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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES (CONSENT) AMENDMENT BILL 2022

REVISED EXPLANATORY STATEMENT

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CRIMES (CONSENT) AMENDMENT BILL 2022

This explanatory statement relates to the Crimes (Consent) Amendment Bill 2022.

This explanatory statement does not form part of the Bill and has not been endorsed by the Assembly. The statement is to provide assistance to the reader of the Bill and is to be read in conjunction with the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

This Explanatory Statement is a revised version of that tabled with the Bill in February 2022. It supersedes the Explanatory Statement as presented and has been revised to reflect comments made by the ACTs Justice and Community Safety (JACS) Scrutiny Committee and the ACT Government's Response.

A Supplementary Explanatory Statement has been prepared to accompany further Amendments moved by Dr Paterson MLA during debate.

OVERVIEW OF THE BILL

Purpose

The purpose of the Crimes (Consent) Amendment Bill 2022 (the Bill) is to update the *Crimes Act 1900* to align with contemporary community understandings and expectations of consensual sexual activity.

The amendments shift the current legislation from the point of sexual assault being a violent act, to a much more nuanced and defined set of parameters around what consent is and is not.

The amendments shift the principle, meaning and definition of sexual consent from something that is presumed and can be negated, to something that is unassumed and must be given. This is a communicative model of consent – one which is underpinned by principles of agency, autonomy and responsibility and is based upon a culture of healthy, respectful relationships.

These amendments will focus trials of sexual offences on whether there was positive communication between the parties about the sexual act, rather than whether the victim-survivor resisted the sexual act.

The Bill:

1. outlines the **principles of consent** – consent is not to be presumed; every person has a right to choose whether or not to participate in a sexual act, and it involves ongoing and mutual communication and decision-making between the people participating;
2. provides a **meaning of consent** – informed agreement that is freely and voluntarily given; and which is communicated verbally or non-verbally by saying or doing something;

3. clearly articulates a set of **circumstances under which consent is not deemed given**. This is a non-exhaustive list that has been updated from the current *Crimes Act 1900*. It changes the nuance of this set of circumstances to ensure that consent is something that is unassumed and must be given rather than something that is assumed and may be negated; and
4. introduces the concept of **reasonable belief** – the current legislation provides that an accused person is guilty of an offence if they know another person does not consent to a sexual act or are reckless as to consent. These are subjective standards. This Bill introduces the principle that any belief an accused person may hold about another person’s consent must be reasonable under all the circumstances, according to an objective standard. In cases where an accused person does nothing to ascertain another person’s consent, they will not be able to rely on a defence of genuinely but mistakenly having believed the other person consented.

The proposed legislative changes provide greater clarity and awareness about the principles, meaning and definition of consent. The changes are, ultimately, intended to better protect the community and ensure that it is absolutely clear that a person must – through free, voluntary and informed agreement – communicate their consent, either verbally or non-verbally, in relation to a sexual act. Where this does not occur, a crime is being committed.

The proposed legislative changes are not complex – persons must communicate their agreement to participate in a sexual act.

A strong criminal justice response to sexual offending is important not just for victim-survivors but also for our entire community.

The Bill makes separate provisions for the distinct elements of the principles and meaning of consent (the definition), the circumstances of consent, and the matters which a trier of fact *must* apply in determining an accused person’s knowledge or recklessness about consent, and whether there was reasonable belief that consent had been given.

These reforms are to be complimented by a strong community education and awareness campaign. The ACT Government’s Sexual Assault Prevention and Response Program is providing this collaborative and holistic approach.

Background

Currently the ACT’s *Crimes Act 1900* defines ‘consent’ as negated if there is force, violence, humiliation, abuse, intoxication or other circumstance outlined at section 67 (1).

A former MLA brought the Crimes (Consent) Amendment Bill 2018 to the Legislative Assembly in 2018. That Amendment Bill was sent to the Standing Committee for Justice and Community Safety and an Inquiry was held.

The key recommendations from the Standing Committee on Justice and Community Safety Inquiry into the Crimes (Consent) Amendment Bill 2018 included:

- that the ACT not consider or enact legislative change until the NSW Law Reform Commission inquiry into sexual offences is presented;
 - This report has subsequently been released (November 2020);
- that a definition of consent be based on a concept of free and voluntary agreement, and affirmative and communicative consent be considered for enactment into ACT law; and
- that legislative change retain the fundamental presumption of innocence until proven guilty.

