

16 March 2023

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

ALS Submission to the Inquiry into Current and Proposed Sexual Consent Laws in Australia

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited ('ALS') and thank you for the opportunity to provide a submission to the Inquiry into current and proposed sexual consent laws in Australia ('the Inquiry').

The ALS is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. We currently undertake legal work in criminal law, care and protection law, and family law, and discrete areas of civil law. We also undertake broader work in law reform and wrap-around programs for community wellbeing. The ALS welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee.

The ALS prepared this submission based on our understanding and experience of sexual consent laws in New South Wales ('NSW') and the Australian Capital Territory ('the ACT').

Harmonisation of Sexual Consent Laws¹

Recent Amendments

In 2022, the ACT and NSW both amended their sexual consent laws. This submission reflects our experience thus far regarding the current legislation.

It is difficult to comment on the effectiveness of consent laws that have been in place for less than one year. When considering submissions, the inquiry should be cognisant of the timeline of the recent amendments and be aware that as more trials and hearings proceed new issues may arise.

¹ Term of Reference (c).

Effect of Harmonisation

As a legal service operating in the ACT and NSW, we are unable to comment on whether harmonisation of sexual consent laws would be beneficial without knowing the terms of the proposed laws.

If harmonisation was to be considered, however, we briefly note the following:

- a) That the age of sexual consent should be 16 years of age (not 17 years of age),
- b) That the definition of consent should be:
 - Clear, concise and in plain English, and
 - Internally consistent with the rest of the Act, and
- c) That any provisions around consent should be logically structured and easy to understand for laypersons.

We also note that for harmonisation to be accomplished to a high standard it would require significant resources—this is particularly true if the legislation attempted to harmonise sexual offences across Australia.

Sexual Consent Laws in NSW and the ACT²

Consent Laws in NSW

In NSW sexual consent is defined in the *Crimes Act 1900* ('the NSW Act').

The NSW legislation stipulates that sexual consent:

- Occurs in sexual activity that the person 'freely and voluntarily agrees to': s 61HI(1);
- Can be withdrawn at any time through words or actions: sub-ss 61HI(2), (3);
- Does not occur if the person does not say or do anything to communicate consent (i.e. must be affirmative consent: ss 61HI(4), 61HJ(1)(a); and
- Cannot be given by a person under 16 years of age: s 66C.

Section 61HJ outlines a non-exhaustive list of circumstances where there is no consent, such as where a person is incapable of consent due to drugs or alcohol, or a person is asleep.

In the experience of ALS solicitors, the meaning of consent is clearly outlined in the NSW legislation. The structure of the legislation is clear and logical.

Consent Laws in the ACT

In the ACT consent is defined in the *Crimes Act 1900* ('the ACT legislation'). Whilst the ACT and NSW legislation is structured differently, they effectively outline the same parameters of consent.

The ACT legislation stipulates that sexual consent:

- Is defined as an informed agreement to the sexual act that is (a) freely and voluntarily given and (b) communicated by saying or doing anything: s 50B;
- Can be withdrawn at any time through words or actions either before or during the act: s 67(1)(a); and

² Term of Reference (a).

- Cannot be given by a person under 16 years: s 50(3).

Sub-section 67(1) provides a non-exhaustive list of circumstances where consent does not occur, such as when someone is asleep or incapable of agreeing due to intoxication.

The ALS submits that consent as outlined in s 55B of the ACT legislation is clear, logical and in plain English.

However, the definition of consent is muddled by sub-ss 67(4) and (5):

67 When a person does not consent to an act

...

(4) An accused person is taken to know that another person does not consent to an act mentioned in a sexual offence consent provision if any belief that the accused person has, or may have, that the other person consents to the act is not reasonable in the circumstances.

(5) For subsection (4), without limiting the grounds on which it may be established that an accused person's belief is not reasonable in the circumstances, the accused person's belief is taken not to be reasonable in the circumstances *if the accused person did not say or do anything to ascertain whether the other person consented* [emphasis added].

Sub-section (5) obfuscates the definition of consent outlined in s 50B, requiring both parties to actively check the other person is consenting. In essence, sub-s 67(5) does not consider the whole of the interaction between two parties who have sexual intercourse it instead only considers the positive actions of each individual to ascertain the others' consent.

This issue was raised after the draft bill was presented in Parliament.³ The Scrutiny Committee articulated the following concerns with sub-s 67(5) "[t]he Bill, therefore, will require both the complainant and accused person to take affirmative steps to communicate or ascertain consent".⁴

The Committee elaborated on this point by considering approaches taken to communication of consent in other jurisdictions:⁵

In recent NSW reforms, for example, following the approach taken in Tasmania and Victoria, consent does not require agreement be communicated. Instead, the list of circumstances where a person is taken to have not consented includes when the person does not say or do anything to communicate consent. The recent NSW reforms include reference to a belief in consent not being reasonable if the accused person did not say or do anything to find out whether the other person consented. However, this requirement for the accused person to take affirmative steps was not recommended by the NSW Law Reform Commission (NSWLRC) report on which the reforms were based. The NSWLRC expressed concerns that such reforms could adversely affect the rights of the accused person. This was also the view of recent reviews of sexual offences in Ireland and Northern Ireland. Those reviews generally considered a proportionate reform would be for the trial to take into account what, if

³ Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), ACT Legislative Assembly, *Scrutiny Report 13* (15 March 2022)

<https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/1966433/Report-13-15Mar22.pdf>.

