

Response to the Inquiry into the Crimes (Consent) Amendment Bill 2018

1. Advocacy for Inclusion is a not-for-profit non-government community human rights organisation in the Australian Capital Territory (ACT). We provide individual, self and systemic advocacy to people with disabilities to promote their human rights and inclusion in the community. In the past, Advocacy for Inclusion advocates for change that the system undermines and restricts the ability to people with disabilities reporting sexual violence and their access and accessibility to protection and justice.
2. We welcome the amendment to the *Crimes Act 1900 (ACT)* to change the definition to 'free and voluntary agreement' rather than focusing on factors that 'negate' consent. However, we have concerns in how 'free and voluntary' will be just and fair towards people, particularly women and girls, with disabilities who cannot voice or communicate their consent.
3. We agree¹ and argue that the *Crimes Act 1900 (ACT)* fails to define and justify what consent is. The 'negating factors' of consent currently listed (i.e. duress, fraud, intoxication) does not include a definition of consent that may or may not be provided by people with disabilities, particularly intellectual and cognitive disabilities.
4. The amendment to the Bill should advocate for a case-by-case basis, rather than by definition because we argue 'it is not always as it seems' in how consent can be provided or defined in how it is communicated.²
5. In the amendment of this Bill, we believe that a statutory definition of consent based on *free and voluntary agreement* must explicitly mention that some members of our community *cannot* provide verbal or physical consent in a traditional way and thus, in exceptional circumstances the onus of proof should be contested to a higher standard than other cases where intellectual and cognitive disability is evidenced.
6. In addition, due to broadness of definitions of what constitutes as 'free and voluntary' consent it is increasingly necessary to begin framing definitions of where unwanted attention and sexual abuse can occur in a location-sense. Such definitions can be useful regarding evaluation of policy initiatives and building an evidence of where abuse has occurred, particularly when high levels of abuse against people with disabilities occur in institutional and residential settings.
7. In responding to the contents of the bill, particularly section 67(a) and (b), it is clear that the language of the amendment needs to be clear, consistent and open to interpretation. At present, the language is unclear, ambiguous and vague where consent cannot readily be provided, which in turn complicates the law where a person is "satisfied on reasonable grounds that the agreement was freely and voluntarily given".

¹ Caroline Le Couteur MLA (ACT Greens) (2018) *Consent in Sexual Violence Laws: A proposal to reform the ACT's criminal law to adopt a new definition of consent in the Crimes Act 1900 (ACT)*, Submission 2: Executive Summary, p.8

² We refer to Northern Territory *Criminal Code Act 1983* in which it is criminal if a person is "guilty of an offence if he person has sexual intercourse with another person... without the other person's consent..." and to interpret consent not provided by a person with a disability, "or being reckless as to the lack of consent" where *reckless* can mean "not giving any thought to whether or not the other person is consenting".

The Context of Disability

8. Research has demonstrated that people, particularly women and girls with disabilities with intellectual and cognitive³ disability, is disproportionately high in comparison to their counterparts without disabilities.^{4 5 6}
9. It is highly common that women and girls with disabilities who have only experienced living in institutional living arrangements⁷ have no knowledge about alternatives and no readily accessible means to acquire that knowledge. It is under these living arrangements that many people with disabilities are particularly isolated, with limited ability to have relationships and confidants outside the environment where the abuse may take place.^{8 9}
10. Isolation is a primary factor contributing to the difficulties faced by people with disabilities in understanding what consent is, the services available and their rights to justice and reporting abuse. In our experience, isolation, both social and physical, can heighten vulnerability by the absence of family, social support and the lack of means to report abuse of consent, particularly if the perpetrator is a carer or family member.

Definition of Consent

11. How the definition of consent is operational with regard to each sexual offence reported is to be noted, particularly when prosecuting on a case-by-case basis. The *ability to communicate* verbal and physical consent plays a large role in the implications for the victim and the accused when disability is a key factor to allegations where consent had been legally abused.
12. There are two ‘myths’ that emerge consistently where disability and vulnerability are reflected in where consent may be given. Firstly, that women and girls with intellectual disabilities are easily influenced and the complainant’s story is not a credible account.¹⁰ The second is that people with disabilities cannot be sexually assaulted due to their vulnerability.
13. Police, in particular, have been demonstrative in the past to be dismissive of allegations of sexual assault where consent had not been readily given or communicated. This is evident in cases where the victim is perceived to make poor witnesses if they become confused, unable to communicate effectively or simply appear to not understand what they had become part of or involuntarily consented to.¹¹ The effect of the

³ The term **cognitive impairment** is a broad term that refers to all people who have intellectual disability, psychosocial disability, traumatic brain injury, autism spectrum disorder, etc. The term refers to people for whom the ability to perceive and process information is impaired in some way, and who may require support to understand and remember information, and to communicate their wishes/intentions.