The ACT Government's response to the Inquiry into the Crimes (Consent) Amendment Bill 2018 included:

- agreement to the above recommendations, noting also:
 - there was a technical issue with the definition of consent as proposed;
 - the need to await and consider the outcomes of the NSW Law Reform Commission Report on Consent in Relation to Sexual Offences;
 - that the ACT Government supports a 'communicative' model of consent – that is, every person has a right to choose whether or not to participate in a sexual act; and
 - the need for a substantial community educational/awareness campaign.

The NSW Law Reform Commission Report (the Report) recommendations were publicly released in November 2020. The objective of the recommendations is to recognise a 'communicative' model of consent through:

- introducing a new subdivision of Part 3, Division 10 of the *NSW Crimes Act 1900* which deals with the law of consent and knowledge of consent. This subdivision:
 - would amend and/or introduce new meanings, circumstances and knowledge of consent and of non-consent;
 - would apply to the offences of sexual assault, sexual touching, sexual acts and their aggravated versions; and
 - would continue to recognise three states of mind by which an accused person's knowledge of the absence of consent may be proved. The three states of mind are:
 - the person knows that the alleged victim does not consent to the sexual activity, or
 - the person is reckless as to whether the alleged victim consents to the sexual activity, or
 - the person has no reasonable belief that the alleged victim consents to the sexual activity.

In late 2021, legislative reforms were passed in both houses of NSW Parliament, giving effect to the various recommendations outlined in the Report.

This Bill responds to, and aligns with, the Inquiry recommendations, the ACT Government's response, and the recommendations and subsequent legislative reforms arising from the NSW Report.

Many key sector stakeholders within the ACT, and members of our community, have requested law reform to introduce a communicative model and a statutory definition of consent. This proposed Bill responds to those requests.

This Bill forms part of significant, holistic Government reform in the prevention of sexual violence in our community. The Bill has received input from Minister Yvette Berry MLA and the ACT Government's Sexual Assault Prevention and Response Program Steering Committee to ensure coordination in the broader context of cultural and educative change, and victim-survivor supports across all groups within our community.

CONSISTENCY WITH HUMAN RIGHTS

During the development of this Bill due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (the HR Act). The Bill engages positively with human rights in criminal justice proceedings (section 22 of the HR Act).

The Bill has a positive impact on the rights of sexual assault victim-survivors in the ACT, whereby criminal justice proceedings relating to matters of sexual assault must apply consideration that consent to a sexual act *must be given*, rather than relying on consent *being denied*. This is a subtle and nuanced, but important, difference whereby the implied or presumed consent of a victim-survivor – in the absence of a clear 'no' – is not an acceptable defence by an accused person. Rather, free and voluntary consent must be communicated – verbally or non-verbally.

The amended definition of consent provided in this Bill helps protect victim-survivors of sexual offences by ensuring that the communicative aspect of consent is relevant to a prosecution and removes the possibility that consent can be "assumed".

Through this Bill, the onus is placed on consent being expressed, rather than non-consent being expressed. The problem with reliance on non-consent being the default position is the reality that many victim-survivors of sexual assault feel unsafe or unable to resist.

This Bill removes the inference of sexual assault being a violent act, to a much more nuanced approach, whereby the reality of sexual assault can occur in many different scenarios.

The Bill also provides clear boundaries around a range of circumstances where consent cannot be assumed. For example, a person does not consent to an act only because the person consented to the same act with the same person at a different time or place.

The Bill has positive impacts on the human rights of Aboriginal and Torres Strait Islander people, people with a disability and the LGBTIQ+ community in the ACT.

These groups are often more vulnerable and susceptible as victim-survivors of sexual assault in the ACT. This legislative reform, coupled with extensive community education, will strengthen individual's knowledge about their rights and clearly articulates boundaries of behaviours that are designed to support the most vulnerable in our community, in the most vulnerable of circumstances.

Research suggests people who are of diverse gender identity or expression, Aboriginal and Torres Strait Islanders, Culturally and Linguistically Diverse or living with a disability experience much higher incidents of sexual assault than other sectors of the community.

This Bill has been drafted in a way that is inclusive and that seeks to acknowledge and protect the rights of marginalised and vulnerable people within our community.

In acknowledging the unique circumstances and impacts that this legislation may have on different groups in the community, this Bill aims to ensure the rights of these groups are considered and are positively, and not adversely, impacted.

One of the intended purposes of the Bill is to increase successful prosecutions for sexual assault in the ACT.

This Bill also engages positively with the right to life, given the correlation with direct violence and the devastating mental health effects that can occur following a sexual assault.

