

16 July 2021

Dr Marissa Paterson MLA
Member for Murrumbidgee

By email: Paterson@parliament.act.gov.au

Dear Dr Paterson

RE: Sexual Consent Law Reform – Exposure Draft Bill

Thank you for the opportunity to comment on these important law reforms. The Women's Legal Centre ACT ('the Centre') supports the introduction of a communicative model of consent in the ACT and applauds the Labour government for championing these reforms. The Centre believes these reforms will not only increase conviction rates for sexual assault offences in the ACT, which are notoriously low, however change societal views about sex and respectful relationships.

About Us

The Women's Legal Centre is a specialist community legal centre. Our main legal practice areas are sexual harassment, family violence, victims of crime, family law, early intervention Care and Protection work, employment, and discrimination.

The Centre provides legal assistance across the spectrum of need, including legal information and referral, legal advice and representation and litigation. The Centre provides legal services within a multi-disciplinary and trauma-informed practice model that incorporates social work, cultural supports, and collaborative service models to provide wrap-around support to the most vulnerable and at-risk clients.

The Centre also provides community legal education and input on law and policy development to build government and community capacity to work towards deeper legal and cultural change to redress power imbalances and address violence and gender inequality.



Submission

The Centre is regularly contacted by women where the criminal justice system has failed them. The reasons for these failures range from evidentiary issues, inappropriate police responses, the lack of trauma-informed approaches from the courts and legal profession, and victim-blaming biases.

Currently, we know sexual assault trials and conviction rates in the ACT have plummeted over the past five years despite an increase in reports to victim services and policeⁱ. The current laws, which place an onus on the victim-survivor to prove they did not consent to sexual activity, does not consider how victim-survivors may react when sexually assaulted. Well known trauma responses include 'freeze' and 'fawn' responsesⁱⁱ, where victim-survivors keep themselves safe by physically freezing, or appeasing their perpetrator, and may not 'put up a fight' or 'run away'. This is clearly problematic when this reaction is masked as consent under our current system. A communicative consent model is more consistent with a trauma-responsive approach, where the proposed bill captures a range of circumstances where consent may not be given.

Specific Provisions

The Centre supports the proposed draft in its current form, yet suggests the following to improve consistency of interpretation and clarity:

1. In relation to proposed section 67 (1) (h) which provides a person does not consent to an act if they are mistake about any element of the act. This provision is very broad, and there is no guidance about the legislative intention, to interpret this provision. One concern is this provision may be used against trans people not disclosing their gender history prior to sex which could have potential transphobic criminal outcomes. It would be useful to clarify the legislative intention of this provision and provide examples within the legislation.
2. In relation to proposed section 67 (1) (k) which provides a person does not consent to an act if they do not have capacity to agree to the Act, it would be useful to include further guiding provisions about how capacity may be determined and examples of when this may occur. For example, '*does not have capacity to consent due to a person's known mental state at the time*' which would capture mental health considerations and known trauma histories.



3. In relation to proposed section 67 (1) (j), for interpretation purposes, the current drafting is problematic in that it is unclear whether the 'abuse of relationship' extends to a professional relationship (not just an abuse of relationship of authority, trust, or dependence), or that consent is simply overborne by 'a professional relationship' which would be an overreach.
4. In relation to proposed section 67 (4), the Centre supports the inclusion of a 'reasonableness' test in determining whether a person gives consent, however, suggests including examples (which do not limit the provision) to provide greater clarity.

Conclusion

Ultimately, the law plays an important role in setting community standards of acceptable behaviour and communicating these standards. The proposed changes clarify consent laws and sets a clear message: you cannot assume consent. A communicative consent model and the introduction of the principle of reasonableness in determining consent, challenges the community's view of women as 'passive' in sexual activity, and places the onus on both parties to have the conversation. In turn, the Centre is hopeful this will change community attitudes to sex, and women become more empowered in sexual relationships, establishing the foundations for respectful relationships.

Yours Sincerely,



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ⁱ Bladen Lucy, [Fears over drop in sexual assault trial numbers | The Canberra Times | Canberra, ACT](#) [29 March 2021]

ⁱⁱ Rape & Sexual Assault Research and Advocacy [Consent Toolkit Part 2 — Rape & Sexual Assault Research & Advocacy \(rasara.org\)](#)

