Ms Thilagaratnam, for appearing on behalf of the Human Rights Commission. When available, a proof transcript will be forwarded to you to provide an opportunity to check and suggest any corrections.

Dr Watchirs: Thank you.

MCINTYRE, MS KAJHAL, legal researcher and project worker, Rape and Domestic Violence Services Australia

THE CHAIR: I welcome today's next witness, Ms Kajhal McIntyre, representing Rape and Domestic Violence Services Australia. Have you read the privilege statement that would have been online?

Ms McIntyre: I have.

THE CHAIR: Can you confirm for the record that you understand the implications of that statement?

Ms McIntyre: I do. I understand.

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

Ms McIntyre: Yes, I would like to. Thank you for the opportunity to appear today. I would like to start by acknowledging that the committee meets on Aboriginal land and pay my respects to elders past, present and emerging. I acknowledge that sovereignty was never ceded and that this land always was and always will be Aboriginal land.

For over 40 years RDVSA has provided a range of specialist trauma-informed counselling services for people whose lives have been impacted by sexual, family and domestic violence, and their supporters. In addition to providing counselling services, RDVSA engages in various advocacy roles to ensure that our clients' experiences inform policy and legislation.

Earlier this year RDVSA made an extensive submission to the New South Wales review of consent law currently being conducted by the New South Wales Law Reform Commission. Our submission was endorsed by many of the key players in the sector, including Community Legal Centres New South Wales, domestic violence New South Wales, Women's Domestic Violence Court Advocacy Services New South Wales, Rape on Campus Australia, Youth Action, Wagga Women's Health Centre and People with Disability Australia.

In our submission we made recommendations for legislative change to the New South Wales definition of consent. These recommendations were designed, first, to provide a clearer endorsement of the communicative or affirmative model of consent and, second, to better capture sexual violence perpetrators within the context of family and domestic violence.

Crucially, we also emphasise the limits of statutory reform to bring about a true shift in legal practice. In this respect, we argued that any changes to consent laws must be accompanied by more fundamental changes to the criminal justice system, including the establishment of specialist sexual violence courts, broad community education, training for first responders and support for sexual assault services.

RDVSA wholeheartedly supports the intention of the bill before the committee to

introduce an affirmative model of consent. We congratulate Caroline Le Couteur on her efforts to bring this important issue into the public sphere. Under an affirmative model, consent is characterised in the affirmative rather than the negative as a positive act of communicating yes rather than the mere absence of a communicated no. This model is founded on the ideals of mutuality and reciprocity in sexual relationships and aims to promote a shared responsibility to ensure respect for each partner's sexual autonomy.

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

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

We would be more than happy to explore these concerns in further detail with the committee. However, given that the committee has already heard extensive evidence today from other witnesses on these issues, I thought it might be of more assistance to outline the potential resolution to these issues.

We strongly believe that it is possible to legislate for affirmative consent in a clear and effective manner that does not derogate from the core principles of criminal law, in particular the right to be presumed innocent. RDVSA believes that in order to effectively integrate the affirmative consent model into criminal law, the legislation would need to include four elements: first, it would need to include a positive definition of consent as involving free and voluntary agreement as well as a communication by words or actions of that agreement.

Second, it would need to include clear guidelines about what circumstances might preclude a free and voluntary agreement as opposed to negating circumstances. Third, it would need to include an objective fault test which provides that the prosecution must prove that the defendant did not reasonably believe that the other person consented. Fourth, it would need to provide guidelines about how to determine whether a defendant reasonably believed that the other person consented.

We think statutory reform must also be accompanied by fundamental changes to the criminal justice system. In this respect, we would second the recommendations we made to the New South Wales committee to establish sexual violence courts that incorporate a trauma-informed approach and specialist judges and prosecutors to consider eliminating the use of jury trials in sexual violence trials or implementing alternative reforms around jury decision-making and implementing community education training and enhanced funding for sexual assault services.

In this respect we would submit to the committee that it would be prudent to suspend

any reform until the conclusion of the New South Wales inquiry and also to refer these issues, as suggested by Ms Le Couteur, to the sexual assault reform program for more thorough consideration.