Further, the Bill positively engages with human rights through the right to protection from torture and from cruel, inhumane or degrading treatment.

Increased clarity around understandings of consent will improve community understanding about respectful relationships and ultimately provide a reduction in sexual assaults across our community. It is anticipated that this Bill will have a proportionate benefit for vulnerable and marginalised groups in the community.

People with disability have a right to recognition and equality before the law, as outlined in section 8 of the *Human Rights Act 2004*. The concept of supported decision making in relation to sexual consent enables persons with disabilities to exercise their legal capacity, recognising the support necessary to make legal decisions and to have control over their lives. The individual autonomy and capacity of persons with disabilities to make decisions is respected in this Bill, through recognition of their right to give consent for intimate relationships, including through supported decision making.

Further, this Bill will benefit people with disability by removing any presumption that a disability implies a lack of capacity to give consent for a sexual act. The principles and meaning of consent include provision for supported decision making, protecting support carers from liability, and extending the legal ability of a person with disability to be able to give consent. Ultimately, this heightens the level of autonomy and agency for people with a disability, while also retaining provisions to prevent these people from sexual violence.

Sections 67 (1) (h) and 67 (1) (i) have the potential to impact people of diverse gender identity or expressions. These sections remain unchanged in this Bill from those in the *Crimes Act 1900*.

However, this Explanatory Statement deals carefully with the complex ethical issues of gender identity, noting different community and cultural levels of understanding, acceptance and awareness. In considering all the circumstances of a matter, a trier of fact must consider that the represented gender of a person *is* their gender.

It is also recommended that any jury considering a matter in which a person of diverse gender identity or expression is involved undergoes gender identity training prior to the hearing.

Section 8 of the HR Act - Right to recognition and equality before the law

The amendments in this Bill may be considered as having a disproportionate impact on accused persons whose age, mental or cognitive impairment or other disability may impact on their ability to take steps or recognise when such steps (to obtain consent) might be necessary.

The ACT's existing criminal laws deal extensively with how cognitive impairment, disability or other factors can affect criminal responsibility and in sentencing. This Bill does not displace existing laws for finding there is no criminal responsibility or to factor in cognitive impairment or disability in sentencing. The Criminal Code 2002 Division 2.3.2 for example addresses this matter.

Criminal responsibility whereby an accused person has a cognitive or mental health impairment which was a substantive cause of their not doing or saying something to obtain consent has been considered in detail in the drafting of this Bill.

This Bill has been drafted in light of the ACT's existing legislation, and therefore engages and retains the right to equality as protected by Section 8 of the HR Act.

Section 22 of the HR Act – the right to be presumed innocent until proven guilty

Section 22 of the *Human Rights Act 2004* makes provision that 'everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law'.

The 2018 Inquiry and ACT Government's response to the Crimes (Consent) Amendment Bill 2018 raised concern regarding the conflation of two discrete issues engaging a person's right to be presumed innocent until proven guilty:

1. consent given by one person; and
2. the responsibility of the other person to take steps to ascertain consent exists.

This conflation resulted in the burden of proof being placed on the accused, whereby they must prove their innocence through evidence that they received consent from the complainant. This engaged, and was inconsistent with, the right to be presumed innocent until proven guilty, under section 22 (1) of the HR Act.

The Inquiry report recommended that the meaning of consent (free and voluntary agreement) be set out separately to the objective fault test for belief about consent. The ACT Government agreed to this recommendation.

This 2022 Bill groups the law dealing with the meaning of consent, the circumstances in which a person does not consent, and knowledge of non-consent, into three distinct sections. The recommendations of the 2018 Inquiry and the ACT Government recommendations have been incorporated and addressed in the development of this Bill.

There is no element in this Bill which is required to be proven by an accused person or which requires that an accused introduce evidence to establish their innocence.

Establishing that an accused person's mistaken belief in consent (if any) is unreasonable is entirely for the prosecution to decide, as is presently the case. The change that this Bill introduces in bringing forward a hybrid test is that honest but unreasonable belief will no longer be acceptable and relying on either a victim-survivor's silence or an accused person's failure to do anything at all to ascertain consent will not be acceptable as a defence. This is in line with growing community expectations about consent and aligns with the changes recently passed in New South Wales.

This is a proportionate reform taking into account what, if anything, an accused person said or did to ascertain consent in assessing the reasonableness of an accused person's belief that consent was given.

This reaffirms the Bill's intent to introduce a hybrid subjective-objective test and ensures appropriate provision from which to establish the intent of an accused person, while retaining their right to the presumption of innocence.

