

Women with Disabilities ACT

Submission to

Inquiry into the Crimes (Consent) Amendment Bill 2018

ACT Legislative Assembly

Standing Committee on Justice and Community Safety

14 September 2018

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CEO WWDACT

Women with Disabilities ACT acknowledges and pays respect to the Ngunnawal peoples, the traditional custodians of the ACT Region, on whose land our office is located. We pay our respects their Elders past, present and emerging. We acknowledge their spiritual, social, historical and ongoing connection to these lands and the contribution they make to the life of the Australian Capital Territory.

Winner 2012 International Women's Day Award, Community Category

Winner 2015 ACT Chief Minister's Inclusion Awards, Excellence in Championing Human Rights

STRONG WOMEN STRONG VOICES

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About WWDACT

Women with Disabilities ACT (WWDACT) is a systemic advocacy and peer support organisation for women, girls, non-binary and feminine identifying people with disabilities in the ACT. WWDACT follows a human rights philosophy, based on the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of (all forms of) Discrimination Against Women (CEDAW). WWDACT is a Disabled People's Organisation, governed by women with disabilities, and its proposals and recommendations to government are consistent with Article 4 (3), and Article 29 of CRPD which outline the imperative for consultation with disabled peoples.

Women with Disabilities' Experience of Sexual Abuse

In Australia, it is known that approximately 1 in 5 women experience sexual violence and only 1 in 5 of these incidents is reported to police¹. The statistics are far worse for women with disability with the rates of sexual abuse are estimated at 4 to 10 times that of non-disabled women². Reporting among women with disabilities is extremely low due to factors such as fear of not being believed, fear of support being removed, feeling guilty and feeling shame and embarrassment³.

Barriers to Justice

Access to justice in sexual assault cases often rests on the word of the victim against the perpetrator. People with disability are often disbelieved when reporting due to myths that they are asexual or "child-like" or that they have wild imaginations or are somehow unstable³. These myths carry over into the justice system, which discourages reporting of abuse and makes it easier for perpetrators to discredit their victims. When the obligation is placed on the perpetrator to prove that they have done the right thing by obtaining free and voluntary consent, it is more difficult for them to rely on these myths.

Setting the legal standard as one of free and voluntary consent, removing the possibility that consent can be "assumed", will provide more explicit guidance on what is acceptable, and encourage clear communication between participants. This is an important step toward cultural change, and provides some protection for victims who are unable, by disability, fear or impairment, to say no. However, it must be ensured that consent is obtained in a mutually understood way for people with communication disability. It is not clear that this amendment specifically addresses the rights of people with communication disability to exercise their capacity to consent. As section 67(1)(b)(ii) states that the other person must

¹ ABS Personal Safety Survey, 2012

² Fact Sheet: Violence against Women with Disabilities (prepared by Carolyn Frohmader, Women With Disabilities Australia (WWDA), Australian Civil Society Delegation to the 53rd Session of the Committee Against Torture, Geneva, November 2014, http://www.pwd.org.au/documents/temp/FS_Violence_WWD's.pdf

³ P French, *Disabled Justice*, Queensland Advocacy Incorporated, 2007, Queensland, p. 22

be “satisfied on reasonable grounds that the agreement was freely and voluntarily given”. This may result in situations where the perpetrator’s defence rests on their *interpretation* of the victim’s actions, and what is “reasonable”. This is an oversight that needs to be considered.

WWDACT would like to draw attention to the Submission to the NSW Law Reform Commission Review by Rape & Domestic Violence Services Australia (R&DVSA), which outlines many of the issues in translating the policy change in NSW into practice. One of the issues is that reasonableness “is a relative concept. Absent strict legislative guidance, determinations of reasonable belief in consent will be informed by the same socio-cultural scripts which have long-underpinned thinking about honest belief in consent”. Indeed, the use of “reasonableness” may allow perpetrators to leverage the myths outlined above to their advantage or grant influence to existing judicial prejudice. The R&DVSA submission also notes that in Tasmania, the influence of juries’ attitudes caused judges and lawyers to be reluctant to engage with the new concept of consent⁴.

Human Rights

Under the Convention on the Rights of Persons with Disabilities (CRPD) Article 12, **Equal recognition before the law**, states that *States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life*. This means that there is an obligation to empower people with disabilities to exercise their right to consent or not consent, and that laws should be amended to make this possible. While this bill improves the current state of consent law in the ACT, it does not adequately address the practicalities of exercising this capacity on *an equal basis with others*. This can be partially addressed by a change in wording, of section 67(1)(a) to read, “the person gives free and voluntary agreement and communicates this agreement to the other person” (modified from R&DVSA’s submission⁴).

CRPD Article 12 also states that *States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity*. There are barriers that remain in our justice system, including the denial of legal capacity, poor communication support, physical and social barriers to reporting, victim blaming culture and the perpetuation of the myths about people with disability, as outlined above. Some of these can be partially addressed by specialist education of jurors and provision of Supported Decision Making volunteers, as part of the **Disability Justice Strategy**, which is currently in development by the Justice and Community Safety Directorate. These barriers can be further addressed through the **Charter of Rights for Victims of Crime**, also currently in development. WWDACT is currently engaged with these processes.

⁴ Rape & Domestic Violence Services Australia, Submission to the NSW Law Reform Commission Review, 2018, <http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/PCO88.pdf>

Further Action

Guidelines are needed to establish considerations for people with communication disability to allow them to freely and voluntarily consent or revoke consent. It is crucial that in the creation of such guidelines, people with disability are consulted, and that the guidelines do not impinge on their right to consent to sexual activity. This will allow the ACT to improve upon the changes seen in NSW.

This amendment should also be followed by community education, particularly targeted to women with disabilities, their families and support workers. Education about the new requirements for consent should include education about safe relationships and communication. Programs for people with disability, like SHFPACT's SoSAFE! should be funded and expanded to combat the disproportionate victimisation of women with disability but broader community education is also needed to change cultural attitudes to consent in a meaningful way.

WWDACT would also like to submit our previous letter of support to Caroline Le Couteur regarding the proposed amendment and discussion paper⁵.

Conclusion

Women with Disabilities ACT would like to restate our support for the *Crimes (Consent) Amendment Bill 2018*. We believe that it will lead to better outcomes for women with disabilities who experience sexual abuse and will promote cultural changes that will better serve the rights of women victims with disabilities. However, a more specific definition of "reasonable" and emphasis on communication could improve the bill. Experiences in NSW and Tasmania indicate that further action is needed to ensure that the intention of this amendment is borne out in practise.

⁵ WWDACT, Letter to Caroline Le Couteur on Consent in Sexual Violence Laws, 2018
<https://www.wwdact.org.au/wp-content/uploads/2018/04/180323-WWDACT-Consent-in-Sexual-Violence-Laws.pdf>