THE CHAIR: Thank you, Ms McIntyre, for that very comprehensive opening statement and also for your submission. I pick up on something that you said in your opening. One of the things you suggested—correct me if I did not hear you properly—was looking at going to judge-only trials for sexual offending.

Ms McIntyre: Yes, that is something that we discussed extensively in our submission to the New South Wales Law Reform Commission. I would refer the committee to our submission for detailed comments on that. But I would also be happy to chat through the reasons for that recommendation if you would like.

THE CHAIR: The only reason I ask is because so far evidence that we have had, especially around the controversy surrounding the Lazarus case, has tended to suggest that perhaps the result may have been different if it had been a jury trial as opposed to a judge-only trial. Do you have any comment to make on that?

Ms McIntyre: I guess what I would highlight to the committee is that the reason why we do not know how juries make their decisions is because they are not required to provide reasons. So had the Lazarus case been decided by a jury, it is very likely that the jury could have made the exact same mistakes but that mistake would never have been discovered because we never would have had the transparency as to how they had come to their conclusion.

THE CHAIR: In terms of the current proposed amendments, there has been some concern raised about the bill bringing in some ambiguity and making it harder to explain to jurors the concept of consent. Do you have any comment on that?

Ms McIntyre: Yes, I would have to agree with some of the other evidence provided today that the bill does lack clarity in how it defines consent. There are a few ways that I think clarity could be improved. The first would be to separate out the two different elements involved in proving a sexual offence, the first being whether or not the complainant did actually consent in her own mind and whether she communicated that consent; and the second separate and discrete element being whether the defendant had adequate knowledge in order to be considered responsible for their conduct.

I think, as other organisations have submitted to the committee, it would benefit the bill to separate those two factors out in clause 61. Also, as I believe many other people have submitted, the bill is unclear as to the burden of proof. It would definitely be advisable, I think, to make clear where that burden of proof lies.

Finally, in terms of setting out what appears to be an objective standard in clause 67(1), it actually provides for the first part, which seems to be actual knowledge, and the second part, which appears to be an objective standard. But by making those two alternative options, it is not clear whether the final result is that a defendant may rely on a subjective or an objective test or whether the objective test does, in fact, override the subjective test. If I have confused you with the explanation, please let me know if

you would like me to run back over any of that.

THE CHAIR: No, it is a complex area; full stop. I think you are doing very well. My understanding is that your submission is that there should be an objective test?

Ms McIntyre: Yes, that is our stance.

THE CHAIR: Do you have any concerns that if we were to introduce an objective test, it may destroy the common law defence of honest mistake?

Ms McIntyre: I do not have knowledge about that defence because it is not a relevant law in New South Wales where we are located. But my understanding is that it would be preferable for that defence to be overridden by an objective standard because that defence maintains elements of the Morgan defence.

THE CHAIR: Yes.

Ms McIntyre: So we would be pleased if the objective standard were to override that defence.

MS CODY: I want to touch on something that you mentioned. I take it that you have heard some of the evidence provided today?

Ms McIntyre: Yes, I missed some of the submissions immediately before my evidence, but I heard some of the earlier ones.

MS CODY: Some of the evidence given today was that it would be difficult to have consent defined in law because there are too many variables. What I am hearing is that you would disagree with that?

Ms McIntyre: I would disagree with that. Every other jurisdiction in Australia does provide a positive definition of consent; so this is not new territory. I would suggest that defining consent as free and voluntary agreement is an uncontroversial proposition. While I understand that some people suggest that that definition is already inherent in the common law, I think that there is still value in having the statement being clear and explicit and able to be communicated not only to juries but also to the broader public.

I would say that if you have a look at the Australian Law Reform Commission and New South Wales Law Reform Commission reports into family violence, they talk about that risk of ambiguity, but what they conclude is that that ambiguity can be appropriately quelled by providing the list of circumstances in which a free and voluntary agreement could not arise. I do not see any issues with ambiguity there.