The benefit to be derived from the provisions of this Bill outweigh any negative engagement of human rights in this scenario and, importantly, a person's right to remain innocent until proven guilty is not engaged through the provisions of the Bill; i.e a person's right to remain innocent until proven guilty remains.

Section 28 of the *Human Rights Act 2004*

Section 28 of the *Human Rights Act 2004* makes provision that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

It may be argued that the provisions of this Bill engage and limit a person's rights in so far as an accused person must have done something in order to avoid a criminal liability. However, this is not the case.

The policy intent for this Bill is to introduce a communicative model of consent, and to hold perpetrators to account. The Objects – part 3, together with the meaning of consent at section 50B, establish that a sexual act requires informed, free and voluntary agreement by the people participating that is communicated by saying or doing something.

A recent legislative review in Ireland found that a proportionate reform for sexual consent would be for the trial to take into account what, if anything, an accused person did to ascertain consent as part of assessing the reasonableness of the accused person's belief in consent.

This Bill introduces provision that an accused person cannot rely on silence and inaction to claim that they reasonably believed another person consented. Section 67 (5) makes provision that a jury must take into account what, if anything, an accused person said or did to ascertain consent as part of assessing the reasonableness of an accused person's belief that consent was given, and in considering whether the accused person's knowledge about consent was reasonable in the circumstances.

The limitations are considered reasonable, justifiable and the least restrictive means to achieve their purpose – introducing a communicative model of sexual consent. The provisions of the Bill are proportionate to achieve this outcome.

CONSULTATION ON THE BILL

This Bill has been prepared and based on the findings of extensive consultation undertaken for the Crimes (Consent) Amendment Bill 2018, as well as more recent consultation with key stakeholder groups in the ACT and a four-week period of public consultation on a Draft Exposure of this Bill in June-July 2021.

The ACT Government's Sexual Assault Prevention and Response Program Steering Committee, together with its Law Reform Working Group, has also provided detailed review and input to this Bill. The Committee's report was provided to the ACT Government in December 2021, with clear support and recommendations in relation to the Bill's Exposure Draft. This Bill has subsequently been updated and amended to accord with the recommendations of the Committee.

On 2 August 2021 Dr Paterson met with the ACTs Commissioner for Human Rights, who provided her support for the Bill.

Each submission provided in response to the 2018 Bill and the subsequent Inquiry have been reviewed and considered in detail in the preparation of this Bill. Further to that, the NSW Law Reform Commission inquiry into sexual offence findings, and the subsequent legislative changes passed through both houses of NSW Parliament in late 2021 have been instrumental in informing this proposed Crimes (Consent) Amendment Bill 2022.

As a result of the above bodies of work, further edits have been made to this Bill and Explanatory Statement, primarily:

- Removal of wording ‘at the time of the act’ in relation to when communication about agreement to the sexual act must occur;
- Refinement of the principles and meaning of consent – the intent has not changed;
- Recognition that consent may be provided through supported decision making;
- Removal of the term ‘overborne’ throughout the provisions set out at section 67 (1);
- Amended wording at sections 67(1) to better achieve the intent;
- Inclusion of ‘recklessness’ as a fault element at section 67 (3); and
- Minor, consequential amendments of an editorial or technical nature.

CLAUSE NOTES

Clause 1 Name of Act

This clause states that the name of the Act is the *Crimes (Consent) Amendment Bill 2022*.

Clause 2 Commencement

This clause sets out that the Act commences on the day after its notification day.

Clause 3 Legislation amended

This clause sets out the legislation that is amended by this Act, being the *Crimes Act 1900*.

Clause 4 New sections 50A and 50B

This clause inserts new sections 50A and 50B outlining the principles and meaning of consent for a sexual act, which pertain to all of Part 3 of the *Crimes Act 1900*. A 'sexual act' includes 'sexual activity' and is intentionally non-prescriptive as to the nature of an exact start and end.

New section 50A – Principles of consent

New section 50A provides the principles of consent. This clause introduces a communicative model of consent in the *Crimes Act 1900*. This model is based upon the principle that consent is not to be presumed, every person has a right to choose whether or not to engage in a sexual act, and consent must involve ongoing and mutual communication and decision-making between the people participating.

Decision-making between the people participating may include supported decision making. Supported decision making may be formal or informal and may include trusted persons, peer support, advocacy, communication assistance and accessibility measures such as information provision or interpretation assistance. The type and intensity of support will vary between individuals.

A person who assists with supported decision making is not guilty of an offence if they assist a person with a disability who requires support in making a decision about consent. However, it is important that the person providing supported decision making does not apply 'undue influence'.

