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

ELEVENTH ASSEMBLY

STATUTORY REVIEW OF AFFIRMATIVE CONSENT LAWS

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ACT
Government

Statutory Review Report

Crimes (Consent) Amendment Act 2022

Justice and Community Safety Directorate

September 2025

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Acknowledgment of Country

We wish to acknowledge the Ngunnawal people as traditional custodians of the lands of the ACT and recognise any other people or families with connection to the lands of the ACT and region. We wish to acknowledge and respect their continuing culture and the contribution they make to the life of this city and this region.

Help and Support

This Report discusses legal issues relating to sexual violence. Material describing serious violent offences, including case summaries drawn from published cases, and descriptions of the impact these offences can have on victims are included in this report.

If you need to talk to someone there are a range of support services available.

If you or someone you know is in immediate danger or distress, please call 000.

Please contact the following services for counselling or assistance:

- Canberra Rape Crisis Service: [\(02\) 6247 2525](tel:0262472525)
- Domestic Violence Crisis Service: [\(02\) 6280 0900](tel:0262800900)
- Sexual Violence Legal Service: (02) 6257 4377 or 1800 634 669 or visit: <https://wlc.org.au/get-help/our-services-and-programs/sexual-violence/>
- Victims Support (ACT): 1800 8222 72 or 02 6205 2222 or visit: <https://www.hrc.act.gov.au/victim-support>
- Lifeline Australia: 13 11 14 or www.lifeline.org.au
- Beyond Blue: 1300 22 4636 or www.beyondblue.org.au
- Full Stop Australia: 1800 943 539 or www.fullstop.org.au
- Relationships Australia: 1300 364 277 or www.relationships.org.au
- National Sexual Assault and Domestic Family Violence Counselling Service (1800RESPECT): 1800 737 732 or www.1800respect.org.au
- Men's Referral Service: 1300 766 491 or www.ntv.org.au
- SANE Australia: 1800 187 263 or www.sane.org
- 13YARN: 13 92 76 (for Aboriginal and/or Torres Strait Islander people)
- Rainbow Sexual, Domestic and Family Violence Helpline: 1800 497 212 (for anyone from the LGBTIQ+ community)

Abbreviations, Acronyms, and Definitions

When referring to a person who has experienced a sexual act or acts without consent, this Review uses the language of victim-survivor. While respecting that some people do not wish such an event to define them, the language of victim-survivor recognises the gravity and harm caused in a way that alternatives such as ‘complainant’ do not. The term also gives a voice to those who have lived to speak about their experiences with the law and the criminal justice system, as well as honouring the absence of those who have not. Finally, the term victim-survivor is used generally, regardless of whether the lack of consent was investigated or determined at law. This is consistent with the language of the *Listen. Take action to prevent believe and heal* report (the ‘SAPRP (Listen) Report’) and the Charter of Rights for Victims of Crime in part 3A of the *Victims of Crime Act 1994*.¹ However, in quotes where the term ‘victim’ is used by the original source, the original wording is retained.

The term ‘accused’ is used to describe the person who, according to a victim-survivor, has not sought consent for a sexual act. This term is used to describe a person at the reporting, investigation, charge and trial stage of the criminal justice process. This is consistent with the language used in the *Crimes (Consent) Amendment Act 2022* and its accompanying Explanatory Statement. If an accused person has been convicted by a court or has pled guilty, the term ‘offender’ is used. The term ‘defendant’ is used in relation to data from ACT Courts and national sources, to reflect consistency in the terms used by those data sources.

The use of these terms does not displace the presumption of innocence or reverse the onus of proof.

¹ [Sexual Assault Prevention and Response Program ‘Listen. Take Action to Prevent, Believe and Heal Report’ \(December 2021\).](#)

Executive Summary

This is a report of the statutory review (the Review) of the operation of sections 50A, 50B, 50C, 67(1), 67(2), 67(4) and 67(5) of the *Crimes Act 1900* (the Crimes Act). These sections were inserted into the Crimes Act by the *Crimes (Consent) Amendment Act 2022* (Amendment Act) and commenced on 12 May 2022.

Section 442D of the Crimes Act provides that the Minister must review the operation of the provisions inserted by the Amendment Act as soon as practicable two years after their commencement. The Minister must also present a Report on the Review (the Report) to the Legislative Assembly within 12 months of the commencement of the Review. This Review was undertaken by the Justice and Community Safety Directorate (JACS) and began on 1 October 2024.

The Review aimed to determine whether these sections of the Amendment Act are clear and effective. It also examined whether the Amendment Act had any unintended consequences. Thirty-seven key stakeholders were invited to provide feedback for the Review, and 10 provided written responses which have been included in the Report (see Appendix A for more information).

Findings and Conclusions

Early observations about the Amendment Act are generally positive. The Review finds that overall, the relevant sections are clear, operating effectively and in line with policy goals. Further, the Review finds that there is no available evidence to suggest that the Amendment Act is having unintended consequences. Therefore, the Review concludes that at this stage, all existing provisions of the Amendment Act should continue to operate in their current form. The Review also identifies some opportunities for further policy work and consultation to continue to improve the ACT's affirmative consent framework into the future.

During the Review, stakeholders raised some specific concerns regarding the possible interpretation and application of the Amendment Act. The Review finds that there is limited evidence available to support these concerns as the Amendment Act has been in force for less than three years. Consequently, as part of the government's regular monitoring of the operation of the law, the Review considers that there is merit in continuing to monitor and assess the operation of Amendment Act generally, and in particular, in relation to the following matters raised by stakeholders:

- the application of the provision regarding how consent is withdrawn
- the ability of section 67(1) (which sets out circumstances where consent is deemed not given) to appropriately protect vulnerable and marginalised cohorts
- the interpretation of circumstances where consent is not to be presumed under section 67(2) and whether this is sufficiently broad
- the operation of the fault element and 'reasonable belief' in sections 67(4) and (5)
- the outcomes of case law to determine whether updates to sections 67(1) and (3) are required
- whether legislated jury directions and other mechanisms would improve clarity regarding the meaning of consent in trials, and
- maintaining the compatibility of the Amendment Act with human rights in criminal justice proceedings.

Stakeholders also provided suggestions to improve the clarity, operation and effectiveness of the Amendment Act. Stakeholders raised some suggestions for amending the definition of sexual act of section 50C to ensure it is sufficiently broad and inclusive, and refining the grounds upon which consent is deemed not given (section 67(1)). Although the Review finds that the Amendment Act already addresses most of these suggestions, there may be merit in further policy work and consultation being undertaken with a view to future reform to clarify the following issues:

- ensure the definition of ‘sexual act’ at section 50C is sufficiently broad and inclusive with particular reference to the following issues raised by stakeholders:
 - adopting gender neutral language in relation to the definition of sexual act, including by substituting ‘breasts’ for ‘breasts or chest’ at section 50C(2)(a)
 - providing that in deciding whether a reasonable person would consider an act to be sexual under section 50C(2), the court is to take into account whether the person carrying out the act does so for the purpose of coercive control
 - providing that in deciding whether a reasonable person would consider an act to be sexual under section 50C(2), the court is to take into account the manipulation of objects
- explicitly refer to ‘coercive control’ in paragraph 67(1)(d)
- explicitly include any limits regarding the scope of ‘fraudulent misrepresentation of any fact’ in paragraph 67(1)(i), and
- state that the intentional misrepresentation about the use of a condom includes other devices that prevent pregnancy and/ or sexually transmitted infections (STIs) in paragraph 67(1)(j).

Where stakeholders made suggestions that went beyond the scope of the review, JACS engaged with relevant areas across the ACT Government to convey this stakeholder feedback so that it could be further considered in other relevant work currently underway.

Introduction

Aim of the Review

As stated in the Revised Explanatory Statement, the amendments were intended ‘to update the *Crimes Act 1900* to align with contemporary community understandings and expectations of consensual sexual activity.’² The Review aims to analyse the effectiveness of the Amendment Act, specifically to ‘ensure that the amendments made [...] achieve the outcomes in relation to consent and prosecution for sexual offences as intended.’³

The Amendment Act aimed to achieve these outcomes by providing greater clarity about the principles, meaning and definition of consent through:

- introducing overarching principles of consent (section 50A)
- introducing a definition of ‘consent’ (section 50B)
- explicitly articulating principles that exclude the operation of presumptions of consent in certain circumstances (section 67(2))
- modifying and expanding the circumstances under which consent is deemed not to have been given (section 67(1))
- expanding the fault element to include a hybrid objective/subjective test about the accused’s knowledge of consent which must now also be ‘reasonable in the circumstances’ (section 67(4)) and
- introducing that what is ‘reasonable in the circumstances’ includes what steps were taken to seek consent (section 67(5)).

In passing the Amendment Act, the Legislative Assembly noted that the consent reforms would ‘defin[e] our standards as a community as to the behaviour we expect’.⁴ The Amendment Act sought to ‘increase the likelihood of reporting’⁵ incidents of sexual violence. The Amendment Act also aimed to strike the appropriate balance between the rights of victim-survivors with the legal and human rights of the accused, including the accused’s ‘right to recognition and equality before the law and presumed innocence’.⁶

Carrying out this Review not only enhances democratic processes by ensuring that laws meet their intended purposes, but it also contributes to the identification of national best practice legal models of consent as recommended by the Australian Law Reform Commission in its recent report ‘Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence’ (2025) (‘the ALRC Report’).⁷

² Revised Explanatory Statement Crimes (Consent) Amendment Bill 2022, 5 May 2022.

³ Revised Explanatory Statement Crimes (Consent) Amendment Bill 2022, 5 May 2022.

⁴ ACT Legislative Assembly, (2022) *Debates*, 1297.

⁵ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022 See also Presentation Speech, Crimes (Consent) Amendment Bill 8 February 2022, 88 (Paterson).

⁶ ACT Legislative Assembly, (2022) *Debates*, 1306 (Paterson).

⁷ Australian Law Reform Commission (2025) ‘*Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*’ (<<https://www.alrc.gov.au/publication/jrsv-report-143/> <https://www.alrc.gov.au/publication/jrsv-report-143/>>).

Methodology and Data

In gathering the data for the Review, the methodology had regard to the report of the Commonwealth Senate’s Legal and Constitutional Affairs References Committee (the Senate Committee) Inquiry into current and proposed sexual consent laws in Australia (2023) (‘the Inquiry Report’).

In the Inquiry Report, the Senate Committee recommended that affirmative consent laws should be evaluated consistently around Australia. The Inquiry Report indicated that any evaluation should include the collection and examination of quantitative data regarding different aspects of the criminal justice process (reporting, charges, trials and convictions), as well as a qualitative assessment of the impact of the reforms from witnesses and stakeholders. The importance of ensuring that any reforms uphold fundamental legal principles was also noted.

Consequently, the ACT Review draws upon, where available and practicable, both quantitative and qualitative data in the evaluation of the Amendment Act. The Review is informed by publicly available data, cases and feedback provided by a range of diverse stakeholders. The Review acknowledges that the voice of victim-survivors is essential in assessing the impact and effectiveness of responses to sexual violence and guiding future reforms. However, significant consultation with victim-survivors had already occurred across a number of related projects in the ACT from 2021 – 2024.⁸ To avoid the risk of over-consultation, the Review did not undertake additional direct consultation with victim-survivors, but rather drew on the reflections and findings shared in existing reports, as well as seeking feedback from key stakeholders that directly engage with victim-survivors.

The sexual offences analysed in this Review are those set out in the Crimes Act. The Review is limited to offences where consent is an element, specifically section 54 (sexual intercourse without consent) and section 60 (an act of indecency without consent) (see Appendix C for the text of these offences). Consequently, sexual intercourse with a child (including historic offences and incest) and offences in the first, second or third degree are not analysed in this Review.

⁸ [Sexual Assault Prevention and Response Program, \(2021\) Listen. Take Action to Prevent, Believe and Heal report](#);

Background

Policy Context

Sexual violence and abuse are pervasive in Australia. According to ABS data, one-in-five adult women and one-in-16 adult men have reported being a victim-survivor of sexual assault.⁹ Groups most likely to experience sexual violence include women with disabilities, sex workers, Cultural and Linguistically Diverse (CALD) women, Aboriginal and Torres Strait Islander women, young people, women living in regional areas, and transgender and gender diverse people.¹⁰ The impacts of sexual violence and abuse can be devastating and life-long for victim-survivors, their families and communities.¹¹

Governments across Australia have committed to working in coordinated and collaborative ways to address the unacceptable rates of sexual violence and improve responses to sexual assault. The National Plan to End Violence against Women and Children 2022–2032 (National Plan) is a key national policy that guides action to ending all forms of violence against women and children.¹² The National Plan emphasises the importance of changing values and attitudes that lead to gender-based violence. An important focus of the National Plan is the prevention of sexual violence, including through teaching consent and respectful relationships.¹³ To implement the National Plan, the Commonwealth has undertaken or funded a number of inquiries,¹⁴ led a national Consent Policy Framework,¹⁵ and developed the educational campaign ‘Consent Can’t Wait’.¹⁶ States and territories, including the ACT, have also taken steps including consent campaigns, educational reforms, exploring alternative forms of justice and increasing the range and kinds of support services available to victim-survivors.¹⁷

Reforms have also specifically focussed on the legal and justice responses by the criminal justice system. In the ACT, the Government has undertaken several projects to investigate, prevent and improve the legal and justice responses to domestic, family and sexual violence. One key project was the establishment of the Sexual Assault Prevention and Response Program (SAPRP) in 2021. The Steering Committee of SAPRP prepared the *‘Listen. Take Action to Prevent, Believe and Heal Report’* (2021) (‘SAPRP (Listen) Report’) which made 24 recommendations across a broad range of themes to prevent and improve responses to sexual violence. The SAPRP (Listen) Report included Recommendation 22 to reform the law to introduce an

⁹ Australia Bureau of Statistics (ABS) (2023) *‘Personal Safety, Australia’* <<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>>

¹⁰ NSW Law Reform Commission *‘Consent in relation to sexual offences’* (Report 148, September 2020), 28-30.

¹¹ Australia’s National Research Organisation for Women’s Safety (ANROWS) (2018) *‘Are we there yet? Australia’s attitudes towards violence against women and gender equality: Summary findings from the 2017 national community attitudes towards violence against women survey’*, 2.

¹² National Plan to End Violence against Women and Children <<https://www.dss.gov.au/national-plan-end-gender-based-violence>>

¹³ National Plan to End Violence against Women and Children <<https://www.dss.gov.au/national-plan-end-gender-based-violence/resource/first-action-plan-2023-2027>>.

¹⁴ For example [Senate Standing Committee on Legal and Constitutional Affairs, *Current and Proposed Sexual Consent Laws in Australia* \(Report, September 2023\)](#).

¹⁵ The Commonwealth Consent Policy Framework (the Framework) was released in January 2024 and aims to promote a clear and consistent community definition of sexual consent and provide practical advice on how to communicate effectively with young people about sexual ethics, healthy sexual activity, relationships and consent (as quoted in the SCAG working plan (Annual Report Nov 2024). See <https://www.dss.gov.au/sexual-consent/resource/commonwealth-consent-policy-framework>,

¹⁶ See <https://www.consent.gov.au/>.