⁴ Dowse L, Soldatic K, Didi A & van Toorn G (2013) *Stop the violence: addressing violence against women and girls with disabilities in Australia. Background Paper for the National Symposium on Violence against Women and Girls with Disabilities*, Sydney, 25 October. Hobart: Women with Disabilities Australia. At: wwda.org.au/wpcontent/uploads/2013/12/STV_Background_Paper_FINAL.pdf

⁵ COAG Advisory Panel on Reducing Violence against Women and their Children, *Final Report* (2016), p.37

⁶ ACT Disability and Community Services Commissioner. (2014). *Developing an ACT crisis response to women with disabilities who experience domestic violence and/or sexual assault*. <http://www.hrc.act.gov.au/res/Final%20Report%20%20Crisis%20Services.pdf>

⁷ People with disabilities live in a diverse range of domestic settings including: community-based group homes or residential institutions, boarding houses, hospitals, psychiatric wards, or nursing homes.

⁸ Australian Law Reform Commission (2010) *Family Violence – A National Legal Response. ALRC Report 114: The Intersections of Child Protection and Family Laws*. <https://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>. P. 36.

⁹ Australian Human Rights Commission (2018) *A Future Without Violence: A Report: Quality, safeguarding and oversight to prevent and address violence against people with disability in institutional settings*; Australian Human Rights Commission. (2014). *Equal before the law: Towards disability justice strategies*; Victorian Equal Opportunity and Human Rights Commission (2014) *Beyond doubt: The experiences of people with disabilities reporting crime – Research findings*; Queensland Advocacy Incorporated (2015) *dis-Abled Justice: Reforms to the justice for persons with disability in Queensland*; NSW Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system*.

¹⁰ Fogarty, B. (2010) ‘Improving legal representation for people with intellectual disability’, *Precedent* 96.

¹¹ Case Study from South Australia in 2011 emphasized why this is necessary when charges of sexual abuse against a bus driver were dropped because the victims had communications difficulties and were unreliable witnesses. The victims were seven children with intellectual disability who had little or no speech, but could all communicate through other means, such as sign language. The prosecutors were concerned the victims could not adequately communicate what happened to them. The rules of evidence did not allow for an interpreter to help a person with disability in a court of law. The prosecutors tendered ‘no evidence’, meaning the case

test of *reasonableness*, that the accused *is satisfied on reasonable grounds that the agreement was freely and voluntarily given* is subjective to consent preferred in the cases of people with disabilities.

14. The over-extensiveness of legal processes can become difficult for a person with disability.¹² In light of the view referred to above, of people with disabilities are not always considered capable of participating in a criminal justice response, independent forensic evidence can be a crucial factor in deciding whether a case is to progress through the system.¹³
15. For cases that do make their way into the criminal justice system, there are particular challenges for people with disabilities, especially for those with an intellectual disability or who use augmentative communication. More specifically, these difficulties include dealing with repeated questioning by a number of people, difficulty in understanding the nature of the crime, unfamiliarity with court processes, and inability to recall sufficient detail about the offence or to put these memories into words.^{14 15}

Section 67(2) and (3)

16. In substitute to section 54 and 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 the sexual intercourse”¹⁶, it is suggested making it clear of those with legal-defined *impaired* decision-making ability.
17. The sections above are incredibly ambiguous and vague implying the open-interpretation that if a person does not resist physically, it is not consent unless proven further. The statement “by reason only of that fact” is not a just and understandable injection to the section.
18. If the effect of the proposed definition (as drafted) of consent is applied under the sexual offence provisions of the *Crimes Act 1900 (ACT)*, it is incredibly vague and advised against using. Language in the amendment of the Bill needs to be simplified, clear and consistent as to where people, with more vulnerability than most, sit within the definition of what consent entails if they cannot verbally or physically consent to sexual intercourse.
19. The confusion of the wording within the Act will essentially complex proof where consent cannot readily be provided, which in turn complicates the law where a person is “satisfied on reasonable grounds that the agreement was freely and voluntarily given”.

could not proceed and the charges were dropped. Case Study example taken from the Australian Human Rights Commission (2013) *Access to Justice in the Criminal Justice System for People with Disability: Issues Paper*, 2013, p. 10

¹² Please refer to Advocacy for Inclusion (2018) Response to the Charter of Rights for Victims of Crime Options Paper, Position Statement in which referred to recommendations to ensure that victims have a clear understanding of their rights and a fair justice process

¹³ Australian Human Rights Commission (2018) *A Future Without Violence: A Report: Quality, safeguarding and oversight to prevent and address violence against people with disability in institutional settings*; Australian Human Rights Commission. (2014). *Equal before the law: Towards disability justice strategies*; Victorian Equal Opportunity and Human Rights Commission (2014) *Beyond doubt: The experiences of people with disabilities reporting crime – Research findings*; Queensland Advocacy Incorporated (2015) *dis-abled Justice: Reforms to the justice for persons with disability in Queensland*; NSW Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system*; Victorian Ombudsman (2015) *Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting* (Report, December 2015) p.31.