The ongoing nature of consent is intentionally unprescribed. This will differ for different parties in different circumstances and is not something that can be stipulated.

This Bill does not change the broad scope of what constitutes sexual intercourse or an act of indecency under the current legislation.

Critically, new section 50A ensures that a community understanding of sexual assault is not based on a grievous, physical or violent act and/or necessitates the active resistance by a complainant – but on a much more nuanced approach whereby consent must be communicated, either verbally or non-verbally.

The principles of consent outlined at Clause 4 provide that consent:

- must be sought and communicated, rather than presumed;
- is a positive decision to engage in a sexual act; and
- is a continuous process of mutual decision-making.

It is intended that this clause will help a person who is silent or does not actively resist a sexual act identify that their experience is non-consensual, thereby increasing the likelihood of reporting. This is particularly relevant for situations of ‘freezing’ and ‘surrender’ - the two most reported responses by victim-survivors of sexual violence.

The principles of consent at new section 50A– outlining that there is no consent where a person does not communicate consent – will assist triers of fact with decisions to charge and prosecute these cases.

50B – Meaning of *consent* – pt 3

Section 50B introduces a communicative model of consent.

This clause inserts a statutory meaning and definition of consent for a sexual act.

Section 50B clearly articulates that consent is reliant upon informed, free and voluntary agreement to the sexual act.

‘Informed’ relates to many of the circumstances set out in section 67 (1) of this Bill. It creates certainty that – to give consent to a sexual act – there must be mutual agreement and understanding about all aspects of the nature of the act.

Free and voluntary consent means that consent is willingly given, unconstrained by any negative influence or factor.

This section also requires that the persons participating in the sexual act must do or say something to communicate agreement to the act. This may be verbal or non-verbal. Doing something to give consent may be in the form of subtle signals and/or might include the aid of a communication device.

A person may non-consent to sexual activity by not saying or doing something to communicate consent, including:

- Not saying or doing something *at all* to communicate consent;
- Not saying or doing something in an ongoing manner; or
- Freezing or surrendering (becomes silent or does not resist a sexual act). Freezing may include situations whereby consent was originally given but is

no longer given due to a person having 'frozen'. In this situation, the person is therefore not giving ongoing communication about consent.

Clause 5 Section 67 – When a person does not consent to an act

A set of circumstances under which consent is not deemed given

Section 67 (1) updates the existing set of circumstances in the *Crimes Act 1900* whereby a person does not consent to a sexual act, to align with community expectations and with law reform in other Australian jurisdictions.

Importantly, this set of circumstances, and the new title of this section – from 'consent' to 'when a person does not consent to an act' – establishes provisions under which consent is deemed not to be given, rather than where consent is negated. This important and nuanced shift is critical in establishing a communicative model of consent for a sexual act.

The circumstances are not exhaustive and do not limit the grounds on which it may be established that a person does not consent to a sexual act. There may be other circumstances in which a trier of fact may determine that consent was not given.

Non-consensual sexual activity can occur in many different circumstances including where people know one another, are married to one another, and/or are in an established relationship with one another.

Section 67 (1) introduces the wording of 'a sexual offence consent provision', amending the existing wording of the *Crimes Act 2001* from specific reference to sections 54, 55 (3) (b), 60 and 61 (3) (b) to 'a sexual offence consent provision'. This creates no substantial change, but is a minor, technical amendment to give effect to current drafting practice.

Section 67 (1) (a) includes a new circumstance whereby consent may be withdrawn. Under this provision, consent may be withdrawn either before or during the act and, where this occurs, consent is deemed to not be given. A person may withdraw consent for many different reasons, including simply a change of mind. Physical resistance is a form of non-verbal communication which is considered withdrawal of agreement to the act. Sexual activity that occurs after consent has been withdrawn occurs without consent.

Section 67 (1) (b) encompasses and expands on pre-amendment section 67 (1) (a). Wording is amended from 'a third person who is present or nearby' to, simply, 'another person'. Section 67 (1) (b) also introduces provision whereby a person may participate in the act because of the infliction of violence or force on an animal or property. Both these updates enable the provision to be applied to a broader range of circumstances. The infliction of violence or force might be real or perceived and can include emotional, physical, financial or another form of abuse. This provision applies regardless of when the force or violence occurs, or whether it occurs as a

single instance or as part of an ongoing pattern. This circumstance includes instances of family or domestic violence.