¹⁷ For a summary of steps taken see: [Standing Council of Attorneys – General, *Communiqués ‘SCAG Workplan to Strengthen Criminal Justice Responses to Sexual Assault: Annual Environmental Scan’* \(November 2024\)](#).

affirmative communicative consent model.¹⁸ Since the SAPRP (Listen) Report, the ACT Government has implemented several of the Report recommendations including the introduction of the Amendment Act to establish an affirmative communicative consent model and funding the development of an ACT specific consent education campaign. Work to implement the SAPRP (Listen) Report is on-going.

To implement Recommendation 15 of the SAPRP (Listen) Report, the ACT Government funded an independent cross-agency taskforce to review 'all sexual assault cases reported to ACT Policing that were not progressed to charge, including those deemed unfounded, uncleared, or withdrawn'.¹⁹ The Sexual Assault (Police) Review Report (Police Review) made 28 recommendations to improve the experiences of victim-survivors in the ACT.²⁰ All but one recommendation was either agreed or agreed in principle by the ACT Government.²¹ Since then, progress has been made against a number of the recommendations, including through the on-going progress of 'Operation Foster' (in accordance with Recommendation 1 of the Police Review). Operation Foster is a specialised ACT Policing taskforce established to re-investigate cases that had been closed without charge that had been identified by the Police Review for further action or re-investigation. Other work to implement the Recommendations of the Police Review is on-going.

The findings from these two key ACT projects have identified clear data about the experiences of victim-survivors of the ACT criminal justice system. They found that in the ACT, as in other jurisdictions,²² sexual offences have high attrition rates (rates of withdrawal) throughout the criminal justice system.²³ The Police Review confirmed that one cause of attrition in the ACT is the barriers that victim-survivors experience when accessing the criminal justice system.²⁴ Barriers following a sexual assault include: fears of not being believed, feelings of shame, fears of retribution, trauma, a lack of confidence in the criminal justice system including that it will be the victim-survivor's actions that will be 'on trial',²⁵ not wishing to be re-traumatised by having to provide information about the incident numerous times,²⁶ not being informed of available supports, and / or not being informed of how the investigations will proceed.²⁷ As a person with lived experience, Louise (pseudonym) observed for the SAPRP (Listen) Report, 'I can really understand and see why victims of sexual assault do not come forward. The whole process is geared to retraumatise them over and over again, it really is.'²⁸

There are also national coordinated efforts to improve responses to sexual assault. Through the Standing Council of Attorneys-General (SCAG), the Commonwealth, states and territories are working to strengthen

¹⁸ [Sexual Assault Prevention and Response Program 'Listen. Take Action to Prevent, Believe and Heal report' \(December 2021\)](#).

¹⁹ Oversight Committee (2024) *Sexual Assault (Police) Review Report* ('SAPR Police Report') 7 <https://www.act.gov.au/open/sexual-assault-police-review>.

²⁰ The Sexual Assault (Police Review) Report (2024) (the 'SAPR Police Review')

²¹ ACT Government Response to 'Sexual Assault (Police) Review Report' (September 2024); <https://www.act.gov.au/open/sexual-assault-police-review> >

²² See for example [NSW Law Reform Commission \(2020\) 'Consent in relation to sexual offences' \(Report 148\)](#), 25; Victorian Law Reform Commission (2020) 'The justice system and sexual offences – tell us how to make things better' (Inquiry); South Australia (2023) *Review of sexual consent laws in South Australia*; Law Reform Commission of Western Australia (2024) 'Sexual Offences (Report, Project 113); Northern Territory Law Reform Committee (2023) *Inquiry into Consent for Sexual Offences* (Final Report, No 49); Queensland Law Reform Commission (2020) *Review of consent laws and the excuse of mistake of fact* (Report 78).

²³ For ACT statistics, see [Sexual Assault Prevention and Response Program 'Listen. Take Action to Prevent, Believe and Heal report \(December 2021\)](#), 19, 34.

²⁴ SAPR Police Report (2024), 27-36

²⁵ [NSW Law Reform Commission \(2020\) 'Consent in relation to sexual offences' \(Report 148\)](#); SAPR Police Report (2024), 27-36.

²⁶ [Sexual Assault Prevention and Response Program 'Listen. Take Action to Prevent, Believe and Heal report' \(December 2021\)](#), 63.

²⁷ [Sexual Assault Prevention and Response Program 'Listen. Take Action to Prevent, Believe and Heal report' \(December 2021\)](#).

²⁸ [Sexual Assault Prevention and Response Program 'Listen. Take Action to Prevent, Believe and Heal report \(the Listen Report\) \(December 2021\)](#), 109.

criminal justice responses to sexual assault, including efforts to strengthen legal frameworks to improve the victim-survivor experience of the criminal justice system and justice outcomes.²⁹ These efforts are supported by wide ranging recommendations made by the Australian Law Reform Commission following its Inquiry into Justice Responses to Sexual Violence, as set out in the ALRC Report.³⁰

Legislative Reforms: Communicative and Affirmative Consent

Around Australia, legal reforms have been introduced in all jurisdictions to enhance protections from sexual violence and to ensure that offenders are held accountable. Previously, sexual assault (or rape) was generally legally defined as sexual intercourse ‘without consent’. Consequently, the absence of consent was a key element of the criminal offence and was often evidenced through the victim - survivor’s acts or words of resistance, including both fight and flight responses. The introduction of communicative and/ or affirmative models of consent in law attempted to shift legal understandings from a ‘resistance’ understanding of non-consent, to a positive understanding of consent as something that must be actively communicated.³¹

All Australian jurisdictions have now introduced ‘communicative consent’ models into the law.³² While the legal detail in different jurisdictions varies, communicative consent reforms incorporate many of the following elements:

- a free and voluntary agreement made with full awareness and understanding without threats or coercion
- mutually sought and given by the people involved
- ‘communicated’ through positive actions (verbal or non-verbal)
- communicated in an ongoing way, emphasising that consent is dynamic, can change and be withdrawn and
- rejects presumptions of consent by explicitly addressing and excluding misconceptions.

These reforms address the concerns raised by victim-survivors, such as those provided for the SAPRP (Listen) Report that ‘[...] while the message ‘no means no’ is important there should be a duty to recognise and respond to other verbal and non-verbal forms of communication that also indicate ‘no’, such as the ‘freeze’ response’.³³

Some jurisdictions, including the ACT, have gone further and introduced reforms that also capture an ‘affirmative consent’ model. Affirmative consent reforms attempt to ensure, within the accepted limits of the criminal law, that all individuals who engage in sexual activity take responsibility for actively seeking and ‘affirming’ consent.

²⁹ [Standing Council of Attorneys-General, Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022-2027 \(August 2022\)](#).

³⁰ Australian Law Reform Commission (2025) *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Report 143).

³¹ [Dowling C, Lawler S, Doherty L & Wolbers H \(2024\) National review of child sexual abuse and sexual assault legislation in Australia. \(Special reports. Canberra: Australian Institute of Criminology\)](#).

³² [Dowling C, Lawler S, Doherty L & Wolbers H \(2024\) National review of child sexual abuse and sexual assault legislation in Australia. \(Special reports. Canberra: Australian Institute of Criminology\)](#).

³³ [Sexual Assault Prevention and Response Program ‘Listen. Take Action to Prevent, Believe and Heal report \(‘the SAPRP \(Listen\) Report’\) \(December 2021\)](#), 117.

The affirmative consent model has been introduced in the Amendment Act by expanding the fault requirement of the accused to include not only 'actual knowledge' or recklessness that there was no consent, but also the requirement that an accused's honest but wrong belief about consent must be reasonable in the circumstances.³⁴ The reforms include providing that whether the accused person said or did anything to ascertain the other person's consent will be relevant to establishing 'reasonable belief'.³⁵ Through the introduction of a combined 'affirmative communicative consent' model in the Amendment Act, the ACT Government has partially implemented recommendation 22 of the SAPRP (Listen) Report.³⁶

³⁴ This amendment removes what is known as the 'Morgan' defence. The Morgan defence permitted the accused to be acquitted of a sexual offence if they held an honest belief that they had consent, no matter how unreasonable that belief was.

³⁵ See s 67(5) *Crimes Act 1900* (Clause 5 of the *Crimes (Consent) Amendment Act 2022*)

³⁶ Sexual Assault Prevention and Response Program (2021) 'Listen. Take Action to Prevent, Believe and Heal report ('the SAPRP (Listen) Report')'.

Overview of Amendment Act

This section of the Review Report provides a brief overview of each of the provisions of the Amendment Act and explains how together they convey an ‘affirmative communicative’ model of consent. The full text of these provisions is set out in Appendix C.

Section 50A provides an objects section to aid the legal interpretation of consent. It ensures that the meaning of consent affirms the principles of the right to sexual autonomy, and recognises that consent should not be presumed, should be mutually communicated, (rather than given by one person and received by the other) and is an ongoing responsibility (rather than a once-off occurrence). This section shifts understanding of consent from previous common law understandings which were based on resistance and context-based presumptions of consent.

Section 50B introduces a new definition of consent. The key elements in the definition are that consent is an informed agreement, must be free and voluntary, and communicated through a positive act (either verbal or non-verbal). Consequently, submission to sexual activity, or not resisting, is generally not sufficient to indicate consent. Section 50B shifts the understanding of a lack of consent away from being evidenced through physical resistance, to identifying what positive indicators of consent might include.

Section 50C defines ‘sexual acts.’ Section 50C clarifies which activities the new definitions of consent in the Amendment Act apply to. Section 50C was intended to promote consistency in the application of the meaning of consent across a number of sexual offences in the Crimes Act.³⁷ Section 50C(1)(a) states that sexual activity ‘means’: ‘sexual intercourse’, ‘an act of indecency,’ or ‘any other act in circumstances where a reasonable person would consider the act to be sexual’.³⁸ Section 50C(1)(b) provides that a medical procedure or an act carried out under lawful authority is not a sexual act (and therefore the consent provisions in the Amendment Act do not apply).

Section 50C(2) identifies what must be considered in assessing ‘reasonable’ as stated in section 50C(1)(a) and includes: whether sexual genitalia were involved, the sexual motivation driving the act, and any other aspect of the act or circumstance.

Section 67(1) sets out a non-exhaustive list of circumstances where consent is deemed not to have been given. These circumstances ensure that participation in sexual activity must be ‘free and voluntary’ and actively communicated. In addition to the circumstances which previously existed, the Amendment Act expands the circumstances where consent is deemed not to have been given to include the following:

- a person says or does something to communicate withdrawing agreement either before or during the act³⁹
- where a person inflicts or threatens to inflict harm on any person, an animal or property⁴⁰
- where a person extorts, coerces, blackmails, or intimidates someone else⁴¹
- where a person participates because of force or fear⁴² and

³⁷ [Sexual Assault Prevention and Response Program ‘Listen. Take Action to Prevent, Believe and Heal report \(‘the SAPRP \(Listen Report’\) \(December 2021\), 148.](#)

³⁸ Note that the meaning of ‘consent’ conveyed by the Amendment Act does not apply to the criminal offence of Image based abuse in Part 3A of the *Crimes Act 1900* (ACT).

³⁹ See s 67(1)(a)

⁴⁰ See ss 67(1)(b) and 67(1)(b)

⁴¹ See s 67(1)(d)

⁴² See s 67(1)(f)

- where a person does not have capacity to agree to the act, is unconscious or asleep.⁴³

It also rewords previous section 67(1)(e) 'by the effect of intoxicating liquor, a drug or anaesthetic' to 'is incapable of agreeing to the act because of intoxication' (now in section 67(1)(g)).

The Amendment Act also changed the language in the heading of the section. Previously, the heading of this section was 'circumstances where consent was negated if that consent is caused' by any of the listed circumstances. By implication, the heading conveyed that consent was presumed before then being negated. The Amendment Act reverses this logic, which is more in line with an affirmative communicative consent model. As the circumstances listed in this section are situations where either freedom or voluntariness has been substantially compromised, it conveys that there must not have been any consent at all. This is reflected in the new heading which states that these are circumstances 'where consent is deemed not given if the person' has one of the listed circumstances.

Section 67(2) explicitly identifies situations where consent cannot be presumed. That is, a person does not consent 'only' because they do not 'say or do something to resist.'⁴⁴ It seeks to explicitly address common myths and misconceptions concerning presumptions about consent that perpetuate sexual violence. This is different to providing that consent is deemed to have not been given as in section 67(1). Section 67(2) explicitly clarifies that consent to participation of one kind of sexual act (for example kissing), does not presume consent to another kind of sexual act (for example penetrative sex). It also clarifies that a sexual act on a past occasion with a person does not mean consent to the same sexual act in the present with that same person, or a different person. Section 67(2) operates to ensure that consent cannot be presumed between those who have had or are currently in a sexual relationship and supports the definition that consent in any situation must be actively sought and ongoing.

Previously, the fault element of sexual offences was either actual knowledge of non-consent, or recklessness as to whether there was consent. Sections 67(4) and (5) introduce the 'affirmative' aspect of the affirmative communicative consent model. The introduction of **section 67(4)** provides that the accused is now taken to know that the other person did not consent, if any honest but mistaken belief in consent is 'not reasonable in the circumstances.'

Section 67(5) is a non-exhaustive provision which identifies when an accused's belief in consent is not reasonable. It states that 'without limiting the grounds on which it may be established that an accused person's belief is not reasonable in the circumstances, the accused person's belief is taken not to be reasonable in the circumstances 'if the accused person did not say or do anything to ascertain whether the other person consented'.

Together, sections 67(4) and (5) introduce a 'hybrid objective/ subjective test'⁴⁵ for assessing the accused's knowledge of consent. They seek to convey that it is the responsibility of each person participating in sexual activity to not only communicate consent but also to take steps to ascertain the other person's consent to any sexual activity.⁴⁶

⁴³ See ss 67(1) (l) – (n)

⁴⁴ Dowling C, Lawler S, Doherty L & Wolbers H (2024). *National review of child sexual abuse and sexual assault legislation in Australia*. Special reports. Canberra: Australian Institute of Criminology, 32.

⁴⁵ Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 8 February 2022.

⁴⁶ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022.

Quantitative Data: Analysis & Findings

In line with the Inquiry Report recommendation that any evaluation of consent laws should include the collection and examination of quantitative data regarding different aspects of the criminal justice process (reporting, charges, trials and convictions), the Review identifies and analyses quantitative data regarding reporting, charging and conviction outcomes. Comparative quantitative data regarding trials was not available.

Reporting and Charging Data

To meaningfully compare the impact of the Amendment Act on reporting and charging, the Review considered data collected for a similar period before and after the introduction of the Amendment Act on 12 May 2022.

ACT Policing provided reporting and charging data in relation to sexual assault offences under sections 54 and 60 (including attempts) for each month from October 2019 to September 2024.⁴⁷ To analyse the emergence of trends, that data was aggregated into 3-month periods (quarters) from 2020 – 2024 except:

- the last quarter of 2019, which was excluded because it covered only 2 months of data, and
- the last quarter of 2024 which was excluded as it only contained one month of data.

The 'previous consent laws' apply to offences committed before the Amendment Act entered into force, regardless of when the report to police was made. The 'new consent laws' apply to offences committed after the Amendment Act entered into force (12 May 2022). Data about reports and charges in relation to both legal frameworks are compared.

The number of reports and/ or charges in any period may not reflect all incidents of sexual offences which have occurred in a specific quarter, as victim-survivors may wait before disclosing or reporting offences or may decide not to disclose or make a report at all.

