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Dear Ms Le Couteur

Exposure draft: Crimes (Consent) Amendment Bill 2018

Thank you for seeking the Human Rights Commission's input on the exposure draft of the Crimes (Consent) Amendment Bill 2018, which is seeking to introduce amendments to the *Crimes Act 1900* to:

- (i) apply the 2-year rule as an exception to young people engaging in consensual sexual activity more consistently across the Crimes Act; and
- (ii) create an affirmative definition of consent for sexual and intimate image abuse offences.

Our analysis of the proposed measures has been aided by the human rights assessment contained in the Explanatory Statement to the bill. We commend the provision of human rights justificatory material at the exposure stage of the bill's development.

Exceptions to child pornography offences

The exposure bill proposes to insert a similar-age consent exception to existing child pornography offences in sections 64, 65 and 66¹ of the *Crimes Act 1900*. Specifically, a person will not have committed an offence under these provisions if there is no more than 2 years difference in age between the person and the young person, and the young person consented to the act constituting the offence.

The Commission is pleased to see these amendments as they address our long-standing concerns that young people who engage in consensual, and non-predatory and non-exploitative behaviour were at risk of inappropriate criminalisation in the ACT. In our view, these changes achieve the right balance between children's rights to freedom of expression in s 16 of the *Human Rights Act 2004* (HR Act), and to protection on the basis of being a child (s 11(2)). It ensures that vulnerable children and young people are protected from predatory sexual exploitation and abuse, while also ensuring that young people are afforded autonomy in limited circumstances without the risk of criminal prosecution and the adverse consequences of incurring a criminal conviction.

¹ We note that new s 66A(1)(e) in item 5 of the exposure bill should refer to s 66(3) of the *Crimes Act 1900*, and not s 66(2).

It is also welcome that the bill clarifies that, for the offences against ss 64 and 65, the defendant bears only an evidential burden in relation to the relevant matters. As we have previously noted, an evidential burden is more likely to be considered a proportionate limitation on the right to be presumed innocent (s 22(2)), in accordance with the reasonable limits test in s 28 of the HR Act.

However, it is not apparent why the bill omits to expressly extend this clarification to the offences in s 66 of the Crimes Act, and it is not clear if the intention is to apply a legal burden instead. Placing a legal burden on the defendant in these circumstances gives rise to a serious risk that a person may be convicted, not because he/she committed the criminal act, but because they were unable to overcome the burden placed upon them to show they did not.

In our view, absent a clear justification for treating the offences in s 66 differently to the other child pornography offences in ss 64 and 65, the bill should clarify that the defendant has an evidential burden for those matters as well. Consideration could also be given to aligning the similar-age consent defences (that impose a legal burden on the defendant) currently contained in the Crimes Act – including in s 55 (sexual intercourse with a young person) and s 61 (acts of indecency with young people) – with this approach to ensure greater consistency across the Crimes Act.

Definition of consent

The exposure bill proposes to define consent for the sexual offences listed in s 67(1) of the Crimes Act as follows:

- (a) the person gives free and voluntary agreement; and
- (b) the other person –
 - (i) knows the agreement was freely and voluntarily given (ie, subjective knowledge); or
 - (ii) is satisfied on reasonable grounds that the agreement was freely and voluntarily given (ie, objective knowledge).

A similar definition is also proposed for the offences in Part 3A of the Crimes Act, relating to the distribution of intimate images.

The Commission considers that the introduction of a statutory definition of consent in ACT law which reflects a ‘communicative model’ of consent is an important reform that has been long overdue. Notably, all Australian jurisdictions, with the exception of the ACT, have a legislative definition of consent, which give effect, in one form or another, to a communicative model of consent. Consistent with the human rights principles in the HR Act, the introduction of an appropriately defined communicative model of consent will provide greater protection of a person’s freedom and autonomy to make decisions about engaging in sexual activity. In particular, the adoption of a statutory definition of consent, which requires examination of whether consent was free and voluntary taking into account all the relevant circumstances, including steps taken by the accused to ascertain the presence of consent, will help advance women’s right to equal protection of the law without discrimination, given that sexual assault is predominantly a gendered crime.

While the Commission strongly supports the introduction of a statutory definition of consent that reflects a 'communicative model' of consent, we have some concerns about the provisions as currently drafted. Under the bill, the meaning of consent for the purposes of sexual and intimate image abuse offences is defined as requiring both (i) free and voluntary agreement by the person; and (ii) either subjective or objective knowledge by the other person that consent was present. The Explanatory Statement to the exposure bill states at page 2 that the objective knowledge requirement of the definition is 'modelled upon the "reasonable belief" construction of section 273.2 of the Criminal Code (Canada) R.S.C., 1985, c. C-46'. The 'reasonable belief' construction in the comparable Canadian legislation, however, is not included as part of the definition of consent, but is instead set out in a separate provision which addresses various matters where belief in consent is not a defence:

Where belief in consent not a defence

273.2 It is not a defence to a [relevant] charge ... that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

...

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

We are not aware of any comparable provision that incorporates the 'reasonable belief' requirement as part of the definition of consent. For example, the NSW *Crimes Act 1900* also defines consent to mean 'free and voluntary agreement' (s 61HA(2)), but sets out the 'reasonable belief' test in a separate provision dealing with knowledge about consent:

61HA Consent in relation to sexual assault offences

...

(3) Knowledge about consent: A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:

...

(c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

(d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but

(e) not including any self-induced intoxication of the person.

Similarly, the Victorian *Crimes Act 1958* deals with the question of reasonable belief about the presence of consent in a separate section (see s 36A). We are concerned that the provisions as currently drafted are likely to result in ambiguity and uncertainty, as they appear to conflate two discrete issues: (i) consent by one person and (ii) the responsibility of the other person to take steps to ascertain consent exists.

In our view, it would be preferable to adopt an approach consistent with other jurisdictions, by setting out the meaning of consent ('free and voluntary agreement') separately to the objective fault test for belief about consent. The purpose of adopting an objective fault test is to ensure that the person has reasonable grounds for their belief about consent, and that the person seeking consent has the responsibility to take steps to ascertain consent exists. While an objective fault test is central to assessing whether consent was freely and voluntarily given, it is not clear how the relevant offences in the Crimes Act would operate if it were included within the definition of consent itself. Dealing with the definition of consent and knowledge about consent separately does not detract from the objective of promoting a communicative model of consent. The requirement that a person must have reasonable grounds for believing that the agreement was freely and voluntarily given sends a clear message that a person must be certain of consent. This is a step that necessarily involves communication with the other person.

Finally, it will be important to ensure that these reforms are accompanied by education initiatives about what is and is not acceptable behaviour, and that a person should take steps to ensure the other person is consenting of that behaviour.

If you have any questions or would like more detailed information on any of the issues raised in this submission, please do not hesitate to contact us on (02) 6205 2222.

Yours sincerely,



Dr Helen Watchirs OAM

President and Human Rights Commissioner



Jodie Griffiths-Cook

Public Advocate and Children and Young People Commissioner



Karen Toohey

Discrimination, Health Services, and Disability and Community Services Commissioner



Heidi Yates

Victims of Crime Commissioner

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