Section 67 (1) (c) encompasses and expands on pre-amendment section 67 (1) (b). Wording is amended from 'a third person who is present or nearby' to, simply, 'another person'. Section 67 (1) (c) also introduces provision whereby a person may participate in the act because of the threat to inflict violence or force on an animal or property. Both these updates enable the provision to be applied to a broader range of circumstances. A threat to inflict violence or force might be real or perceived and can include emotional, physical, financial or another form of abuse. This provision applies regardless of when the force or conduct giving rise to fear of violence occurs, or whether it occurs as a single instance or as part of an ongoing pattern. This circumstance includes instances of family or domestic violence.

Section 67 (1) (d) applies an update to pre-amendment sections 67 (1) (c) and (d). It retains reference to extortion, public humiliation or disgrace of the person or another person, and includes additional circumstances of coercion, blackmail, intimidation or fear of public humiliation or disgrace. The amended wording continues to cover instances of threat which leads to the fear. This might be real or perceived and - as with existing section 67 (1) (c) and (d) - may apply to the person or to another person. This section is intended to cover a range of behaviours including verbal aggression, begging and nagging, physical persistence, social pressuring, controlling behaviour, emotional manipulation and intimate image abuse. Intimidation can include the threat or fear to inflict violence. This circumstance applies regardless of when the matter occurs; or whether it occurs in a single instance or as part of an ongoing pattern. This circumstance includes instances of family or domestic violence.

Section 67 (1) (e) updates the circumstance provided in pre-amendment section 67 (1) (d) about physical or mental harassment. This circumstance applies regardless of when the threat occurs; or whether it occurs in a single instance or as part of an ongoing pattern. This circumstance includes instances of family or domestic violence.

Section 67 (1) (f) includes provision for any other circumstance whereby a person might participate in the sexual act because of force or fear. It is applicable across a broad set of circumstances which are related to the person's participation in the sexual act and that of the accused. This circumstance applies regardless of when the force or fear occurs; or whether it occurs in a single instance or as part of an ongoing pattern. This circumstance includes instances of family or domestic violence.

Section 67 (1) (g) and the new definition at section 67 (6) update pre-amendment section 67 (1) (e) by changing the wording from 'by the effect of intoxicating liquor, a drug or anaesthetic' to, simply, 'intoxication'. This update enables the provision to be

applied to a broader range of circumstances. Intoxication may be self-induced or caused by other means.

In accordance with the ACT Court of Appeal finding (*Agresti v The Queen*) [2017] ACTCA 20 at [97] and at [156]) this provision that the complainant's intoxication must be so substantial to cause the complainant to be unable to consent to the sexual act. This Bill does not intend to introduce a higher test for the level of intoxication that negates consent than is currently provided for at S67(1)(e) of the *Crimes Act 1900*.

Section 67 (1) (h) retains pre-amendment section 67 (1) (f) regarding a 'mistaken belief as to the identity of that other person'. This may include, but is not limited to a mistaken belief:

- that the person is married to the accused person; or
- about ethnic or religious background.

A person cannot claim a mistaken belief about the identity of the other person only because the other person has not disclosed a matter related to their gender identity. Cisgender normativity, gender identity discrimination and transphobia should not influence an outcome of trial.

Section 67 (1) (i) encompasses and expands on pre-amendment section 67 (1) (g). It covers any circumstance in which participation in a sexual act is dishonestly procured by a false representation or upon a false pretence, known by the maker to be false when it was made.

This section includes requirement that the complainant's mistake is an operative reason (but not necessarily the only reason) for participating in the sexual act. Examples of fraudulent misrepresentation under this circumstance might include:

- the nature or purpose of the sexual act, including that the sexual act is for:
 - health or hygienic purposes (including cosmetic); or
 - spiritual, cultural or religious purposes; or
- HIV or STI status; or
- payment.

A trier of fact must prove that the accused person was acting fraudulently (intentionally misled the other person). This provision is not intended to capture trivial matters that, while immoral, should not be regarded as criminal. Such matters might include misrepresentation about a person's income, wealth or feelings.

Non-disclosure about gender history is not inherently fraudulent misrepresentation. A body of a person of diverse gender expression is not inherently deceptive and their gender identity is their real and authentic identity. A person of diverse gender expression is not obliged to disclose their gender history. Non-disclosure of gender history is not active deception. Cisgender normativity, gender identity discrimination and transphobia should do not influence an outcome of trial.

Section 67 (1) (j) reflects pre-amendment section 67 (1) (h), and expressly criminalises stealthing by providing that consent is negated if it is obtained by the intentional misrepresentation by a person about the use of a condom.