⁴ Ibid 2.

⁵ Ibid.

anything, the accused person did to ascertain consent as part of assessing the reasonableness of the accused person's belief in consent.

The Committee went on to outline the risks of this provision:⁶

By imposing an objective basis on which consent of a complainant can be established, the Bill may impose additional practical burdens on the accused person in establishing that they acted with the consent of the complainant. By expanding the objective basis on which the fault element of sexual offences may be established and, in particular, imputing fault in circumstances where an accused person did not say or do anything to ascertain whether the other person consented, the Bill limits the requirement in the prosecution of any relevant offence to establish the subjective intent of the accused person. While not strictly imposing a legal burden on the accused person, the Bill may still limit the presumption of innocence protected as a right in criminal proceedings by section 22 of the HRA [Human Rights Act].

Dr Marisa Paterson, the Member for Murrumbidgee, responded to the Committee's concerns.⁷ To alleviate concerns a revised explanatory statement was released which indicated the intention of the Bill was not to infringe upon an accused's right to silence but to ensure the prosecution is not required to prove the accused's mistaken belief in the complainant's consent was unreasonable.⁸

The ALS is yet to be involved in a matter which turns on sub-s (5), noting the explanatory statement we remain hopeful that any application by the courts will be conservative. Despite this, we submit that s 67(5) is internally inconsistent with the definition of consent in s 55B. Furthermore, it risks breaching the accused's right to the presumption of innocence and the right to silence. In short, s 67(5) is a poorly drafted provision. If harmonisation of sexual consent laws was pursued, the ALS submits this provision should be excluded from any national legislation.

Defence where Children are of a Similar Age

In NSW and the ACT there is a defence available where the complainant is under 16 years of age and the accused is of a similar age.

In the ACT this defence is available where the complainant is of or above the age of 10 years, the accused is no more than two years older than the complainant, and that the person agreed to the sexual act.⁹ In NSW this defence is only available where the complainant is of or above 14 years and the accused person is no more than two years older than the complainant.¹⁰

In the experience of our solicitors, the narrower NSW defence can result in unjust and illogical outcomes.

⁶ Ibid.

⁷ Dr Marisa Paterson, Member for Murrumbidgee, *Member Response to Scrutiny Committee Report* (2 May 2022) <https://www.parliament.act.gov.au/__data/assets/pdf_file/0003/2003277/Response-Crimes-Consent-Amendment-Bill-2022.pdf>.

⁸ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022 (ACT) 7.

⁹ *Crimes Act 1900* (ACT) s 55(5)(b).

¹⁰ *Crimes Act 1900* (NSW) s 80AG.

For example, a 14-year-old accused has no defence where the complainant was 13 years old, and the sexual act was reciprocal in nature.¹¹

Similarly, the ALS has acted in cases where young children are charged with sexual offences involving exploratory behaviour. In these cases, it is not always clear why one child is charged over the other and often appears to be due entirely to age. For example, where two ten-year-old children are engaged in sexual touching the slightly older child may be charged despite little variation in their actions or maturity. It should also be noted that such behaviour in children may be symptomatic of their own exposure to sexual abuse.

The ALS submits that the criminalisation of exploratory behaviour, in circumstances where neither party can legally consent, is an injustice. Furthermore, we note the process of prosecuting a child in such circumstances, risks encroaching on their rights under the United Nations Convention on the Rights of the Child (UNCRC) including Articles 37 and 39.

The ALS submits that if harmonisation were to be considered, then the inquiry should implement a nationwide defence of a similar age. The defence should be available in circumstances where the complainant is of or above the age of 10 years and the defendant is not more than two years older.

Specialist Training for Responding to Allegations of Sexual Assault¹²

The ALS submits that there is a need for police officers, first responders witness intermediaries and judicial officers to receive specialised training for responding to allegations of sexual assault.

Police Officers and First Responders

Police officers and first responders have significant roles in the early stages of an investigation. They are responsible for gathering evidence and are often called as witnesses during a trial or hearing. This is particularly relevant for police officers.

In NSW and the ACT, police officers may record evidence from complainants when they first disclose to police. In certain circumstances these recordings can be used as the complainant's evidence in chief. This may occur in two situations: for complainants alleging domestic violence and for child complainants in sexual assault proceedings. The recorded evidence can then be adopted by the complainant during the proceedings.