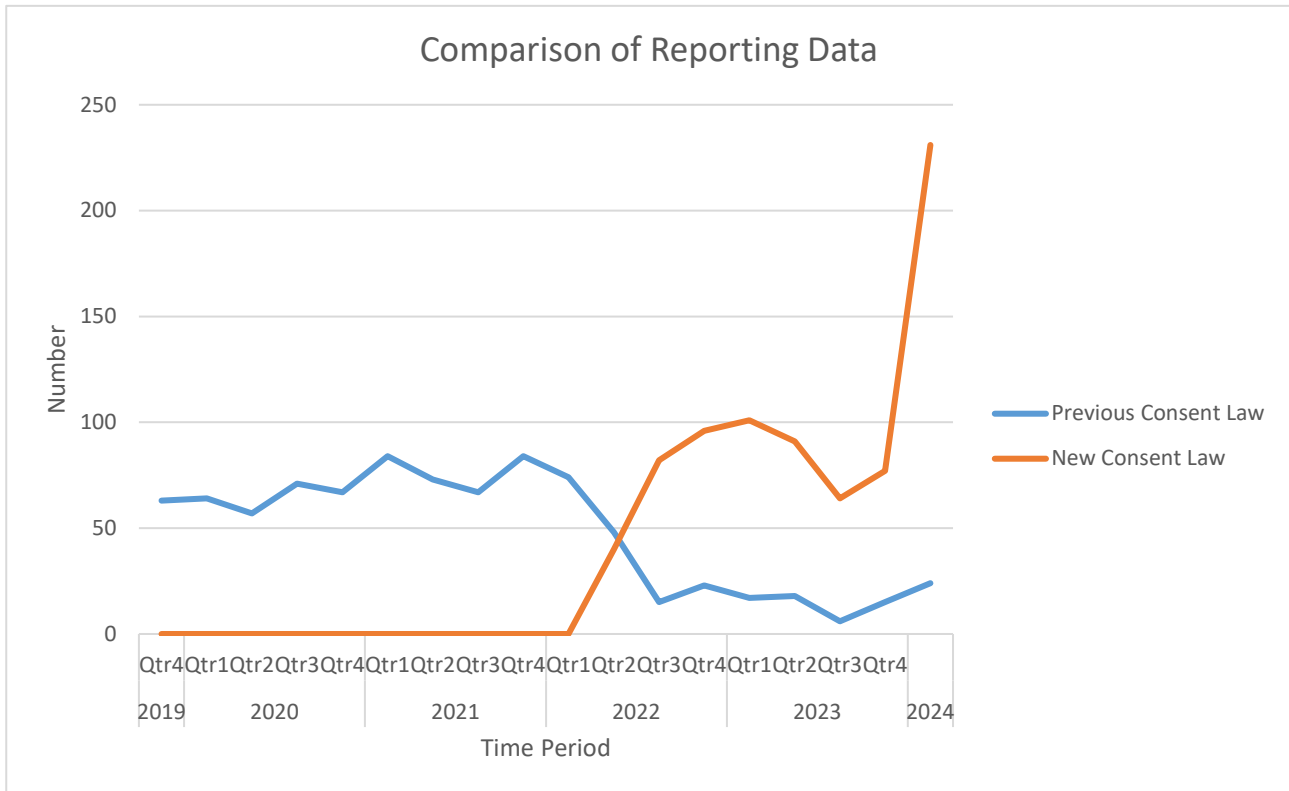
Rates of reporting

The ACT Policing data shows the following changes in reports of sexual offences over the past 5 years:

- The total number of reports under the new consent laws in the last quarter of 2024 (231) was an increase of almost fourfold on the number of reports under the previous consent laws in the last quarter of 2019 (63).
- The total number of reports made in the 2 years under the new consent laws (782) is a 38% increase on the total number of reports made under the previous consent laws in the 2 year period prior to the introduction of the Amendment Act (568).
- The total number of reports made under the new consent laws continues to increase. Reports in the last quarter of 2024 (231) has shown a nearly 3 fold increase (282%) since the third quarter of 2022 (82).
- It is expected that reports under the previous consent laws will decline but will continue to be reflected in the data as individuals report historic sex offences.

⁴⁷ See Appendix C for full text of sections 54 and 60 *Crimes Act 1900* (ACT).

Table 1: Sexual offences reported to ACT Policing ⁴⁸



Although the data collected indicates that reporting rates have increased since the introduction of the Amendment Act, it is difficult to say whether the increase in the number of reports has been due to the Amendment Act. A range of factors are likely to have contributed to this increase, including increased media and community attention about the occurrence of sexual offending and the criminal justice systems response to these matters, outcomes of significant law reform reports and research in the ACT and other jurisdictions, and implementation of other key reforms introduced since May 2022. Consequently, the available data cannot conclusively determine whether the Amendment Act caused the increase, or to what extent it contributed to the increase.

However, the work of the Review and input from stakeholders indicates, at least anecdotally, that the Amendment Act has played a role. While submissions did not go into detail about the reasons for the increased reporting, ACT Policing and SVLS suggested that the new definition of consent had been positively received by the community because it validated victim-survivors' experience of sexual violence and reflected a more contemporary understanding of consent. This feedback indirectly suggests that the Amendment Act may have contributed to reducing barriers to reporting sexual offences.

Noting the limitations on the data, the Review finds that reporting rates of sexual offences have increased since May 2022. The Review finds that the introduction of the Amendment Act may be one of several factors that has contributed to more victim-survivors reporting sexual offences.

⁴⁸ Data drawn from PROMIS as of November 2024.

Rates of charging

In 2021, the SAPRP (Listen) Report identified that in the ACT, 'less than 3% of sexual offences reported to ACT Policing resulted in charges being laid against the accused.'⁴⁹

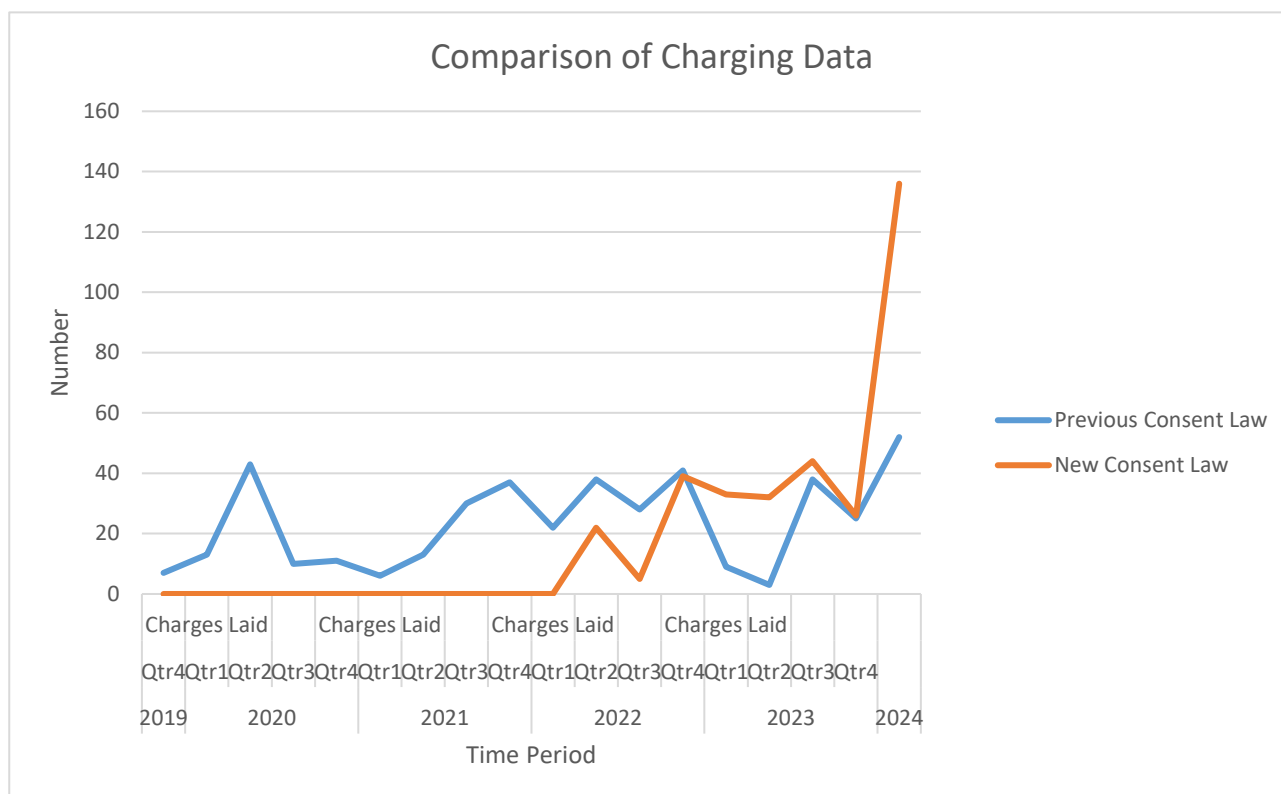
The data provided by ACT Policing for this Review shows the following changes in charges of sexual offences over the past 5 years:

- The total number of charges laid under the new consent laws in the last quarter of 2024 (136) is more than 20 times greater than under the previous consent laws five years earlier (7).
- The total number of charges laid under the new consent laws over the last 2 years (337) is almost double the total number of charges laid under the previous consent laws in the 2 years prior to 12 May 2022 (172).
- The total number of charges laid under the new consent laws has increased over the last 2 years. The number of charges in the last quarter of 2024 (136) was almost 5 times greater than the 3rd quarter of 2022 (28).
- The average number of charges made under the previous consent laws has slightly increased since May 2022 (21 per quarter prior to May 2022, compared with 30 per quarter after May 2022), with the highest total number of charges per quarter (52) occurring in the last quarter of 2024. Although it might be expected that the numbers of charges under the previous consent laws might fall as the number of historic reports of sexual offences decline over time, this does not seem to have occurred. One potential reason for this is the impact of the ACT government response regarding the implementation of Recommendation 1 in the ACT Sexual Assault Police Review (2024),⁵⁰ including the reinvestigation of some reports that initially did not lead to charges being laid.

⁴⁹ [Sexual Assault Prevention and Response Program \(2021\) 'Listen. Take Action to Prevent, Believe and Heal report](#), 34.

⁵⁰ The Sexual Assault (Police) Review (2024) 'Responding to Recommendation 15 of the Listen. Take Action to Prevent, Believe and Heal Report (2021); and the ACT Government Response to the Sexual Assault (Police) Review Report (September 2024) <<https://www.act.gov.au/open/sexual-assault-police-review>>.

Table 2. Charges laid by ACT Policing ⁵¹



Broadly, the data collected for this Review indicates that charging numbers have increased since the introduction of the Amendment Act. However, it is difficult to say whether the increase in the number of charges laid has been due to the Amendment Act or other key reforms introduced since May 2022. Consequently, it cannot be conclusively determined whether the Amendment Act caused the increase. Neither ACT Policing nor other stakeholders commented on the factors that might be driving the increase in charging rates.

Noting the limitations on the data, the Review finds charging numbers have increased since May 2022. The Amendment Act may be one of several factors that have contributed to that increase.

Attrition rates

To further analyse the effectiveness of the Amendment Act, this section now compares the relative number of charges laid with the number of reports made (the ‘attrition rate’) under the previous and new consent laws. A lower attrition rate may indicate greater confidence in the criminal justice system.

Attrition rates are expressed as a percentage. The figure is calculated by subtracting the number of charges laid from the total number of reports made in the same period, divided by the number of reports made in the same period, and multiplied by 100 for a percentage figure. If all reports led to charges being laid, the attrition rate would be 0%. Attrition rates reveal the extent to which individuals withdraw from

⁵¹ Data drawn from PROMIS as of November 2024.

participation at different stages of the criminal justice system. Generally, the different stages in the criminal justice process include reporting, investigation, charging, preparation for trial, trial, the hearing, and the outcome of proceedings (convictions).⁵²

This Review gathered data from ACT Policing regarding the number of reports and charges laid as set out above, identified attrition rates for reporting and charging and compared the attrition rate before and after the Amendment Act.⁵³ Data regarding the other stages of the criminal justice process was unavailable.

As a benchmark, the SAPRP (Listen) Report provides ACT data from 2020 which indicates the proportion (calculated over a 30 day period) of sexual assault complaints and investigations (broadly defined) that were finalised and led to the accused being charged following a police investigation was 10%.⁵⁴ This indicates an attrition rate of 90%.

It should be noted that there are some important limitations regarding the conclusions that can be drawn from the ACT attrition data. The charges laid in any period may have arisen from an incident reported in a different period. This means that the graphs do not indicate changes in effectiveness or efficiency in converting reports to charges in any given quarter, and instead only indicate general trends. Ongoing monitoring over a longer period would identify trends more reliably.

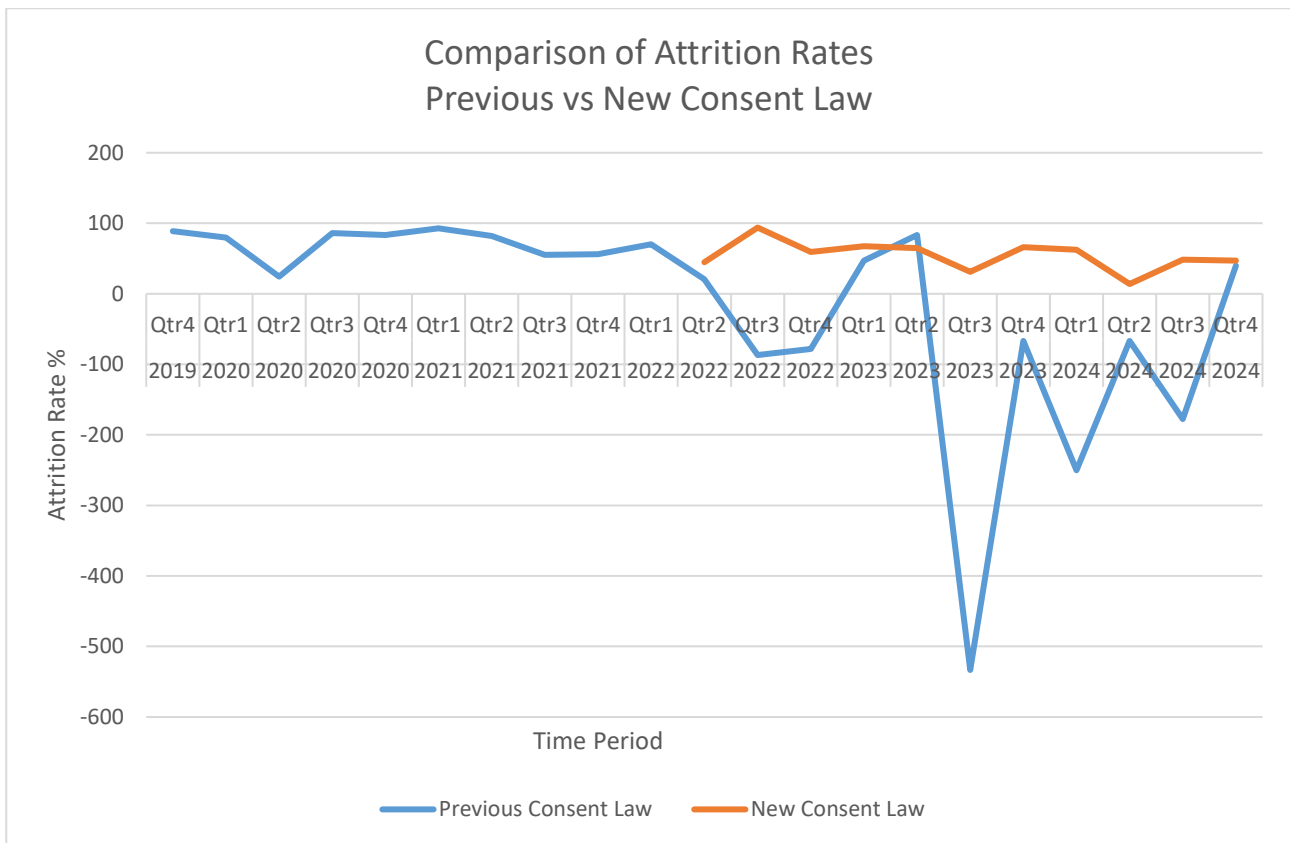
The ACT Policing data provided for this Review suggests that:

- There has been a fall in attrition rates since May 2022 under both the previous and new consent laws.
- The attrition rate under the ACT's consent laws continues to fall. It is now half (47%) what it was in May 2022 (94%).
- At the time of the Review (Nov 2024) the attrition rates under the previous consent laws (40%) were roughly similar to the attrition rate under the previous consent laws (46%).