THE CHAIR: Just on that, that was an interesting point that you raised about perhaps introducing circumstances as opposed to elements that negate consent. Can you give us examples of how that would be set out in legislation? At the moment what we have are, I suppose, elements, or factors if you like, that negate consent. But when you said that it would be preferable to go to circumstances, how would that, on a practical level, be set out in law?

Ms McIntyre: It is somewhat a symbolic change, but I would direct you to the examples of the Victorian legislation as well as the Tasmanian legislation. While the ACT legislation sets out circumstances where consent will be negated, what that implies is that consent has already arisen and is then being eroded by the circumstance. So it suggests that consent is the starting point, is the presumption, until you can prove circumstances that would negate it.

In contrast, the legislation in Victoria sets out circumstances in which a person does not consent to an act. What that is doing is setting up circumstances that preclude consent from ever arising in the first place. So it is a different starting point in that sense. Does that make sense?

THE CHAIR: Yes, I have just pulled up the Victorian section 36. The Human Rights Commission witnesses, who gave evidence just before you, also referred to that one.

Ms McIntyre: And the Tasmanian model provides that a person does not freely agree to an act if, and then outlines the circumstances.

MS CODY: In regards to jury versus judge-only trials, in the ACT it is automatically a jury trial. It is not judge only ever in any circumstance when it comes to sexual assault. We have heard evidence this morning from some of our witnesses that have identified the fact that explaining to a jury the current rules around consent and the current legislation as it stands is confusing. Therefore, it basically falls back on juries to sort of have their own understanding. I am paraphrasing. Is that why you are suggesting a judge-only trial?

Ms McIntyre: There are a number of reasons why we believe judge-only trials might be preferable. Firstly, I would like to acknowledge that our recommendation for judge-only trials is conditional on those judges being specialist judges. We would not propose judge-only trials if those judges had not received extensive training in sexual assault, otherwise they may be subject to many of the same preconceptions as jurors are. I clarify that first.

But the reasons we would suggest that jury trials may be preferable are, firstly, what we describe as the decision-making problems, the fact that juries lack the necessary expertise in order to make accurate and informed decisions about the credibility of sexual violence allegations. That relates not only to understanding of issues of the law but also into understanding the complexity of trauma responses to sexual violence and understanding the circumstances in which sexual violence occurs. Our submission to the New South Wales inquiry deals extensively with the prevalence of ignorance and often prejudiced views about sexual violence.

The second reason we suggest that juries might be preferable is the harm problem. That describes the fact that even the presence of a jury may have a harmful impact on the complainant in their experience of the courtroom and have additional risk of retraumatisation.

The third reason, which I referred to earlier, is in relation to transparency. As long as jurors are making decisions around these cases, we have no ability to recognise or

correct misapplications of the law. Because we know that the law is so complex in this area, it is really important that we do have that transparency.

The final reason is that we see that there is a risk to jurors of vicarious trauma just by being present within a sexual violence trial. So in order to protect jurors from the risk, we see that a judge-only trial could be more appropriate.

MS CODY: Can I clarify something? A couple of times you said that juries are more preferable. You meant "judge trials," did you not?

Ms McIntyre: I am sorry, I did mean judges.

MS CODY: That is fine. I assumed that was the case; I wanted to clarify that for *Hansard*.

Ms McIntyre: Sorry about that.

MS CODY: I have one quick final question that has now gone from my brain.

THE CHAIR: It has gone? You have lost it?

MS CODY: Completely gone.

THE CHAIR: Expect to get an email from Ms Cody.

Ms McIntyre: No worries.

THE CHAIR: Sorry, Ms Cody has remembered the question.

MS CODY: I have. Because of your obvious expertise in this field, do you think a positive consent would give people who have been involved in sexual assault better opportunity to come forward and that there would be better reporting mechanisms and, therefore, I guess better outcomes for victims?

Ms McIntyre: I do. What we have seen, unfortunately, is that the reform that has happened in other jurisdictions has not necessarily led to a rise in convictions. That is unfortunate. However, I do think that a change like this has incredible importance symbolically and instigating cultural change will hopefully lead to a better experience for complainants, even if not a higher conviction rate.