Section 67 (1) (k) encompasses pre-amendment section 67 (1) (i) and amends the wording to apply to a broader set of circumstances where a person participates in an act because of the abuse of a relationship of authority, trust or dependence, or by the abuse of a professional relationship. This includes situations whereby a person may participate in a sexual act because they believe it might help progress their career or other prospects; or because they believe not participating in the sexual act might hinder their career or other prospects.

Section 67 (1) (l) updates pre-amendment section 67 (1) (j) and amends wording from 'physical helplessness or mental incapacity' to, simply, 'does not have the capacity to agree'. Reasons for incapacity to give consent include physical helplessness, mental incapacity/cognitive impairment and other reasons. Cognitive impairment can include an inability to understand either the sexual nature of the act or the effect of consent. Capacity can fluctuate, and a person may have the capacity to consent to a sexual act at some times but not at others.

This circumstance can include mental health considerations and known trauma histories. Under this provision it is important to note that a disability is not to be presumed as a lack of capacity to give consent. There will be instances where a person with mental or cognitive impairment is capable of consenting, with or without supported decision making.

Section 67 (1) (m) provides that consent is not given if the person is unconscious. This includes instances where a person is unconscious for part or all of the sexual act. Where a person has given consent but subsequently becomes unconscious during the sexual act, they are unable to provide ongoing communication about their consent. This means that consent is no longer given.

Section 67 (1) (n) provides that consent is not given if the person is asleep. This includes instances where a person is asleep for part or all of the sexual act. Where a person has given consent but subsequently falls asleep during the sexual act, they are unable to provide ongoing communication about their consent. This means that consent is no longer given.

Section 67 (1) (o) encompasses and expands on pre-amendment section 67 (1) (k), and amends wording from 'the unlawful detention of the person' to 'is unlawfully detained or knows that another person is unlawfully detained'. Another person may include a family member. This provision can provide additional protection to people who experience domestic violence and other forms of family sexual assault. This circumstance may also apply to instances of people held hostage and/or seeking refuge. The change of wording of this provision broadens the context in which the provision may apply.

Further circumstances under which consent is not deemed given

Section 67 (2) updates this existing section in the *Crimes Act 1900*, to align with contemporary community expectations and standards.

Section 67 (2) (a) changes the nuance from ‘a person who does not offer actual physical resistance’ to ‘a person does not say or do something to resist the act’.

This is a critical amendment to introduce a communicative model of consent in the ACT. Consent is not to be presumed and silence or lack of resistance is not to be taken as giving consent.

This provision continues to include circumstances of physical resistance, whereby – in the situation that a person does something to resist the act – consent is deemed not given.

This provision includes circumstances where a person ‘surrenders’ to a sexual act. In the case of ‘surrender’ a person does not either say or do something to communicate consent and, thereby, consent has not been given.

This provision also covers circumstances of surrender where a person does not offer physical or verbal resistance to the sexual act – and consent is not deemed given.

The explanation given above, at section 50A regarding the situation of ‘freezing’ is relevant also for section 67 (2) (a) and should be read in conjunction.

Freezing (where a person becomes silent or does not resist a sexual act) may include situations whereby consent was originally given but is no longer given due to a person having ‘frozen’. In this situation, the person is therefore not giving ongoing communication regarding their consent.

Section 67 (2) (b) introduces new provisions articulating that consent to one sexual act does not constitute consent to another sexual act. This provision introduces four circumstances in which consent to one sexual act does not provide consent for another. It clarifies that consent must be given for each occasion of a sexual act, at the time of the act.

S67 (2) (b) (i), (iii) and (iv) - as well as S67 (2) (b) (ii) where it is expressly stated - apply to those acts having occurred at the same time or place as well as to having occurred at a different time or place.

Knowledge of non-consent where circumstances of non-consent apply

Section 67 (3) encompasses and expands on pre-amendment section 67 (3), introducing a fault element of recklessness. Under section 67(3) if person knows or is reckless as to whether consent has not been given in any of the circumstances set out in section 67 (1) (a) to (o), the person is taken to know that consent has not been given.

Introduction of an objective test through ‘reasonable belief’ and the steps an accused person may have taken to obtain consent

Sections 67 (4) and 67 (5) introduce a hybrid objective/subjective test in a trial of fact and remove the Morgan defence principle. These provisions have been drafted to give effect to the recommendations of the ACT Government’s Response to the Justice and Community Safety Inquiry on the draft Crimes (Consent) Amendment Bill 2018, and the subsequent New South Wales Law Reform Commission’s Report 148 of 2020, *Consent in relation to sexual offences*.