⁵² See The Sexual Assault (Police) Review (2024) *'Responding to Recommendation 15 of the Listen. Take Action to Prevent, Believe and Heal Report (2021)'*, 92

⁵³ Data drawn from PROMIS as of November 2024.

⁵⁴ [Sexual Assault Prevention and Response Program \(2021\) 'Listen. Take Action to Prevent, Believe and Heal report'](#), 34.



Caution should be exercised in drawing any conclusions regarding the causes of the fall in attrition rates. As with the increase of reporting and charging rates, there might be many reasons for a decrease in attrition rates. Indeed, the significant fall in attrition rates under the previous consent laws in quarter 3 2023 (-530%) is likely due to a significant number of charges laid following action taken to reinvestigate previously closed cases to implement Recommendation 1 of the ACT Sexual Assault (Police) Review (March 2024).

However, it is possible to conclude that the Amendment Act may have either positively contributed to the decrease in attrition rates between reporting and charges being laid, or least it has not been counterproductive to that outcome.

Ongoing monitoring of the data is recommended to determine whether these trends continue.

The Review finds that attrition rates between reporting and charging have decreased since the passage of the Amendment Act. This indicates the Amendment Act may have positively contributed to reducing attrition rates. However, as noted already above, the Amendment Act may be one of several factors that has led to a decrease in attrition rates and its specific causal impact cannot be determined.

Conviction Outcomes

The ability to evaluate the impact of the Amendment Act on conviction outcomes is limited due to various external factors. The ACT population is small, and the total number of sexual offence proceedings that are

determined by the courts is even smaller. Consequently, only some tentative observations about conviction outcomes in sexual offences can be drawn from the limited number of cases.

Quantitative data on conviction outcomes for sexual offences in the ACT prior to the Amendment Act and following the Amendment Act, is drawn from data provided by ACT Courts.

The conviction data compares how charges of sexual offences (sections 54 and 60) were finalised in ACT Courts (Supreme Court, Magistrate Court and Children's Court) in the 2 years prior to 12 May 2022 (12 May 2020- 11 May 2022), with those finalised under current consent laws in the 2 years after 12 May 2022 (12 May 2022 – 11 May 2024).

In the two years prior to the introduction of the Amendment Act, of 135 charges:

- 22% (30) of charges were withdrawn
- Of charges finalised by an adjudicated outcome:
 - defendants pled guilty to 26% (35) of charges
 - defendants were found guilty of 23% (31) of charges and
 - defendants were found not guilty to 29% (39) charges.

In the 2 years after the Amendment Act, of 117 charges

- 19% (22) of charges were withdrawn
- Of charges were finalised by an adjudicated outcome:
 - defendants pled guilty to 39% (46) of charges
 - defendants were found guilty of 21% (25) of charges
 - defendants were found not guilty of 20% (24) of charges.

Noting the small sample size, this data suggests that there may have been a slight increase in the proportion of outcomes resulting in a conviction, either through the defendant pleading guilty or being found guilty, since the Amendment Act, and a slight decrease in a finding of not guilty.

Notably, there is an increase in the proportion of charges where the accused entered a plea of guilty. The ALRC noted that a plea of guilty is a desirable outcome in sexual violence cases for many reasons, including that it reduces the possibility of re-traumatising the victim-survivor through being called as a witness and fulfilling justice needs by the offender accepting responsibility.⁵⁵

As with the reporting, charging and attrition data analysed above, caution should be exercised in drawing any conclusions regarding conviction outcome data. It is not possible to conclude that the Amendment Act alone caused the change. There may be many reasons for changes in conviction outcomes, including the specific and often unique facts of the charges themselves. However, it is possible to conclude that the Amendment Act may have not been counterproductive to holding the offender accountable for their actions.

Analysis of national data

National data on general trends in relation to sexual assault proceedings (broadly defined)⁵⁶ applying different legal definitions of consent is also available. The national data suggests that from 2010-2020, the

⁵⁵ ALRC Report, p 159 -

⁵⁶ This includes not only offences where consent is an element, but all sexual offences

national statistics (combining the data on Higher Criminal Courts and the Magistrates' Criminal Courts)⁵⁷ on conviction outcomes are:⁵⁸

- Of 29,861 cases finalised by an '**adjudicated outcome**' as defined by the ABS,⁵⁹
 - 77% (22,907) of defendant were held to be guilty of all or some of the charges
 - 57% of defendants pled guilty (16,942).
 - 20% of defendants were adjudicated as guilty (5,965)
 - 23% (6,954) were adjudicated as not guilty

This national data demonstrates general trends and conviction outcomes across Australia. However, this data is not directly comparable with data from the ACT regarding the Amendment Act, given legislative differences across jurisdictions regarding the definitions of consent and parameters and elements of sexual offences. While this data provides an overall image of national outcomes, caution should therefore be taken in drawing any conclusions for the ACT from this data.

Analysis of published decisions ⁶⁰

Noting the limitations of the available data discussed above, the Review supplemented this analysis with consideration of the publicly available Supreme and Magistrate Court decisions since the Amendment Act was passed. The publicly available decisions provide more precise information on conviction outcomes, including whether the previous or new Act applied, enables the consolidation of data from both the Supreme Court and Magistrate Court, and includes information about whether the conviction was a result of a court finding or a guilty plea.

It is important to note that published cases do not represent all the cases that have applied the Amendment Act, as a number of cases could not be used or referred to because publication has been restricted and/ or the case is under appeal.⁶¹ Further, the total number of cases in the ACT is very small, so the quantitative findings on the conviction data from these cases cannot be generalised. Therefore, whilst a review of published cases cannot inform complete analysis of cases, it does however provide some insight on how the Amendment Act is being applied to date.

The resulting data set comprised 14 first instance cases and one appeal case which involved either sexual intercourse without consent (or attempts to, whether aggravated or not), or an act of indecency without consent (or attempts to, whether aggravated or not).

Analysis of the first instance cases showed:

- Of the 14 cases that were finalised by a court, 28.6% of accused had their case determined by a trial (4) and 71.4% of accused pled guilty (10), and
- In the 4 first instance cases where the outcome was determined by trial, all the accused were found guilty of some or all of the charges.

The case regarding an application for leave to appeal to the ACT Supreme Court was refused.

⁵⁷ The data on Children's Court proceedings were not included.

⁵⁸ Australian Bureau of Statistics (ABS) (2022) *Sexual Assault – Perpetrators* <https://www.abs.gov.au/articles/sexual-assault-perpetrators>.

⁵⁹ 'Adjudicated outcome' as defined in the ABS data excludes transfers and withdrawal but includes both a guilty finding and a guilty plea.

⁶⁰ The case review includes cases that were publicly available as of 26 May 2025.

⁶¹ For a list of the cases available and which have informed this review, see Appendix B.

To assist in interpreting qualitative data, quantitative data on conviction outcomes provides important information about the potential impact of the law reforms. The Review therefore finds that data on conviction outcomes requires further monitoring over time and requires more tailored data in order to make more meaningful comparisons and improve the evaluation.

The Review finds that further monitoring and evaluation of the Amendment Act should be undertaken to better understand its potential impact on conviction rates. This aligns with Recommendation 35 of the ALRC Report.

Qualitative Data: Analysis of Issues & Findings

Stakeholder Responses

The Review invited submissions from a range of stakeholders to inform the Review (see Appendix A). Responses were received from the following stakeholders:

- Aboriginal Legal Service NSW/ACT (ALS)
- ACT Bar Association – Criminal Law Committee (Bar Association)
- ACT Office of Director of Public Prosecutions (ODPP)
- ACT Law Society
- ACT Policing
- Forensic and Medical Sexual Assault Care, Canberra Health Services (FMSAC)
- Legal Aid ACT
- Office of LGBTIQ+ Affairs, Chief Minister, Treasury and Economic Development Directorate
- Sexual Violence Legal Service, Women’s Legal Service (SVLS)
- Victim Support ACT

These stakeholders represent the legal profession, as well as a range of interest groups, including organisations working directly with both victim-survivors and groups that are more likely to experience sexual violence, including women, and people that identify as LGBTIQ+⁶² or are Aboriginal and/or Torres Strait Islander.⁶³ These stakeholders raised several issues in relation to the operation and effectiveness of the Amendment Act. These issues are discussed and considered below.

Effectiveness of the Amendment Act

Stakeholders consistently noted that at the time they were invited to respond, the Amendment Act had only been in force for 2.5 years. They observed that some aspects of its effectiveness were difficult to comment on, and further time would be required to fully assess the operation of the Amendment Act.

In particular, stakeholders stated that they were unable to comment on the effectiveness for the following reasons:

- given the time that some victim-survivors need to take before reporting sexual offences, it was difficult to know whether the Amendment Act had improved the victim-survivor’s experience of the criminal justice system
- there had been only limited cases applying the Amendment Act, and of the cases that had been heard, there was limited legal or judicial consideration of the interpretation of the provisions of the Amendment Act and
- information about the cases that had applied the Amendment Act was limited due to restrictions on publication, and because some cases were awaiting verdicts or were under appeal.

Nonetheless, most stakeholders observed that overall, the Amendment Act had positive impacts in a few areas, and did not yet seem to have any unintended negative consequences.

ACT Policing and SVLS observed that the Amendment Act supported nuanced understandings of consent and better protected vulnerable groups in the ACT. They also suggested that the new definition of consent had been positively received by the community because it validated victim-survivors' experience of sexual violence and reflected a more contemporary understanding of consent. ALS observed that affirmative consent reduced harm caused to the Aboriginal and Torres Strait Islander community.

Violence against Aboriginal and Torres Strait Islander women and children is driven by the ongoing impacts of colonisation intersecting with gendered drivers of violence, including racist stereotypes and myths about consent and sexual violence. These myths and stereotypes are present in public attitudes and reinforced in responses by police, courts and other agencies, underscoring the importance of investment in ongoing anti-racism training, education, and public awareness raising regarding the meaning of affirmative consent.

In contrast, the ACT Bar Association indicated that in their view, the Amendment Act did not really add anything new to the previous law. Further, the changes risked compromising fundamental principles of the criminal justice system and therefore continued not to support the changes. This view was not expressed by any other stakeholder.

The Review notes that while some aspects of the Amendment Act may be consistent with the previous law, the Amendment Act has clarified and expanded the previous law.

The Amendment Act introduced a new objects section (section 50A), which articulates explicitly for the first time that consent cannot be presumed, that people have a right to choose not to participate in a sexual act, and that consent involves ongoing and mutual decision making.

The Amendment Act also introduced a new definition of consent, (section 50B) which is a positive statement of what consent is, rather than the legislation which previously only outlined circumstances where there was no consent. While the previous law may have recognised that consent ought to be freely and voluntarily given and that the absence of resistance does not lead to a presumption of consent, the introduction of section 50B shifts the starting point. Section 50B makes clear that there are no presumptions of consent (which is also underpinned by the new wording of the heading to section 67(1)) and requires the communication (by words or actions) of free and voluntary consent.

While retaining the previous presumption that if a person does not resist, that does not mean that they consent, the Amendment Act takes this further (subparagraphs 67(2)(b)(i)-(iv)). These provisions provide that a presumption of consent cannot be made only because the person has previously consented to another act with the accused person, or the same act with the accused person at a different time or place, or the same act with a person other than the accused, or a different act with a person other than the accused. This additional wording ensures that the meaning of consent captures contemporary community standards, requiring ongoing and mutual decision making in contexts where the victim-survivor and the accused may have or have had a previous intimate relationship, and restricts the relevance of consent drawn from a person's perception of the victim-survivor's sexual reputation.

The Amendment Act also now overrides the Morgan defence and extends the fault element to include a new hybrid objective/ subjective standard into law. The Bar Association also raised concerns about this

extension of the fault element, particularly as it relates to the rights of the accused. The rights of the accused are explored further below (at pages 44-45 of the Report).

Further to the extension and clarification of consent in law for those in the legal community, these reforms also clarify the contemporary standard of consent for the wider ACT community. The role of legislation in educating the community about consent, and countering myths and misconceptions that sustain the prevalence of sexual violence was an important theme raised by victim-survivors in the SAPRP (Listen) Report. The ACT Law Society noted in their submission that clarifying expectations in legislation can be valuable because legislation is a tool that can 'change social attitudes towards sexual offending'.

This feedback points to a finding that overall, the impact of the Amendment Act to date has been positive, but on-going monitoring of its operation over time will be important. The ALRC Report has recommended that all states and territories undertake a review of their affirmative consent laws (Recommendations 3.c.ii, 3.d, and 35.1). The Review places the ACT at the forefront of this work. Should they occur, further reviews of affirmative consent laws in other jurisdictions will likely provide an important source of evidence against which the ACT can continue to benchmark its own laws and identify further opportunities for reform where appropriate.

This Review finds that to date most stakeholders agreed the Amendment Act had positive impacts in a few areas and had not given rise to unintended negative consequences. Stakeholders noted however that further time was needed to fully understand the impact of the changes introduced by the Amendment Act. Therefore, the Review finds that regular monitoring and evaluation of the Amendment Act, with reference to reviews and developments in other jurisdictions, will be important to ensure that it continues to operate as intended.

The Objects, Definition and Principles of Consent - Sections 50A, 50B and 67(2)

The meaning of consent

The SAPRP (Listen) Report anticipated that the adoption of a 'communicative affirmative consent' model of consent would 'provide greater clarity in the community about what consent is and is not. Reforming the law of consent is an important way to address and dispel myths about consent and nonconsent [...].'⁶⁴

The Amendment Act introduced three provisions which attempted to clarify the meaning of consent as both communicative and affirmative. Section 50A inserted a new objects section. Section 50B inserted a new definition, and section 67(2) explicitly dispelled several historically accepted presumptions regarding consent.