THE CHAIR: On behalf of the committee, thank you, Ms McIntyre, for appearing for Rape and Domestic Violence Services Australia. The proof transcript will be forwarded to you to check and to provide any corrections.

Ms McIntyre: Thank you very much.

CAMPBELL, MS JANE, Head, Criminal Practice, ACT Legal Aid

THE CHAIR: Good afternoon, and welcome to the final witness for the day, Ms Jane Campbell from Legal Aid ACT. Can you confirm for the record that you understand the privilege implications of the statement before you?

Ms Campbell: Yes, I do.

THE CHAIR: Thank you. Would you like to make an opening statement, given that Legal Aid has not actually made a submission?

Ms Campbell: Thank you, yes. I am recently appointed as the head of the criminal practice at Legal Aid and before that I had been a prosecutor. So I have had a large amount of experience in prosecuting sexual assault trials, so hopefully I can bring a bit of that experience today to the table.

Thank you for the opportunity for Legal Aid to appear today. Legal Aid did not make a submission, and Dr Boersig would ordinarily appear at these things but, unfortunately, because of the late notice in the request for us to attend, Dr Boersig had a long-standing commitment and was unable to attend. So he passes on his apologies, and he sends me along.

In terms of sexual violence and the work of Legal Aid, it is not something that we see only in our criminal practice; it is something that we see in our family law practice as well as our general practice where we often will represent victims of sexual and family violence as well as seeking protection orders for those victims.

Legal Aid supports the discussions and any discussions that seek better outcomes for victims. It is encouraging to see the community engaging in a communicative model approach, and that is clearly a message we want to send to our children and hopefully that will guide them in their own interactions in sexual relationships. However, the criminal law is just one strategy in affecting people's changing behaviour, and education would have that primary role rather than the criminal law.

The criminal law as it stands marks a clear line in the sand to say that this type of conduct is criminal conduct and is conduct that, as such, deserves criminal sanction. That has to be a clearly identifiable line in the sand. The criminal law also has to work with the reality of human experience and how people interact with each other. The criminal law responds to conduct. The criminal law, of course, is always changing. Some people might say it that is slow, but it is something that changes, and that reflects the changing values in our community.

The bill is concerned with matters that essentially have to be proved at a sexual assault trial: consent and the knowledge or the state of mind of the perpetrator. These are matters that are always tried in the ACT by a jury, because they are sexual offences, and the jury has to determine those things as a matter of fact. They are the fact finders. It is the role of the jury to bring their own life experiences, their own common sense to those deliberations.

Consent is a concept that is, I would say, readily understood by juries. It is not a magical, illusive legal concept that they struggle with; it is a concept that is given to them and those terms "freely and voluntarily given" are usually the terms that are used by the prosecutor, defence counsel or the judge in giving their directions.

Juries equally understand that there are factors that vitiate that consent. They get the position that if someone is intoxicated they are in a state where they cannot give that consent. So Legal Aid is of the view that a definition of consent is not going to make any difference to the task a jury has as to whether consent was or was not given.

Increasingly we are seeing in sexual assault trials the use of expert evidence, and that is designed to explain or give information to a jury to help them in that determination. It is often used to explain what people might say is counterintuitive behaviour. So we see that in the descriptions of freeze responses, and often now the prosecution will be leading evidence about the responses to trauma. That is information the jury can then use in determining those facts that they have to determine: whether the consent was given and was the perpetrator reckless as to that.

At the end of the day those two concepts of consent and recklessness are concepts that I would say are regularly explained to juries by the DPP or by the defence counsel. I would say that those people are the experts in this field; they are the ones who have to get up on their feet every day and explain these concepts to juries. I would say that there is value in the submissions put forth by the DPP and by the Bar Association and that there is some value in the matters they have raised.

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

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

There is some concern that the bill as drafted casts a legal onus upon the defendant and the word "satisfied" suggests that there is a standard. That, of course, raises concerns about fundamental rights and rights to a fair trial.

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

Some of those rape myths are now addressed by mandatory jury directions from a judge, such as the fact that if you do not offer any resistance that does not equal consent, as well as that expert evidence that is also being left. So there is an attempt to address some of those rape myths when a jury comes to consider the issue.