At <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports>; Community Affairs References Committee (2015) *The Australian Senate, Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, pp.37-38.

At https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect (viewed 13 June 2018).

¹⁴ Victorian Equal Opportunity and Human Rights Commission (2014) *Beyond doubt: The experiences of people with disabilities reporting crime – Research findings*; Queensland Advocacy Incorporated (2015) *dis-abled Justice: Reforms to the justice for persons with disability in Queensland*; NSW Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system*.

¹⁵ Refer to Recommendation 15 of the Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Executive Summary and Parts I-II, page 30 – accessible justice processes for people with disabilities

¹⁶ *Crimes (Consent) Amendment Bill 2018*, s67(2) and (3)

The onus of proof

20. We acknowledge that the Bill, as currently drafted, reverses the onus of proof of the accuser, however we believe that there needs to remain a balance. Where the accused either knows or *'is satisfied on reasonable grounds that the agreement was freely and voluntarily given'* is a dangerous proposition to make when a person with disability may be unable to communicate their consent verbally or physically – thus allowing the perpetrator to take full advantage of their vulnerability.
21. In the context of institutional and congregate living housing people with disabilities, the issue of consent becomes complex. For example, research has shown male residents in residential care facilities are the most common perpetrators of sexual abuse against women with intellectual disability.^{17 18 19} In these facilities the *onus of proof* may be diminished because it is seen to be an indication of the perpetrator's or the victim's disability.^{20 21}
22. The obligation should indeed to be placed on the person to prove that consent was given, by both the victim and the accused, without the assumption that consent was provided due to a person's vulnerability, inability to communicate or lack of physicality to fight back.
23. The proposal that consent is provided *'freely and voluntary'* can be a misdemeanor when either a person *could not* consent, or the perpetrator gives evidence that it was *assumed* as consent.²² It is in this instance people, particularly women and girls, with disability are provided exceptional circumstances under this amendment.
24. It is necessary to highlight that for people living in institutional arrangements may not make a police report as they do not realise what happened or continues to happen to them is a crime – if they are unaware how and what is *valid consent*, they cannot say no. In supported disability service settings, people with disabilities are often alone with support workers to provide a range of personal supports, such as showering, toileting and dressing which, in our experience, has been the emphasises of some cases of abuse.
25. Finally, many people that are supported through individual and self-advocacy at Advocacy for Inclusion have limited education or exposure regarding healthy sexual relationships, information and support to their human right to report a crime or abuse. They often do not recognise the violence that is perpetrated against them is a crime are unaware of how to seek assistance or support. Even if, and when, they can disclose, they are unable to be believed and are often actively prevented from seeking help and support. In such setting, victimising behaviour has become normalised.²³

Conclusion

26. We thank you for your time in considering this submission and I hope it may assist the committee's inquiry into the Crimes (Consent) Amendment Bill 2018.

17 Community Services Commission & Intellectual Disability Rights Service, 2001, Crime prevention in residential services for people with disabilities, A discussion paper, Sydney: Community Services Commission.

18 People with Disability, 2007, SADA Action Strategy Project, Sexual assault in disability and aged care residential settings, NSW regional consultations findings and recommendations, Sydney: Author.

19 Wilson, C., & N. Brewer, 1992, The incidence of criminal victimisation of individuals with an intellectual disability, *Australian Psychologist*, 27(2), 114-17.

20 Attard, M., 2007, Senior Project Officer, Sexual Assault in Disability and Aged Care Action Strategy Project. Interviewed by A. Powell, 18 December 2008. Cited in Sullen, M., & Powell, A., Op. Cit.

21 Worth, C., 2008, Manager, South East Centre Against Sexual Assault (SECASA). Interviewed by A. Powell, 22 January 2008. Cited in Sullen, M., & Powell, A., Op. Cit.

22 Example, "well, he/she didn't say no..." or "he/she didn't physically fight back"

23 Please see Appendix A of two Case Study examples from Advocacy for Inclusion's *Submission to the Senate Inquiry into violence, abuse and neglect against people with disability*, pp.22-25