Evidence demonstrates the importance of clarifying community standards in the criminal law about consent and non-consent. As noted by the SAPRP (Listen) Report, outdated myths and misunderstandings

[...] contribute to the perpetuation of sexual violence and inhibit the effectiveness of response and support measures. Reforming consent law is vital as we work to build a community that rejects sexual

⁶⁴ [Sexual Assault Prevention and Response Program \(2021\) 'Listen. Take Action to Prevent, Believe and Heal report'](#), 78.

violence in all forms because the criminal law 'is the basis for enforcing the minimum standards of behaviour that the community expects.'⁶⁵

Most stakeholders confirmed that the Amendment Act more clearly encapsulated the contemporary community meaning of consent. For example, SVLS reported that 'We have had a positive response from victim-survivors who were subjected to sexual violence following the amendments, in advising them of the legal definition of consent in the ACT. It is validating for victim-survivors that the legislation has improved to more accurately capture what is, and is not, consent.'

SVLS and ACT Policing observed that although the meaning of consent in the Amendment Act was generally clear for members of the legal community, further explanation was sometimes needed for non-legal professionals, including others working in the criminal justice system.

Researchers have identified that in addition to quantitative data that might show an increase in the number of reports, charges and convictions, another important measure of the effectiveness of legal reforms to the law of consent is the diversity of the factual circumstances raised in cases determined by a court (whether successful or not).⁶⁶ It has been observed that while previous legislative reforms in this area may have broadened the meaning of consent to challenge misconceptions (that sexual assaults occur in existing relationships and a freeze response may indicate an absence of consent), this has not always led to cases where these broader factual bases have been publicly considered by the courts.⁶⁷

A review of publicly available cases in the ACT where the Amendment Act has been applied may therefore be useful in considering whether the Amendment Act is supporting the application of a more nuanced understanding of consent. While there are only 15 such cases publicly available at the time of writing the Review Report (for a list see Appendix C), and only two of the 15 cases explicitly involved the judicial consideration of the interpretation of the Amendment Act (*Police v Beech and Ware v DPP*), the factual matrix of these cases demonstrate that a more nuanced understanding of the dynamics of the meaning of consent is being applied.

For example, in 8 of the 14 first instance cases,⁶⁸ while the victim-survivor was in, or had been in, an intimate relationship with the accused, it was determined or agreed that the victim-survivor had not consented. Further, in 6 of the 14 first instance cases, the victim-survivors did not engage in physical 'resistance' or say 'no', yet it was determined or agreed that they had not consented (*DPP v RR, DPP v Mastalerz, DPP v Ware, Police v Beech, DPP v Garcia, DPP v Hojlund*). This suggests that the requirement that consent be communicated is operating effectively to overcome previous presumptions that resistance is needed to demonstrate non-consent. Moreover, in 3 cases of the first instance cases, it was recognised that the victim-survivor's 'freeze response' did not amount to consent (*DPP v RR, DPP v Ware, DPP v Garcia*). The factual matrix of these cases appears to better reflect the contemporary community standards of consent captured by the Amendment Act.

⁶⁵ [Sexual Assault Prevention and Response Program \(2021\) 'Listen. Take Action to Prevent, Believe and Heal report'](#), 77 quoting NSW Law Reform Commission (2020), *Consent in Relation to Sexual Offences* (Report 148) [6.43].

⁶⁶ Wendy Larcombe 'Falling rape conviction rates' (2011) 19 *FLS* 27-45.

⁶⁷ Wendy Larcombe 'Falling rape conviction rates' (2011) 19 *FLS* 27-45.

⁶⁸ The facts of the appeal case are not considered in this analysis as they are already reflected in the first instance decision.

Whilst the increased number of first instance cases that reflect a greater diversity of facts regarding consent may reflect improvement in understanding of consent over time by the community and within the criminal justice system, feedback from stakeholders, and the case law also suggests that the Amendment Act is contributing to this result.

Withdrawal of consent

SVLS raised the concern that the Amendment Act does not go far enough to clarify that ‘consent must be ongoing’. SVLS noted that while the objects section (section 50A) includes that consent must be ongoing, the definition of consent does not (section 50B). Additionally, SVLS further suggested that when withdrawing consent, section 67(1)(a) ‘places an unnecessary burden on the person withdrawing consent to say or do something’. SVLS suggested amending the legislation to require that the ‘accused person be satisfied, on an ongoing basis, that the other person is consenting.’ The SVLS was the only stakeholder to raise this concern.

The Review notes that a similar concern was considered in the NSW Law Reform Commission Report (NSW LRC Report) regarding the interpretation of largely similar consent laws. The NSW LRC Report recommended that any withdrawal of consent ought to be expressly communicated.

Some submissions oppose including the expression “by words or conduct” in recommended s 61HI(2) because this means that the withdrawal of consent must in some way be communicated. Some express concerns that this would require complainants to demonstrate a lack of consent. One submission argues that this contradicts the communicative model of consent. Some submissions also question how this would operate in cases where a complainant consents initially, but “freezes” partway through the sexual activity. There is a concern that the law would not recognise that consent had been withdrawn in these circumstances.

We do not accept those submissions. Fairness dictates that, if consent has been freely and voluntarily given, its **withdrawal should be communicated** before a person acting on the consent that had been given could be convicted of a criminal offence. That is, in any event, inherent in the requirement that the prosecution prove that the person knew (in one of the ways defined) that the complainant did not consent [emphasis added].⁶⁹

The Review observes that it was not the intention of the Amendment Act to explicitly prescribe what ‘ongoing communication’ will generally require, as this will differ in each circumstance depending on the facts. The Revised Explanatory Statement states that ‘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.’⁷⁰ The objects and definition of consent in section 50A and 50B are however further developed through section 67 which sets out when a person cannot be deemed to have consented (see further discussion of these principles below). Section 67(1) of the Amendment Act states that a person does not consent to an act if the person says or does something to communicate withdrawing agreement to the act either before or during the act. Section 67(2)(a) further clarifies that a person cannot be taken to have consented to a sexual act in a range of circumstances, including because the person does not say or do something to resist the act.

These provisions, when read together, provide further clarity in determining when consent is withdrawn, including the situation where a person actively engaging in a sexual act ‘freezes’. The Review has not

⁶⁹ NSW Law Reform Commission (2020), *Consent in Relation to Sexual Offences* (Report No 148, 2020), 71 <<https://lawreform.nsw.gov.au/completed-projects/recent/consent.html>>.

⁷⁰ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022

identified any ACT cases that indicate whether the interpretation of section 67(1)(a) will be interpreted inconsistently with the objects, definition or principles of communicative affirmative consent.

This Review finds that on balance the Amendment Act provides an appropriate framework in relation to the withdrawal of consent and there is no present need for change. Regular monitoring of the operation of the Amendment Act however, should facilitate identification of any issues in this regard as case law and practice develop.

Presumptions of non-consent

The Office of LGBTIQ+ Affairs recommended an expansion of section 67(2) to explicitly specify that consent should not be assumed as arising from certain relationships and contexts such as: dating, sex work, the removal of clothing. The ODPP agreed with this position, noting these circumstances create sensitivities due to social norms and stigmas which are unique and may raise assumptions of consent which would not ordinarily be made. The ODPP considered that while the existing provisions make the general intent clear, it would be useful to provide extra clarity and protection in those contexts.

The objects of Part 3 of the Crimes Act, set out at Section 50A, recognise that consent to participate in a sexual act is not presumed. This section operates to provide that an individual would not be taken to have consented solely due to their relationship status or removal of clothing. Section 67(2) is also sufficiently broadly framed to include these circumstances by stating that a person should not be understood as consenting 'only for the reason that' they consent to the same (or another) act with the same or a different person.

The Review considers that these provisions together provide protections in the circumstances raised and can be applied to the specifics of any case. The Review also notes that the current circumstances included in section 67(2) are broadly consistent with the matters identified as best practice in Recommendation 36 of the ALRC Report. However, noting the commentary provided by ODPP and the Office of LGBTIQ+ Affairs, it will be important to monitor the interpretation of this provision over time to ensure it is operating as intended and that consent is not taken to be assumed in certain relationships and contexts including where a person is in a romantic or sexual relationship with the accused, has engaged in sex work, or has removed their clothing or is wearing revealing clothing.

Flexibility of consent

The ACT Bar Association expressed the concern that to avoid criminal liability, the meaning of consent in the Amendment Act requires a person to agree to a 'schedule of pre-determined consensual acts [that is] highly prescriptive'. They indicate that as sexual encounters are 'organic and fluid in nature, this is ... completely untenable.' In contrast, the ODPP considered the current provisions provide a good level of flexibility and recognise the autonomy of individuals to consent and to ensure consent is active rather than presumed or assumed.

The Amendment Act acknowledges that consent is complex and dynamic in nature. Sections 50A and 50B recognise that consent to participate in sexual activity is fluid, dependent on the context, and can be withdrawn. The Amendment Act seeks to recognise this by expecting individuals who participate in sexual encounters to take responsibility for consent in an ongoing and active way. The Review finds that together, sections 50A, 50B and section 67(2) allow for a more fluid and contextual notion of consent than previously when contextual presumptions of consent were applied.

The Review finds that the publicly available cases indicate that the concept of consent as defined in the Amendment Act is generally clear, nuanced and flexible. There is no clear evidence at this stage that further changes are warranted. However, it is recommended that the implementation and application of the Amendment Act continues to be monitored regarding how consent is withdrawn and the presumptions of non-consent.

Role of education and awareness campaigns

Several stakeholders, including the FMSAC, the ALS, the ACT Law Society, SVLS and ACT Policing, noted that ensuring the definition and understanding of consent is clear is not only a matter of legislative reform. These stakeholders recommended further education and training about consent for those operating within the criminal justice system and the public. ALS also specifically noted the need for intersectional awareness raising, particularly ‘the importance of investment in ongoing anti-racism training, education, and public awareness raising regarding the meaning of affirmative consent.’ This aligns with recommendation 22 of the SAPRP (Listen) Report which recommended law reform be accompanied by a consent education campaign. It is also supported by Recommendation 38 of the ALRC Report.

While recommendations relating to education are beyond the scope of the Review, the Review has referred these matters and findings to relevant policy areas across the ACT Government to help inform their ongoing work. The Review notes that ACT Government has funded the development and roll out of a consent education campaign to improve community understanding of the affirmative communicative consent model. A research report, market testing with local focus groups, and consultation with experts in the domestic, family and sexual violence sector have informed the strategy and creative direction of the campaign. The campaign is currently in development and is expected to be in market in mid to late 2025.

Definition of Sexual Act - Section 50C

Scope of definition of ‘sexual act’

The Office of LGBTIQ+ Affairs expressed a concern that the definition of ‘sexual act’ in section 50C was not sufficiently broad and inclusive, as it was unclear whether a ‘sexual act’ included:

- body parts that were gender neutral. For example, under section 50C(2)(a) in deciding whether a reasonable person would consider an act to be sexual, the court is to take into account whether the area of the body involved in the act is a person’s breasts, genital area or anal area. The Office of LGBTIQ+ Affairs recommended the word ‘breasts’ be amended to ‘breasts or chest’ to use gender neutral language.
- whether a sexual act might include the manipulation of objects, and
- motivations wider than sexual gratification such as coercive control.

The ODPP agreed with the suggested amendment.

While section 50C does not explicitly mention these aspects, the Review notes that the provision is non-exhaustive. Section 50C(1)(a)(iii) provides that a sexual act means any other act in circumstances where a reasonable person would consider the act to be sexual, which arguably addresses the issues raised by the Office of LGBTIQ+ Affairs. Further, section 50C(2) invites a broad construction of ‘sexual act’ by providing that in deciding whether a reasonable person would consider an act to be sexual, a decision maker is to consider ‘whether any other aspect of the act (including the circumstances in which it is carried out) makes

it sexual'. Arguably, the definition of a sexual act also already includes the use of an object. Section 50C(1)(a)(i) provides that a sexual act means sexual intercourse. Sexual intercourse is defined at section 50(1)(b) to mean the penetration of the genitalia or any of a person by an object.

Following consideration of the issues raised, the Review is satisfied that current construction of the definition adopts a balanced approach which enables the Court to exercise its discretion. However, the Review considers there may be value in further policy work and consultation to ensure the definition is appropriately broad and inclusive, with a view to future reform if appropriate.

The Review finds that the definition of 'sexual act' adopts a balanced approach that enables the Court to exercise its discretion in relation to the interpretation of a sexual act.

The Review recommends however, that further policy work and consultation be undertaken in relation to section 50C to ensure the definition of 'sexual act' is sufficiently broad and inclusive, with specific reference to the issues raised by the Office of LGBTIQ+ (see page 31).

Where Consent is deemed not given - Section 67(1)

A core element of consent under section 50B is that agreement to a sexual act must be freely and voluntarily given. The concept of 'informed agreement' underpins the circumstances where a person does not consent as set out in section 67(1).⁷¹ The Amendment Act changes the previous language, which referred to these as circumstances where 'consent was negated.' In line with the new emphasis conveyed by sections 50A, 50B and section 67(2), where consent cannot be presumed and must be communicated, the heading is now expressed as circumstances where 'a person does not consent'. The Revised Explanatory Statement states that this section is intended to operate as a deeming provision.⁷²

The Review received mixed feedback regarding different aspects of section 67(1), including:

- the appropriateness of section 67(1) generally, and
- the scope of some of the specific circumstances listed in section 67(1).

These separate concerns are explored further below.

Appropriateness of circumstances listed in section 67(1)

One stakeholder expressed concern that the scope of section 67(1) was not entirely appropriate and may have unintended consequences. Another commented on how to ensure section 67(1) was interpreted as intended.

Legal Aid ACT expressed the concern that section 67(1) may criminalise the sexual activity of consenting adults despite evidence that 'the alleged victim ... did in fact subjectively want to engage in the relevant act.' They concluded that the deeming provisions in section 67(1) rendered the 'actual state of mind of the victim-survivor ... irrelevant.'

⁷¹ This includes mistake as to the nature of the act (see s 67(1)(j)), or the identity of the person with whom the sexual act is undertaken (section 67(1)(h)). Section 67(1)(i) more widely captures situations where a person 'participates in the act because of a fraudulent misrepresentation of any fact made by someone else...'

⁷² Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022.

The Office of LGBTIQ+ Affairs also recommended the Explanatory Statement (ES) specifically include an example highlighting that relationships between a carer and a person with disability are the relationships of authority, trust or dependence that would fall within the circumstances of section 67(1)(k)(i), such that consent should be deemed not to be given. This would support increasing awareness of this form of abuse. However, the ES cannot be revised after an Act has been debated and passed. Absence of such an example in the ES does not however prevent the provision being interpreted to cover such relationships. The scope of section 67(1)(k)(i) is a matter for judicial interpretation and improving awareness of the Amendment Act and this form of abuse is a matter for community education.

Having considered the issues raised by stakeholders as against the legislation and other supporting materials, the Review considers the circumstances where consent is not given (as listed in section 67(1)) are appropriate. The list is narrowly confined to circumstances where the communication of free and voluntary consent is both objectively and significantly impinged. This includes circumstances such as:

- where a person's free will can be said to be overborne because the accused has used threats, force, coercion, blackmail, or by an abuse of a relationship (professional or one of dependence) to procure consent,
- when a person is not able to communicate consent, for example when they are intoxicated, asleep or unconscious, or
- where a person is not able to make an informed decision due to, for example, a misrepresentation about a key fact (e.g. whether the accused is wearing a condom).