Clearly the community is engaging in this debate, and this conversation is very encouraging. A communicative model of consent is an aspirational goal for us. But the criminal law at this point is possibly not the appropriate vehicle to dictate the social interactions a person should adhere to when they are engaged in sexual conduct.

THE CHAIR: What do we say about broader criticism from the community that we are the only jurisdiction that does not have a definition of consent, and if our definition of consent is the free and voluntary agreement anyway from the common law, what is the harm in including it in legislation? Perhaps that would not be in the way this bill has raised it because of those conflation issues, but in terms of the way Victoria or New South Wales or Tasmania has done it. How would we respond to those two criticisms from the broader community who are not thinking about technical legal arguments?

Ms Campbell: I can understand that is a perception—that when they say other states have it specified they think that somehow it is different for us. In terms of addressing that, I do not know. But I do not see the point in passing legislation that really is just adding words to what we already know is the definition. The very long tradition of common law that we rely upon does not need for every term used to be spelt out.

There is, of course, the concern that if you provide a definition you run into further interpretive issues. At the moment the term "consent" as interpreted by the common law is very readily understood and accepted by the courts. As I said, "free and voluntary agreement" is referred to often and the fact that it is not in the legislation does not really have a practical impact when it comes to court proceedings.

MS CODY: There is a review going on in New South Wales and there has been evidence from all sides about how our laws should and should not align with New South Wales. Do you think that is something that we need to be mindful of? We are currently very different to New South Wales in consent. They are reviewing their legislation. Is there something we should be thinking about if we are talking about reform?

Ms Campbell: I think there is value in looking at the result of the New South Wales review. I know the Director of Public Prosecutions has indicated that the model presently in the New South Wales act is something that should be considered. Again, I would say that there is some value in considering the present New South Wales provisions, which include that reasonable steps issue. But, again, I see value in waiting to see what is going to happen with the New South Wales review. They are obviously undertaking a significant review of that provision itself.

At the end of the day the ACT has to adopt what it finds works for the ACT. Whether that be from another jurisdiction is a matter for you. But the more information we get about these types of issues the better the decision that can be made.

THE CHAIR: The question I have is about the subjective fault element. There have been some suggestions or recommendations that an objective element needs to be introduced. Do you have any comment on that?

Ms Campbell: That is the argument on the Morgan principles?

THE CHAIR: Yes.

Ms Campbell: In practical terms the Morgan principles do not necessarily play out in our courts because we have a provision in the Evidence (Miscellaneous Provisions) Act that the judge may tell the jury when they are considering whether a belief is honestly held whether or not there is reasonable grounds for that. So there is that.

I understand the director's view that it would be preferable that there be a prohibition on considering the honesty and that, rather, the focus should be more on the reasonableness of the decision. In practical terms I think that is what juries do. When looking at recklessness they look at the issues of reasonableness to determine whether a person considered consent or if they just went ahead without considering whether a person was or was not consenting.

It is clearly a matter that should be put to bed, that is, whether we have that Morgan defence available in the ACT. At the moment the Morgan defence is clearly there under the common law, but we have this provision in the Evidence (Miscellaneous Provisions) Act which seems to suggest otherwise.

Again, it is that the court "may", so it is not a mandatory direction the judge must give. It is something that the legislature needs to consider. And it is probably timely at the moment when there is discussion on the reform of sexual assault laws that that issue be fully explored.

THE CHAIR: In your experience from both the prosecution and now the defence side of things, despite the fact that it is a "may" provision, do judges give that direction on the whole and do juries follow that?

Ms Campbell: It is not the usual case, I would say from my own experience, that a person runs a defence of an honestly held belief but not on reasonable grounds because that is a very hard sell to the jury.

THE CHAIR: Yes, you would think so. It sort of goes hand in hand in a way.

Ms Campbell: That is right. So you often do not see that honestly held but not on reasonable grounds type of defence. Usually the defence is, "I honestly held that belief and there are reasonable grounds for it because of the way she was acting," or the conduct beforehand or whatever. So it is often not a direction that is sought or made.