Section 67 (4) introduces the concept of ‘reasonable belief’ in addition to the fault elements of knowledge and recklessness in the existing legislation. This applies an objective test by a trier of fact to consider and determine whether an accused person’s belief that consent had been given was reasonable in the circumstances. Under this provision, a trier of fact is required to apply a test of reasonable community standards, and consider whether a reasonable person, given all the circumstances of the case, would have reason to believe that consent had been given.

This section gives effect to the removal of the Morgan defence. Under the Morgan defence an honest but mistaken belief by the accused that consent was given – no matter how misguided or unreasonable – may be used as a defence. Section 67 (4) makes it clear for a trier of fact, that any belief that consent had been given must be reasonable in the circumstances.

Section 67 (5) introduces a new provision whereby – for an accused person’s belief about consent to be deemed reasonable in the circumstances – the accused person must have taken steps to ascertain the other person’s consent. This provision is an important component in establishing a communicative model of consent through the Bill.

This new provision makes it clear that the person seeking consent has a responsibility to take steps to ascertain consent exists. Importantly, the clause shifts the focus of the inquiry at trial away from whether the complainant resisted or otherwise demonstrated an absence of consent.

Under section 80D of the *Evidence (Miscellaneous Provisions) Act 1991* a jury has discretion whether or not to consider if an accused person’s mistaken belief that a person consented to a sexual act was reasonable in the circumstances. Provisions at section 67 (4) and 67 (5) of this Bill remove that discretion and make it a requirement that juries must consider this element.

Under sections 67 (4) and (5), where an accused person holds a belief (subjective) that consent was given, but that belief is (objectively) unreasonable by community standards, a trier of fact may find the accused person guilty of the sexual act.

Under these provisions, a trier of fact will be required to consider all the circumstances of the case, including whether an accused person said or did anything to find out whether the other person consented to the act and, if so, what the accused person said or did.

A person's distorted view about appropriate sexual activity is not an excuse for sexual assault. The objective test prevents an accused person from relying on abhorrent views that fall below the accepted standards of the community.

Note:

Existing sections 54 and 60 of the Crimes Act 1900 require proof of knowledge or recklessness. These sections continue to apply and relate to new sections 67 (4) and 67 (5).

The ACT's Criminal Code 2002 part 2.3 applies to 'circumstances where there is no criminal responsibility'. The provisions contained in this part are relevant to matters:

- as to whether an accused person's cognitive or mental health impairment was a substantial cause of the accused person not saying or doing something to obtain consent, whereby the onus lies with the accused person on the balance of probability. In considering community standards of reasonableness and 'all the circumstances of the case', a trier of fact must consider an accused person's cognitive capacity or impairment; and*
- which ensure a trier of fact must not consider any self-induced intoxication of the accused person. Self-induced intoxication is irrelevant to any assessment by a trier of fact as to an accused person's recklessness regarding the element of consent. Self-induced intoxication is not a defence to an allegation of sexual offence.*

Meanings of 'intoxication' and 'sexual offence consent provision'

Section 67 (6) provides a definition of 'intoxication' to mean the consumption of alcohol, a drug or any other substance. Another substance might include anaesthetic, as per the current provision of the *Crimes Act 1900* pertaining to this matter.

This section also provides a meaning of 'sexual offence consent provision'. This gives meaning to those offences which are provided for at sections 54, 55 (3) (b), 60 and 61 (3) (b) of the *Crimes Act 1900*. This is a minor, consequential amendment of a technical nature only.

Clause 6 Section 72F

This clause is a consequential amendment of a technical nature. Provisions at section 72F of the *Crimes Act 1900* currently reference the set of circumstances at section 67 (1) (a) to (k) of the Act under which a person does not consent to the distribution of an intimate image. The amendment provides amendment to reference

the updated set of circumstances provided through this Bill at section 67 (1) (a) to (o).

Clause 7 New section 442D Review of definition of *consent* for pt 3

This clause requires that the Minister must review the operation of the effects of the provisions of this Bill, as incorporated into the *Crimes Act 1900*, two years after its commencement.

The requirement has been introduced to ensure that the amendments made by this Bill achieve the outcomes in relation to consent and prosecution for sexual offences as intended.

The clause contains details for the parameters of what the review must consider, as well as reporting requirements.

Clause 8 Dictionary, new definition of *consent*

This clause gives effect to the new definition of consent for part 3 (sexual offences) as detailed through the amended sections of the Bill.