The Review notes that these circumstances are limited to those situations where the other person could not 'freely and voluntarily' consent to participate in sexual activity. The Review also notes that the circumstances listed in section 67(1) are broadly consistent with the list of circumstances outlined as best practice in Recommendation 37 of the ALRC Inquiry.⁷³

In relation to the importance of section 67(1) appropriately capturing the relationships between people with disability and their carers, the Review is satisfied that the broader Amendment Act addresses this. The definition of consent in section 50A(b) protects 'every person's right to choose not to participate in sexual activities' and would include people with disabilities. Additionally, the Revised Explanatory Statement noted that consent included consent through supported decision making, to '[protect] support carers from liability, and extending the legal ability of a person with disability to be able to give consent.'⁷⁴ This heightens the level of autonomy and agency for people with a disability, while also retaining provisions to prevent ... sexual violence.'⁷⁵ Supported decision-making is distinguished in the Revised Explanatory Statement from circumstances where a carer applies 'undue influence'.⁷⁶

As such the Review is satisfied that the circumstances set out in section 67(1) are appropriately justified. They are narrow and clearly defined situations where consent ought to be deemed not given. Although there appears to be no basis for immediate reform, given the significance of this issue for the ACT

⁷³ Australian Law Reform Commission (2025) *'Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence'* (< <https://www.alrc.gov.au/publication/jrsv-report-143/> <https://www.alrc.gov.au/publication/jrsv-report-143/>>, p 335 – 336, including discussion from 336 - 346

⁷⁴ Revised Explanatory Statement Crimes (Consent) Amendment Bill 2022, 5 May 2022.

⁷⁵ Revised Explanatory Statement Crimes (Consent) Amendment Bill 2022, 5 May 2022.

⁷⁶ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022

community, there may be benefit in monitoring this issue in consultation with stakeholders to confirm this remains the case.

The Review finds that the circumstances in section 67(1) are appropriate. Further, there is no present evidence to suggest that it is having any unintended consequences that would justify the need for immediate reform.

The scope of specific circumstances in subsection 67(1)

Some stakeholders also raised concerns about the scope of the specific paragraphs of section 67(1), noting that some paragraphs went too far or not far enough.

The Review found that most of these concerns were appropriately covered by section 67(1). For example, the Office of LGBTIQ+ Affairs considered the provision should be amended to specifically state that consent is deemed not given in the following circumstances: threat of visa cancellation or deportation, the infliction of mental or physical harassment, the removal of clothing, sex workers, and what a person is wearing. The ODPP agreed there may be merit in providing that consent should be deemed not to be given in those circumstances, and that this issue should be monitored. The Review considers that while the Amendment Act does not explicitly address these circumstances, it is likely that they are already covered by the current provisions.⁷⁷

The Review found however that three concerns raised by stakeholders about the scope of section 67(1) merit further consideration and consultation, with a view to further clarification. These issues relate to stealthing (section 67(1)(j)), 'coercion' (section 67(1)(d)), and 'fraudulent misrepresentation of any fact' (section 67(1)(i)).

Coercive control – Section 67(1)(d)

SVLS raised concerns that while section 67(1)(d) identifies threats, the use of force, and 'coercion' as circumstances where consent is not given, it was unclear whether the section covered 'coercive control'.

Previously domestic violence was understood as physical and/ or sexual violence, with a focus on single or episodic acts of violence. More recently however it is also understood to cover a wider range of behaviours or harms. By contrast, the term 'coercive control' is understood to capture 'a pattern of controlling behaviour, used by a perpetrator to establish and maintain control over a person.'⁷⁸ It can include a wide range of 'everyday' behaviours that are not necessarily 'violent', but are ongoing and cumulative, and which can perpetuate dominance or control over another person.⁷⁹ A relationship where there is coercive control raises real questions as to whether that person can 'freely' provide consent to any sexual act.

⁷⁷ The threat of visa cancellation under ss 67(1)(k) or (f); infliction of mental or physical harassment under s 67(1)(b), the protection of sex workers under s 67(2)(b), and what the person was wearing and removal of clothing under s 67(2)(b)(i).

⁷⁸ Australian Institute of Health and Welfare, (2024) 'Coercive Control' < <https://www.aihw.gov.au/family-domestic-and-sexual-violence/understanding-fdsv/coercive-control>>.

⁷⁹ Australian Institute of Health and Welfare (2024), 'Coercive Control' < <https://www.aihw.gov.au/family-domestic-and-sexual-violence/understanding-fdsv/coercive-control>>.

The Review considers coercive control is most likely already covered by ‘coercion’ in section 67(1)(d). The Revised Explanatory Statement notes that subsection 67(1)(b) – (f) are all intended to apply to situations of family and domestic violence, whether it occurs in a single instance or as part of an ongoing pattern.⁸⁰ The impact of domestic violence on consent was raised in the recent case of *DPP v Masterlerz (No 2)*. Although the offender pled guilty, the judge noted that any apparent consent, acquiescence or submission to sexual intercourse communicated by the victim-survivor was deemed not given due to her fear arising from the history of their relationship,⁸¹ which was described as ‘a long history of violence and control.’⁸²

The Review notes that subsections 61HJ (1)(e)(ii) and 61HJ(f)(ii) of the *Crimes Act 1900* (NSW) explicitly acknowledge coercive control by identifying that consent might be deemed not given in circumstances where:

- there is the use of force, threats of force, blackmail or coercion (etc)
- whether or not the fear is real or perceived,
- is immediately experienced at the time of sexual activity, and
- whether it arises as a single instance or a ‘pattern of behaviour’ of the accused.

Although it is likely that coercive control and the ongoing pattern of abusive behaviour is covered by section 67(1)(d), the Review finds there may be merit in updating the language of ‘coercion’ to include ‘coercive control’, and that this warrants further policy work and consultation with stakeholders.

‘Fraudulent misrepresentation of any fact’ – section 67(1)(i)

The ACT Law Society, ALS and FMSAC raised concerns about the how the definition of consent as an informed agreement that is freely and voluntary given (section 50B) may widen the interpretation of the scope of ‘fraudulent misrepresentation of any fact’ under section 67(1)(i), which may lead to unintended consequences.

The ACT Law Society and ALS both raised the concern that the use of ‘informed agreement’ alongside ‘fraudulent misrepresentation’ would support a very wide scope of information that may need to be disclosed and inadvertently cover unintended situations. They recommended that section 67(1)(i) be explicitly narrowed so that it was not a fraudulent misrepresentation to exaggerate one’s ‘income, wealth or feelings.’ Stakeholders observed that a similar exclusion is presently included in section 61HJ(3) of the *Crimes Act 1900* (NSW).

FMSAC noted that some confusion presently exists in the community regarding what information a person is required to share for agreement to be considered ‘informed’, including whether a person is under a Family Violence Order (FVO) or has a sexual transmitted infection (STI). FMSAC recommended that neither FVOs nor STI’s should arguably be required to be disclosed for informed participation in sexual activity, and that any failure to provide this information should not be criminalised. Rather, clearer information for the community about what is and is not consent and the risks of sexual activity ought to be developed and made available.

⁸⁰ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022.

⁸¹ *DPP v Masterlerz (No 2)* [2024] ACTSC 267 at para 22.

⁸² *DPP v Masterlerz (No 2)* [2024] ACTSC 267 at para 42.

The circumstance of ‘fraudulent misrepresentation of any fact’ has been included in the sexual offences for some time. However, while the wording of this section appears very wide, most Australian jurisdictions have interpreted ‘fraudulent misrepresentation’ narrowly to include only those misrepresentations that are ‘fundamental’ to the nature or character of the sexual act.⁸³ However, the ACT legislation is expressed more widely than other jurisdictions,⁸⁴ and a wider application of its scope has been confirmed by the ACT Supreme Court.⁸⁵

The Review notes that the wording of section 67(1) is non-exhaustive, and ‘do[es] not limit the grounds on which it may be established that a person does not consent to a sexual act.’⁸⁶ This suggests that it was intended that a broad approach be taken to interpreting section 67(1)(i). This is supported by examples of ‘fraudulent representation’ identified in the Revised Explanatory Statement including: the ‘health, hygienic or cosmetic nature of purposes of the act, spiritual, cultural or religious nature or purposes of the act, HIV or STI status, or payment’. However, the Revised Explanatory Statement also suggests that a more limited interpretation of ‘fraudulent misrepresentation’ was intended in other respects, as it clarifies that non-disclosure of ‘trivial matters’ and ‘gender history’ were not fraudulent misrepresentations.⁸⁷ The Explanatory Statement provided slightly more information, indicating that ‘trivial matters’ might include a ‘person’s income, wealth or feelings’.⁸⁸

As no publicly available cases have clearly considered the scope of ‘fraudulent misrepresentation’ in the Amendment Act, it is unclear how this provision will be interpreted. However, the Review finds that multiple and varied concerns about the scope of provision have been expressed by stakeholders, suggesting that there may be benefit in further consideration whether amendment is needed.

Condoms and other devices – Section 67(1)(j)

The Office of LGBTIQ+ Affairs recommended that section 67(1)(j) regarding the ‘intentional misrepresentation about the use of a condom’ ought to include the intentional misrepresentation of other devices such as ‘dental dams’.⁸⁹

Section 67(1) does not limit ‘the grounds on which it might be established that a person does not consent to an act mentioned in the provision.’ However, subsection 67(1)(j) specifically provides that the ‘intentional misrepresentation by another person about the use of a condom’ is a circumstance where consent is deemed not given. Presently, as the section does not include the words ‘or any other device’, the rules of statutory interpretation may apply to limit the application of this provision to condoms alone. If so, then it is unclear whether purely contraceptive devices such as ‘the pill’, and/ or devices which only prevent the transmission of sexually transmitted infections (such as dental dams) are intended to be covered by section 67(1)(j). The Review considers there may be value in further policy work and consultation on this issue, with a view to future reform if appropriate.

⁸³ R v Clarence (1888) 22 QBD 23. See also Anderson et al (2022) *Criminal Law Perspectives: From Principles to Practice* (Cambridge), 293-294.

⁸⁴ Anderson et al (2022) *Criminal Law Perspectives: From Principles to Practice* (2022), 293-294.

⁸⁵ Per Refshauge ACJ in R v Tamawiwiy (No 2) (2015) 255 A Crim R 81 at [55].

⁸⁶ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022.

⁸⁷ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022.

⁸⁸ Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 8 February 2022.

⁸⁹ A dental dam is a device used to cover the genitals during oral sex to prevent the transmission of sexually transmitted infections (STIs).

The Review finds that the overall list of circumstances where consent is deemed not given is appropriate and in line with Recommendation 37(2) of the ALRC report.

The Review recommends however, that further policy work and consultation be undertaken in relation to stakeholder proposals to amend: section 67(1)(d) to include the term ‘coercive control’, section 67(1)(j) to include intentional misrepresentation as to the use of other contraceptive and/or devices designed to prevent STIs, and section 67(1)(i) to explicitly clarify any limits of ‘fraudulent misrepresentation of any fact’.

The Fault Element and ‘Reasonable Belief’- Sections 67 (4) & (5)

Criminal offences generally include physical and fault elements. For sexual offences, the physical element is sexual intercourse without consent. Prior to the introduction of the Amendment Act, the level of knowledge that the accused must have about the lack of consent to be found guilty (‘fault element’) was either actual knowledge or recklessness. In the 1976 UK decision of *Morgan*,⁹⁰ the House of Lords decided that a genuine belief, even if unreasonable, in a women’s consent to sexual intercourse could serve as a valid defence and lead to an acquittal of a sexual offence charge. This decision was subsequently adopted in Australian law.

In a judgment delivered after the passage of the Amendment Act, but applying the previous law of consent, Chief Justice MacCallum indicated that the previous law was insufficient to enable the consideration of the absence of steps taken to ascertain consent.⁹¹

The Revised Explanatory Statement provides that the purpose of introducing new sections 67(4) & (5) was to ‘remove the Morgan defence principle’.⁹² Sections 67(4) & (5) state that when a person ‘believes that the complainant consented, but that belief is unreasonable in the circumstances, then the accused person is taken to know that the other person has not consented.’ Section 67(5) clarifies that ‘the accused’s belief is taken not to be reasonable in the circumstances if the accused person did not say or do anything to ascertain whether the other person consented.’

The Review notes that section 67(3), which was part of the previous law and remains today, states that a different fault element applies to all the circumstances where consent is deemed not given (as set out in section 67(1)). When applying section 67(1), the fault element is still limited to either actual knowledge or recklessness. This issue is considered further below (see pages 39 -41).

The majority of stakeholders did not comment on the fault element and concept of reasonable belief under sections 67(4) and (5). Of those that did, Legal Aid ACT explicitly expressed support for a mechanism to address the issue of ‘unreasonably subjective beliefs about consent’. The ACT Bar Association, the ACT Law Society and the Office of LGBTQIA+ Affairs expressed concerns about how these sections may operate. The Review notes that these sections have not yet been considered by the courts.

⁹⁰ *DPP v Morgan* [1976] AC 182.

⁹¹ *R v Incandela (No 4)* [2022] ACTSC 139, at [14-15] per MacCallum CJ.

⁹² Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022.

Interpretation of fault element

The ACT Bar Association expressed concern that sections 67(4) and (5) impute a ‘negligence standard’ about what the accused knew about the other person’s consent. They stated that these provisions shift the fault element from what the accused knew (subjective knowledge) to what a reasonable person should have known (objective knowledge) which they considered to be ‘inappropriate for a criminal offence ...’. The ODPP disagreed with this position.

The Review considers the characterisation of these provisions as imputing a ‘negligence standard’ to be incorrect. The Revised Explanatory Statement is clear that sections 67(4) and (5) are intended to impute a ‘hybrid objective/ subjective’ test of reasonableness.⁹³ This can be contrasted with other tests, such as a purely objective test of reasonableness such as that which applies in negligence. The hybrid ‘objective/ subjective’ is different because it assesses what the accused might reasonably understand or know in the circumstances that the accused was in, rather than what a person generally would find to be objectively reasonable.⁹⁴ The Review notes that hybrid objective/ subjective tests are used in other ‘defences’ to criminal offences,⁹⁵ including self-defence,⁹⁶ and the defence of provocation.⁹⁷

While there may be other grounds upon which it may be established that the accused person’s belief was not reasonable in the circumstances, section 67(5) provides that where an accused person does not say or do anything to ascertain whether the other person consented, the accused person is taken to know that the other person does not consent. These are aspects which must be proved beyond all reasonable doubt by the prosecution.

Noting that no other stakeholder raised this concern, and in the absence of judicial consideration of these provisions, the Review finds that there is no evidence to support the need for any changes to these provisions.

Scope of ‘reasonable belief’

Three stakeholders expressed concern that the scope of a ‘reasonable’ belief was uncertain.

The Office of LGBTQIA+ Affairs stated that the Amendment Act does not go far enough, and that section 67(5) should be amended to make clear that a ‘reasonable belief’ should not be ‘based on the differences in cross-cultural communication, limited English language, assumed cultural expectations or other communication differences.’ In the absence of legal argument and debate, the Review considers that section 67(5) likely already operates to prevent the accused from relying on cultural and gendered presumptions as the basis for their reasonable belief in consent. However, without legal or judicial consideration this interpretation cannot be confirmed.