If it has been requested I have not ever seen that refused. So it would seem to be a case of if it is requested there is not really an issue with it. It comes out in the case that they believe they honestly held the belief and that there are reasonable grounds. So

when a judge is telling the jury what they have to consider they would be looking at whether it is honestly held and whether there are reasonable grounds for it.

MS CODY: I have asked this question of some other witnesses today: how would you explain these proposed amendments to a first-year law student? We have had so much commentary from the general public about this stuff and it is a really technical area of law. I am trying to get to the guts of how you would describe the proposed amendments in plain English.

Ms Campbell: I would start with the saying that there are really three elements the prosecution has to prove to prove this offence, and each beyond a reasonable doubt. First of all, there was no consent. We need to know what is consent, so let's look at what the legislation says consent is.

Assuming that this bill is the act, the prosecution will have to prove first of all that the consent was freely and voluntarily given. What does that mean? First of all, do they have capacity to give consent? Is their capacity affected by certain things? Are they in a position to give free and voluntary consent, so they are not impacted by threats or those sorts of things? So you come to a conclusion that yes, it is freely and voluntarily given or no, it is not.

Then this definition of consent says that you have to consider that the perpetrator is satisfied that reasonable steps have been taken or is satisfied that the consent is freely and voluntarily given. That is the problem I have in explaining it to a first-year student. They would say, "The consent is really just in the mind of the person. Why would I need to establish that? Don't I need to establish that in the second element? Don't I need to consider in proving the second element that the perpetrator was reckless as to that lack of consent?" So that is the problem; I cannot explain it to a first-year law student.

THE CHAIR: We had that same answer, saying, "No, I couldn't explain it."

Ms Campbell: That is right.

MS CODY: As opposed to the current legislation, that would be easier to—

Ms Campbell: That is right. At the moment it is not a problem to just say, "This is consent. This is how we understand consent." People understand consent every day. They go through their lives—

THE CHAIR: So they employ an everyday sort of—

Ms Campbell: That is right.

THE CHAIR: plain English meaning to it?

Ms Campbell: Yes. That is often what is used to explain to the jury, for the jury to think about. You do things every day. You give consent to people to do things. That is a concept that we understand. I do not think having to go through those steps, is it freely and voluntarily given—the clause 67 factors will not necessarily come up in

every case. Sometimes it is just a factual dispute. No, there was no consent. Yes or no.

The clause 67 factors can come up, and that is obvious from the facts of the case: whether it is alcohol, whether there is intoxication, whether there is pressure, whether it is the use of a position or authority, or something like that. Those matters are then raised with the jury and explored. They understand that as well, how that impacts on the ability to consent.

MS CODY: I briefly touch on one of the elements in your response just then. A jury will generally have an idea about what consent is. Clearly that is being tested, particularly at the moment with what people understand as consent. I know that you have already touched on educative programs. Do you think that there is a need for targeting the educative processes a bit differently to identify consent better for people that are struggling with the definition?

Ms Campbell: I think clearly yes is the answer to that. I think so. I do not know whether you are aware of the tea analogy, which puts it so simply.

MS CODY: Yes.

Ms Campbell: That is a wonderful learning tool and so well accepted. People get it immediately. In relation to consent and the issues of consent, if we are going to be moving to a communicative model, those sort of concepts can be explained from a very early age. Hopefully we would be doing that with educating our young people in that.

THE CHAIR: Which goes to your point earlier about it not necessarily being the criminal justice system that is going to play the biggest role in the education of the community.

Ms Campbell: That is right, yes.

THE CHAIR: Given the time, we will call it there. When available, a proof transcript will be forwarded to you to provide an opportunity to check the transcript and to suggest any changes. Thank you, Ms Jane Campbell, for appearing on behalf of Legal Aid ACT today, despite no submission. We do appreciate it. We thought it was important to get your contribution.

Ms Campbell: Thank you.

THE CHAIR: I do not think any witnesses took any questions on notice. The committee has now completed today's hearing program. I close the hearing for the day.

The committee adjourned at 4.48pm.