There are advantages to pre-recorded evidence for both parties: it reduces the number of times the complainant is required to outline what occurred, it provides certainty for the accused in what will arise in evidence in chief and allows for any prejudicial or extraneous details to be edited out of the evidence before it is played to the decision-maker.

However, this process is undermined when the police officers recording the evidence have insufficient training. In such circumstances, the police officer's line of questioning can be leading or inappropriate—this disadvantages the accused and means the complainant is required to give evidence multiple times to make up for the police officer's lack of training.

¹¹ Reciprocal is used here to describe sexual acts where both parties were in agreement but unable to consent under the law due to their ages.

¹² Term of Reference (h).

Witness Intermediaries

Child complainants in sexual assault cases are also provided with witness intermediaries.¹³ Witness intermediaries make recommendations about how the complainant is questioned during cross-examination and can interrupt a line of questioning if they consider it needs to be reworded for the child to understand it. The evidence of the child is recorded, and the witness intermediary's contributions are edited out. The edited footage is then played to a judge or jury during the trial.

Pre-recorded evidence and witness intermediaries have the potential to be an excellent addition to the trial process—one which supports complainants while ensuring the process does not cause prejudice to the accused. However, in our experience the programs can disadvantage the accused.

Across our ACT and NSW offices, ALS solicitors have encountered:

- Witness intermediaries acting outside the scope of their role by interrupting questions that were appropriate for the child, and
- Courts ordering cross-examination questions to be made available in advance of the trial at the recommendation of the witness intermediary.

When a witness intermediary acts outside the scope of their role it infringes upon the rights of the accused—this is particularly so where the court requires cross-examination questions to be provided in advance. It requires the defence advocate to present and effectively outline their case to the prosecution well in advance of the trial—giving the prosecution time to further investigate and undermining the trial process.

Judicial Officers

In NSW, judicial officers often rely on the NSW bench book to assist when providing directions to juries. The bench book not only outlines when directions should be given but provides the appropriate wording with reference to case law.

In contrast, the ACT does not have a bench book. In our experience, judicial officers often use the NSW bench book to assist in directions—however this is not ideal in circumstances where the laws differ. It can also result in inconsistent directions to juries.

The ALS submits that judicial officers receive specialised training and have access to appropriate resources (including bench books) to ensure consistency in decision-making and directions to the jury.

Experience of the Criminal Justice System for Complainants

The adversarial system of justice is one that is inherently stressful for complainants, witnesses, and the accused. In NSW, there are safeguards for complainants to support them in giving evidence and protect their privacy throughout this process.

Complainants are entitled to give evidence from a remote witness room (so they do not see the accused) and with a support person present.¹⁴ The court is closed for the duration of the complainant's evidence.¹⁵

¹³ See generally *Evidence (Miscellaneous Provisions) Act 1991* (ACT) Chapters 1A and 1B; *Criminal Procedure Act 1986* (NSW) Part 29.

¹⁴ *Criminal Procedure Act 1986* (NSW) ss 294B(3)(a), 294C.

¹⁵ *Criminal Procedure Act 1986* (NSW) s 291(1).

If there was a delay in disclosure, then the judge is required to give to jury a direction not to infer that the complainant is lying as a result.¹⁶

Sexual Assault Communications Privilege prevents counselling notes and other confidential therapeutic records being accessed by parties without access being granted by the court. The court may only grant leave if it is satisfied the evidence that will be adduced by the document has significant probative value, that the evidence cannot be obtained through another document or means and that it is in the public interest.¹⁷

Evidence given by a complainant in sexual assault proceedings is also recorded to ensure they are not required to give evidence again if there is a retrial.

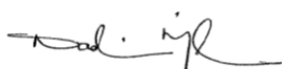
It is critical that the rights of the complainants are balanced against the rights of the accused. The ALS submits that the above processes effectively support the complainant throughout a sexual assault criminal proceeding. Any further protections proposed for complainants should be carefully scrutinised to ensure they do not infringe upon the accused's right to silence or their right to a fair trial.

Specialist Court for Sexual Assault Proceedings

One aspect of the criminal justice system that causes substantial stress for parties involved is the delay. Due to the high quantity of sexual assault matters, if any specialist court were imposed it would require sufficient resourcing to work efficiently and reduce the delay between charging the accused and proceeding to trial. Such a reform would require substantial funding across all sectors of the criminal justice system including criminal legal services such as Legal Aid and the Aboriginal Legal Service.

The ALS welcomes the opportunity to discuss any matter raised in this submission. If you have any questions, please contact ALS Justice Policy Officer Grace Worthington by email at grace.worthington@alsnswact.org.au.

Sincerely,



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¹⁶ Criminal Trial Courts Bench Book, 'Complaint Evidence' [5-055].

¹⁷ *Criminal Procedure Act 1986* (NSW) s 299D.