The NSW LRC Report acknowledged that there was a need for the Crimes Act NSW to address misconceptions about consent in the context of ‘reasonable belief.’ However, the NSW LRC rejected the option to pass legislation that explicitly provides ‘that a belief based on certain assumptions is not

⁹³ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022

⁹⁴ For an explanation of the subtle distinction see NSW Law Reform Commission (2020), *Consent in Relation to Sexual Offences* (Report No 148), 127

⁹⁵ These are not strictly legal ‘defences’, as the prosecution has the burden to argue and provide evidence on these matters beyond all reasonable doubt. See discussion in Anderson et al (2022) *Criminal Law Perspectives: From Principles to Practice* (Cambridge), 46-49.

⁹⁶ See s 42 *Criminal Code 2002* (ACT) (for offences from 1 Jan 2023) and the common law for pre-2003 offences.

⁹⁷ See s 13 *Crimes Act 1900* (ACT).

reasonable'. Instead, they preferred to rely on future possible 'clarifications to the definition of consent, along with a suite of new jury directions, to address common misconceptions and assumptions about sexual behaviour and consent.'⁹⁸ The Review finds that ongoing monitoring of the Amendment Act will need to consider how these provisions are being implemented, and if a similar concern emerges, what direction further reforms should take.

The ACT Law Society expressed the concern that the uncertainty in the scope of 'reasonable' in sections 67(4) and (5) meant that there is a risk that 'misconceptions about sexual violence that are at odds with affirmative consent [would] continue to play a role in trials.' They suggested that misconceptions might arise in prosecution case theories, jury direction, or jury focus. The ODPP agreed with the concern that the misconceptions about sexual violence that are at odds with affirmative consent may continue to play a role in trials.

The Review finds that there may be uncertainty regarding the future application of 'reasonable belief'. However, noting cases considering the application of this provision were not available, the Review finds that this should be monitored and considered further if issues arise.

The Review finds that some stakeholders have concerns about the future application of the fault element and the scope of 'reasonable belief', however the Review is not aware of any evidence that these concerns have materialised in implementation of the Amendment Act to date. However, noting there are no publicly available cases considering legal parameters of sections 67(4) and (5), the Review finds that this provision should be monitored and considered in future reviews.

Recent case law: The Application of *Agresti* to sections 67(1) & 67(3)

The ODPP and VSACT raised queries regarding how the application of the pre-Amendment case *Agresti* may impact the interpretation of 'causation' in circumstances where a person is deemed not to consent (under section 67(1)).

Background: Gillard v the Queen and Agresti v The Queen

Agresti and *Gillard* are two significant cases, pre-dating the Amendment Act, which consider the issue of consent in circumstances where consent could be negated (as it was expressed in the legislation at the time).⁹⁹

The High Court of Australia decision of *Gillard v Queen* was an appeal from the ACT Court of Appeal. The case concerned the prosecution of a man for several acts of sexual intercourse and indecency. Following a trial in the ACT Supreme Court, the offender was found guilty of 4 sexual offences on the basis that the consent of the young women who had been entrusted to his care was 'negated' due to a circumstance set out in section 67(1), namely 'abuse of a position of authority' (previously section 67(1)(h)). The Court

⁹⁸ NSW Law Reform Commission (2020), *Consent in Relation to Sexual Offences* (Report No 148), 134 [para 7.95].

⁹⁹ Section 67(1) *Crimes Act 1900* ACT, in force from 7 November 2013 – 11 May 2022

determined that the fault element for section 67(1) was contained in section 67(3), that the accused must know, or be reckless, as to whether one of the listed circumstances **caused** consent.

The offender appealed to the ACT Supreme Court of Appeal, arguing that the fault element of section 67(1) was not contained in section 67(3) and required knowledge only. The ACT Supreme Court of Appeal rejected the appellant's argument, and he subsequently appealed to the High Court of Australia.

The High Court unanimously decided that although the fault element in section 67(3) did apply, 'the causal relation in section 67(1) is important' to the determination of fault, and that 'the causal connection between the circumstance and the complainant's consent must be sufficiently substantial to warrant the attribution of criminal responsibility.'¹⁰⁰ The legal issue before the High Court was whether 'the trial judge left it open to the jury to convict if it was satisfied that the complainant's consent **was caused by** the appellant's abuse of his position of authority and the appellant was reckless as to that risk.'¹⁰¹ The High Court held that the trial judge had not done so, and the appellant was acquitted of 4 of the 5 charges, and a new trial ordered.

The causation test in *Gillard* was subsequently applied in the ACT Supreme Court of Appeal case of *Agresti*.¹⁰² The facts in *Agresti* involved charges of knowingly engaging in sexual intercourse without consent or being reckless as to whether the complainant was consenting. Following a trial in the ACT Supreme Court, a jury found the offender guilty.

The offender appealed to the ACT Supreme Court of Appeal, arguing that the judge's directions to the jury regarding whether the complainant's consent was 'caused by' 'intoxication' (previously section 67(1)(e)) were erroneous. The judge's directions to the jury had involved describing the 'sufficiently substantial' causal test from *Gillard* as requiring that: 'but for' the alcohol the complainant would not have consented, and that alcohol was a 'decisive factor' in her consent.¹⁰³

The ACT Supreme Court of Appeal determined that the trial judge's directions regarding the description of causation were 'erroneous'¹⁰⁴ and described the 'substantial connection test' as requiring a higher standard than a 'but-for test' or 'decisive factor' test.¹⁰⁵ In assessing whether the victim-survivor's consent was negated,¹⁰⁶ the court considered whether being 'heavily intoxicated' was the 'sufficiently substantial' cause of her consent.

Two separate issues related to applying the test derived from *Agresti* to the consent laws in the Amendment Act are explored below.

Fault element (section 67(3)) where the accused knows (or is reckless about) that consent is 'caused by' one of the deeming circumstances

At present, when the deeming provisions of section 67(1) apply, the fault element is set out in section 67(3). Section 67(3) provides that it must be established that the accused knows, or is reckless about,

¹⁰⁰ *Gillard v Queen* [2014] HCA 16 at [24]

¹⁰¹ *Gillard v Queen* [2014] HCA 16 [30], emphasis added.

¹⁰² *Agresti v The Queen* [2017] ACTCA 20

¹⁰³ *Agresti v The Queen* [2017] ACTCA 20 at [75].

¹⁰⁴ *Agresti v The Queen* [2017] ACTCA 20 at [76]

¹⁰⁵ *Agresti v The Queen* [2017] ACTCA 20 at [93]-[94].

¹⁰⁶ *Ibid*, [159].

whether consent was ‘caused by’ any of the circumstances set out in sections 67(1)(a) – (o). The ODPP expressed concern that in light of comments in the Explanatory Statement to the Amendment Act, the interpretation of ‘caused by’ in section 67(3) may continue to be interpreted in light of *Agresti* as ‘sufficiently substantial’. The ODPP indicated that a legislative definition of the term ‘caused by’ may be appropriate to avoid this concern.

The Review notes that the Amendment Act has introduced a new hybrid objective / subjective standard of fault in sections 67(4) and (5) which has widened the scope of the fault element to include whether the accused’s belief about consent was reasonable in the circumstances. Further, section 67(1) has been amended such that it no longer refers to negation of consent being ‘caused by’ the relevant circumstances to clarify that consent cannot be assumed.

At this stage, it is unclear how the Courts would consider the ‘sufficiently substantial’ causation test set out in *Gillard* and *Agresti*, in light of the new reforms introduced by the Amendment Act and whether this test would continue to apply in determining whether the accused is to be held criminally responsible.

Considering this uncertainty, the Review concludes there may be merit in monitoring the interpretation of this provisions by the Courts and potentially consulting with stakeholders regarding whether a ‘sufficiently substantial’ causation test continues to be appropriate for the attribution of criminal responsibility in circumstances where consent is deemed not given.

Consent of the victim-survivor ‘caused by’ intoxication in section 67(1)(g)

The recent decision of *Police v Beech* is the only recent case that has considered the application of the test in *Agresti* to the Amendment Act, in considering the level of intoxication for section 67(1)(g) necessary to cause incapacity to consent.¹⁰⁷ Although the language of causation is also used in this section, this issue is different to the one outlined above in that it considers ‘causation’ from the point of view of the victim-survivor.

In *Police v Beech*, the Court referred to the Revised Explanatory Statement which provides that ‘In accordance with *Agresti* ...the Bill does not intend to introduce a higher test for the level of intoxication’.¹⁰⁸ Applying *Agresti*, the Court in *Police v Beech* confirmed that the test for the level of intoxication necessary to cause an incapacity to consent was a ‘substantial connection’. On the facts, the Court determined that although the victim-survivor was ‘significantly intoxicated’,¹⁰⁹ this was not sufficiently substantial to deem that consent was not given to the act of indecency (kissing). However, in relation to the act of sexual intercourse, the court found that the victim-survivor was ‘highly intoxicated’,¹¹⁰ such that her consent was deemed not given.

The outcome of *Police v Beech* raises questions as to whether applying the ‘sufficiently substantial connection’ test to this specific circumstance is appropriate, and whether this aligns with the principles of the communicative and affirmative model of consent introduced by the Amendment Act. The Review notes that the Revised Explanatory Statement indicates that the test of *Agresti* was intended to apply to an incapacity to consent in the circumstances of intoxication. The Review also notes that the Amendment Act

¹⁰⁷ *Police v Beech (a pseudonym)* [2025] ACTMC 1.

¹⁰⁸ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022.

¹⁰⁹ *Police v Beech (a pseudonym)* [2025] ACTMC 1, [38].

¹¹⁰ *Ibid*, [112].

has introduced new provisions which may impact the application of the *Agresti* test in other factual circumstances. Specifically, section 50B now explicitly provides that consent must be free and voluntary and cannot be presumed and section 67(1) has been amended so that the words ‘is negated if that consent is caused by’ no longer appear.

Given this matter has only been considered by one case in the ACT Magistrate’s Court, the Review finds there is insufficient evidence to conclusively assess how the *Agresti* test regarding intoxication will apply to matters adjudicated under the Amendment Act, and whether any legislative amendment is required to clarify this.

The Review considers there may be merit in monitoring the interpretation of these provisions by the Courts and potentially consulting with stakeholders as to whether the interpretation of ‘caused by’ in *Agresti* remains an appropriate test regarding the level of intoxication necessary to deem there was no consent.

The Review finds that stakeholders have lack clarity regarding the application of *Agresti* to interpreting section 67(1)(g) and section 67(3). There may be merit in in monitoring the interpretation of these provisions by the Courts and potentially consulting further with stakeholders to consider whether the application of the causation test from *Agresti* remains appropriate in light of the introduction of the affirmative communicative consent model.

The Experience of Victim-Survivors

While some stakeholders responded that the Amendment Act was validating for victim-survivors because the definitions, principles and meaning of consent addressed the myths and misconceptions of sexual violence, they also noted that it is too early to say if the Amendment Act has improved the experience of victim-survivors in the broader criminal justice system. Some stakeholders raised concerns that the Amendment Act alone may not prevent myths about sexual assault being raised during cross examination and in the process of jury deliberation and consequently may not reduce the re-traumatisation of victim-survivors in the ACT.¹¹¹ These issues are considered below.

Cross examination by the defence

The SAPRP (Listen) Report observed that ‘... the lack of consistent trauma-informed processes and practices in the criminal justice system exposes victim survivors to damaging experiences, including [...] unnecessarily hostile cross-examination.’¹¹² ACT Policing and the ACT Bar Association noted that evidentiary matters concerning credibility raised during a trial may continue to draw on understandings of consent which are inconsistent with the Amendment Act. They noted that issues of credibility arise in sexual assault cases because many incidents of sexual violence lack witnesses, and because the trauma experienced by victim-survivors can impact on memory recall leading to inconsistencies in evidence. This means that defence questioning may seek to challenge the victim-survivor’s evidence and their credibility by drawing upon

¹¹¹ Sexual Assault Prevention and Response Program (2021) ‘Listen. Take Action to Prevent, Believe and Heal report’, 4, 109, 117.

¹¹² [Sexual Assault Prevention and Response Program \(2021\) ‘Listen. Take Action to Prevent, Believe and Heal Report’](#), 61.

myths about consent such as why they did not resist or report earlier or drawing on presumptions of consent from contexts.

While ‘improper questioning’ is not permitted under s 41 of the *Evidence Act 2011* (ACT), the ALRC Report recently found that the mechanisms to challenge improper questioning were not often used. The ALRC Report found that consequently, protections against improper questioning were not adequately effective in protecting victim-survivors from questions during cross examination that drew upon myths and misconceptions about consent.¹¹³

At the time of the Review, information concerning whether there had been a change in the cross examination of victim-survivors following the Amendment Act was not available.

Although data was not available for this Review, in line with Recommendations 35(3)(b)(ii) - (iii) and 41 in the ALRC Report, the Review recommends further monitoring of the effectiveness of provisions should be undertaken regarding ‘improper questions’ and defence questioning.

Misconceptions held by juries

The ODPP, ACT Law Society and ACT Policing noted that there were inconsistent practices in trials concerning whether the objects of consent (in section 50A) and definition of consent (in section 50B) or the principles of consent (in section 67(2)) were drawn to the attention of the jury to clarify the meaning of consent.

To address these challenges and to clarify the meaning of consent in certain situations, all 3 stakeholders indicated that they would advocate for the introduction of jury directions. For instance, ACT Policing proposed ‘stronger jury directions to ensure that these nuances (i.e. where consent is less clear) are fully explained, helping jurors interpret consent within the context of contemporary norms.’

As the Amendment Act did not make any changes in relation to procedure for sexual offence matters, jury directions are beyond the scope of this Review. However, the Review notes that Victoria has codified jury directions in legislation, including sexual offences.¹¹⁴ The ACT and NSW currently have a more limited approach, where jury directions are largely contained in the common law, supplemented by legislation in some specific areas.¹¹⁵ The ALRC Report recommended that the Standing Council of Attorneys-General fund a multi-disciplinary expert panel to produce a model bill containing judicial directions to address myths and misconceptions in sexual offence trials, to be enacted by each state and territory (the Model Jury Directions Bill- Recommendation 21). In doing so, the ALRC Report noted that the *Jury Directions Act 2015* (Vic) may be a useful starting point. This Review concludes that the ACT may benefit from any national work arising from the ALRC Report regarding the introduction of legislation to direct juries to the meaning and definition of consent.

¹¹³ Australian Law Reform Commission (2025), ‘*Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*’ (ALRC Report 132) < <https://www.alrc.gov.au/publication/jrsv-report-143/> / <https://www.alrc.gov.au/publication/jrsv-report-143/>> , 363.

¹¹⁴ *Jury Directions Act 2015* (Vic).

¹¹⁵ *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 57 and 64; *Criminal Procedure Act 1986* (NSW) ss 292 – 294AA.

The ACT Law Society also suggested that an ACT Bench Book on sexual offences should be developed to promote consistency and fairness in decision making. This aligns with recommendation 18 of the SAPRP (Listen) Report,¹¹⁶ and is also supported by Recommendation 22 of the ALRC report. The Review notes that the ACT Courts are developing an ACT Bench Book for sexual offences. The Review expects this work will support the implementation of the Amendment Act once available.

Recommendation 23 of the ALRC Report made suggestions regarding how to make expert evidence on the impact of sexual violence on child and adult complainants more accessible. Although technically already admissible in the ACT, an explicit provision would remove any doubt that the existing section only applies to children.¹¹⁷

Further work to consider these recommendations may assist in determining the opportunity for other reforms to improve the experience of victim survivors in the criminal justice system.

Recommendations 21, 22 and 23 of the ALRC Report made suggestions about how to improve the experience of victim survivors who give evidence in sexual assault proceedings. The Review considers that the ALRC Report will provide the opportunity to consider whether further reform on these issues is needed.

Wider Legal and Human Rights Considerations

The Amendment Act raises different legal and human rights considerations for victim-survivors and the accused. While the ODPP and ALS commended the ACT government for seeking to address the need for balance between these competing interests, the ALS and ACT Bar Association raised concerns about the negative impact of the Amendment Act on the legal and human rights of the accused.

The accused's right to silence and presumption of innocence

One stakeholder considered the Amendment Act may compromise the accused's right to a presumption of innocence and right to silence (see s 22 *Human Rights Act 2004* (HRA)). They argued that the basis for a reasonable belief in sections 67(4) and (5) may practically require the accused to provide evidence of their actions, otherwise they might be found guilty of an offence.

Based on the information currently available, the Review is not satisfied that the Amendment Act will be applied in this way. The debate accompanying the bill made clear that where there is a question about the reasonable basis of the belief in consent, it is still the role of the prosecution to bring evidence about what the accused person did, or did not do, to ascertain consent.¹¹⁸ The recent ACT Supreme Court of Appeal decision in *Ware v DPP* supports this view.¹¹⁹ The court unanimously agreed that

... contrary to the appellant's submissions (...) the onus of establishing that an accused knew or was reckless about a complainant's lack of consent to the acts of sexual intercourse remains on the

¹¹⁶ [Sexual Assault Prevention and Response Program \(2021\) 'Listen. Take Action to Prevent, Believe and Heal Report'](#).

¹¹⁷ *Evidence Act 2011* (ACT) ss 79(2) and 108C(2).

¹¹⁸ ACT Legislative Assembly, *Debates*, 5 May 2022, 1309 (Rattenbury); Crimes (Consent) Amendment Bill, Member's response to the Scrutiny Committee, 1 (Paterson).

¹¹⁹ *Ware v DPP* [05] ACTCA 15.

prosecution at all times. Even where an accused does not give evidence, the burden remains on the prosecution to establish that the accused did not do or say anything to ascertain consent, or the accused's honest belief in consent was not 'reasonable in the circumstances'.¹²⁰

The accused's right to equality

The ALS and the ACT Bar Association noted that the Amendment Act does not alter the standard of consent required where a person has a cognitive or developmental disability such that they do not understand consent or cannot seek or communicate consent. Consequently, they expressed concern the Amendment Act may have a disproportionate impact on individuals with a disability and compromise their right to recognition and equality before the law (see s 8 of the HRA). ALS was particularly concerned that this issue would intersect with jury bias in sexual offence proceedings against Aboriginal and/or Torres Strait Islander people and be particularly disadvantageous.

The Review finds that an accused's right to equality is unlikely to be compromised as there are mechanisms through which the accused's cognitive capacity or disability can be considered and accommodated.

Where a person's mental impairment is significant, the accused may plead not guilty due to a mental impairment. Alternatively, in instances where a person's impairment is not so substantial that it can support a special verdict, the Revised Explanatory Statement also makes it clear an accused's disabilities will also be relevant when it comes to sentencing.¹²¹ Depending on the factual circumstances, a disability may significantly diminish the moral blameworthiness of an accused's actions or even remove all moral culpability and exculpate the accused.

The protection of the accused's right to equality under the Amendment Act is further supported by an analysis of publicly available cases that have applied the Amendment Act (see Appendix B). Of the 14 first instance cases included in the Review, there were 5 cases where the offender argued that their disability/ disabilities had impacted on their ability to communicate consent, or to understand that they needed to seek consent.

- In *DPP v Matas*, the court considered the argument that the offender had a disability, but it was not accepted. Ultimately the judge determined that the lack of self-awareness at the time of the sexual offence was more a consequence of self-induced drug consumption than a cognitive or communicative disability.
- In *DPP v Best*, the offender was a young person (15) with 'several intellectual disabilities and mental health challenges.' The court accepted this evidence and the impact of the offender's disability led to a finding of reduced moral culpability and a reduced sentence.
- In *DPP v Aghahosseini*, the Court accepted that the offender had a psychiatric illness that impaired his cognitive functions. However, while his disabilities were seen as a partial motivation for some offences committed, the judge determined that the disability did not impact the motivation for the sexual offences. Consequently, the offender's responsibility was not reduced in relation to the sexual offences.
- In *DPP v Hojlund*, the offender asserted that his mental conditions, including mental health conditions, somnophilia, and drug use contributed to the offending.¹²² The court accepted this, and

¹²⁰ Per Loukas-Karlsson, Baker and Taylor JJ at [33].

¹²¹ Revised Explanatory Statement, Crimes (Consent) Amendment Bill 2022, 5 May 2022.

¹²² Somnophilia is a condition where an individual experience sexual interest or arousal from engaging in sexual activity with someone who is asleep or unconscious.

that the impact of these conditions reduced his moral culpability. However, the Court also found that any reduction in sentencing was negated by the simultaneous increased need for community protection and specific deterrence arising out of the offender's conditions (particularly his somnophilia), noting that the offender was assessed as having a 'well above average' risk of sexual reoffending by the authors of the pre-sentence report.

- In *DPP v Mastalerz (No 2)*, the issue and impact of a disability (and other mitigating factors) was raised by the offender and accepted by the court. However, the Court determined that the case 'involves very serious acts of sexual abuse occurring in a context of a relationship involving violence and abuse.' Given the seriousness of the offending, the need for protection of the victim-survivor, the need for general deterrence and the risk of the violence occurring again in the future, the judge did not consider that the sentence ought to be lessened due to any reduced moral culpability arising from the offender's disability.

From the case law available there is no indication that the statutory framework of the Amendment Act impeded the Court's consideration of this issue. Rather the cases appear to indicate that this issue was raised and carefully considered, and its impact individually weighed in the context of the offences.

Further, although a jury may determine the guilt or innocence of a person accused of a sexual offence, determining whether a cognitive or communicative disability diminishes the offender's moral blameworthiness is assessed by a judge during sentencing. Consequently, some of ALS's concern about the risk of jury bias arising from any intersectional disadvantage experienced by an accused who is an Aboriginal and/ or Torres Strait Islander with a disability, may be partly avoided.

The Review finds that the Amendment Act appropriately protects the accused's presumption of innocence, as well as their right to silence and right to recognition and equality before the law. Therefore, the Review recommends that the Amendment Act should not be changed. However, as there are limited publicly available cases confirming how the Amendment Act has been implemented the legal rights of the accused, and the importance of the issue, the Review recommends ongoing monitoring.

Conclusions and Areas for Further Consideration

The Review finds that although the Amendment Act is clear, effective and operating as intended, further ongoing monitoring of the interpretation and application of the Amendment Act is necessary to ensure effective operation of the ACT's communicative affirmative consent laws.

The Amendment Act appears to be contributing to the safety of the ACT community, including vulnerable and marginalised members of the community that are most likely to experience sexual violence. It also finds that the reforms in the Amendment Act are one of a number of factors leading to an increase in reporting sexual offences, although the operation and effectiveness of the Amendment Act must be considered in light of this broader work to improve the ACT's response to sexual violence.

However, given that the Amendment Act has only been in force just over 3 years, the Review considers that more time is needed to evaluate the impact of the Amendment Act.

Whilst the Review concludes that the Amendment Act should largely continue in its current form at this stage, stakeholders have identified opportunities for reform that warrant consideration and monitoring including:

- how consent is withdrawn
- whether the definition of 'sexual act' at section 50C is sufficiently broad and inclusive
- the ability of section 67(1) (which sets out circumstances where consent is deemed not given) to protect vulnerable and marginalised cohorts
- circumstances where consent is not to be presumed under section 67(2) and whether this is sufficiently broad
- the operation of the fault element and 'reasonable belief' in sections 67(4) & (5)
- consider the outcomes of recent case law to determine whether updates to sections 67(1) and (3) are required
- whether legislated jury directions and other mechanisms would improve clarity regarding the meaning of consent in trials and reduce re-traumatisation of victim - survivors in the criminal justice system and
- maintaining the compatibility of the Amendment Act with important human rights in criminal justice proceedings.

Although likely already covered by the Amendment Act, the Review also finds that further consideration should be given to the following specific changes raised by stakeholders, which may enhance the clarity, operation and effectiveness of the Amendment Act:

- ensure the definition of 'sexual act' at section 50C is sufficiently broad and inclusive with particular reference to the following issues raised by stakeholders:
 - adopting gender neutral language in relation to the definition of sexual act, including by substituting 'breasts' for 'breasts or chest' at section 50C(2)(a)

- providing that in deciding whether a reasonable person would consider an act to be sexual under section 50C(2), the court is to take into account whether the person carrying out the act does so for the purpose of coercive control
 - providing that in deciding whether a reasonable person would consider an act to be sexual under section 50C(2), the court is to take into account the manipulation of objects
- explicitly refer to 'coercive control' in section 67(1)(d)
- explicitly include any limits regarding the scope of 'fraudulent misrepresentation of any fact' in section 67(1)(i) and
- state that it includes the intentional misrepresentation about the use of other devices that prevent pregnancy and/ or sexually transmitted infections (STIs) in section 67(1)(j).

Appendix A: List of Stakeholders

A total of 37 stakeholders were invited to provide submissions to inform this Review.

- Aboriginal Legal Service NSW/ACT
- Aboriginal and Torres Strait Islander Elected body
- ACT Bar Association
- ACT Corrective Services
- ACT Council of Social Services
- ACT Courts and Tribunal
- ACT Director of Public Prosecutions
- ACT Human Rights Commission
- ACT Law Society
- ACT Policing
- Advocacy for Inclusion
- A Gender Agenda
- Beryl Women Inc.
- Canberra Rape Crisis Centre
- Chief Minister, Treasury and Economic Development Directorate Communications and Engagement team
- Community Services Directorate Communications and Engagement team
- Criminal Justice Responses to Sexual Violence
- Domestic, Family and Sexual Violence Office
- Domestic Violence Crisis Service
- Domestic Violence Prevention Council
- Family Violence Safety Action Program
- Family Violence Working Group
- Forensic and Medical Sexual Assault Care
- Legal Aid ACT
- Meridian
- Ministerial Advisory Council on Women
- Multicultural Hub
- Office of LGBTIQ+ Affairs
- Office for Women and Youth Engagement
- Restorative Justice Unit
- Sexual Violence Legal Service
- Toora Women Inc.
- Victim Support ACT
- Women's Health Matters
- Women with Disabilities
- Women's Legal Centre ACT
- YWCA Canberra

Appendix B: Case summary

As of 26 May 2025, there are 15 publicly available cases involving sexual offences relating to sections 54 or 60 committed since 12 May 2022. There are 14 first instance decisions, and 1 appeal case. These cases are drawn on to inform the Review as they apply the provisions of the Amendment Act that refer to consent. A summary of each of those cases is set out below.

Content warning: These case summaries contain descriptions of sexual violence and family violence

Case and Citation	Fact summary and outcome
<p>1. <i>DPP v RR</i> [2024] ACTSC 279</p>	<p>The victim-survivor and the offender had been in a relationship for about 2 decades and were divorced. The victim-survivor was the primary carer of their children, although the offender was involved in parenting. The victim-survivor had asked the offender to stay at her residence to help look after the children for around 4-5 nights because she was unwell. The victim-survivor went to bed by herself and during the night, the offender got into the bed and committed an act of sexual indecency. The facts indicate that she <i>'awoke partway through, didn't move and considered it "easier" to wait until it was "over".'</i> After the offender had ceased the act of indecency, she left the bed and slept on the couch.</p> <p>The offender had initially claimed to police that the victim-survivor was consenting because 'he and the victim had an agreement that if the ex-partner was not wearing underwear, this indicated her consent.'</p> <p>The offender was charged with an aggravated act of indecency without consent (family violence) under s 60(1) of the <i>Crimes Act 1900</i> and plead guilty to that offence. In sentencing, the judgment notes [at 20]:</p> <p>'I am satisfied beyond reasonable doubt that when the offending commenced the offender knew the victim was asleep and that she was not consenting. While the offender said he "knew she wasn't really asleep" there is simply no support for that proposition. The offender assumed his contact would be welcome. It clearly was not. The offender made no genuine attempt to ascertain that the contact he was making with her body was with the victim's consent. The victim did not say or do anything that communicated her free and voluntary consent.'</p>
<p>2. <i>Director of Public Prosecutions (DPP) v Matas</i> [2024] ACTSC 234</p>	<p>The victim-survivor and offender had an intermittent domestic relationship. The victim-survivor visited the offender's house to take GBH and then have sex. While the victim-survivor was initially unconscious, the offender commenced sexual intercourse and other sexual acts with her. When the victim – survivor gained consciousness, she asked the offender to stop and tried to get away. The offender then restrained the victim-survivor with handcuffs, threatened and then used force, and other sexual acts were undertaken without the victim-survivor's consent. Many of these offences were recorded.</p>

	<p>The offender was later charged with a several offences, including aggravated sexual intercourse without consent, attempted aggravated sexual intercourse without consent, aggravated sexual assault in second degree, aggravated sexual assault in third degree, aggravated act endangering health, aggravated common assault, aggravated assault occasioning actual bodily harm, aggravated capture intimate data, using a carriage service to menace, harass, or cause offence, aggravated non-consensual distribution of intimate images, escape arrest, and possess prohibited weapon.</p> <p>The offender initially told police that the activities were consensual. However, later conceded that the victim-survivor could not consent, and plead guilty to the charges.</p> <p>In sentencing, the offences were each considered for their degree of seriousness. The offender also raised a history of disadvantage as he experienced traumatic upbringing due to family violence. He also claimed mental illness which are ‘primarily responsible for his offending behaviour’ and drive his substance misuse [para 263]. However, it was determined that although drug addiction and mental health issues were relevant [para 297], the extent to which these were mitigating circumstances were offset because the offender knew the impact of substance abuse on his behaviour.</p>
<p>3. <i>DPP v Mastalerz (No 2)</i> [2024] ACTSC 267</p>	<p>The offender and victim-survivor had been in an ‘on again off again’ relationship for some years and have had children together. The offender committed family violence against the victim-survivor, including coercive control. The relationship ended in late 2022, when the offender was arrested in NSW for a breach of a DVO.</p> <p>After being released from custody, and in breach of bail conditions and a DVO, the offender went to the victim-survivor’s house in early 2023. The victim-survivor performed various sexual acts with the offender over a weekend, however, those acts were agreed ‘not to have been the subject of free and voluntary consent of the victim because she participated in the acts because of the implicit threat of violence or force by the offence and out of fear of him due to previous abuse in the relationship.’ [para 22].</p> <p>The offender was charged with several offences, including aggravated sexual intercourse without consent s 54(2).</p> <p>The offender pleaded guilty to the charges. In sentencing, the judge noted that ‘The victim did not resist the offending because of the long history of violence and control within their relationship.’ [para 42]</p> <p>The offender identified as Indigenous and identified a childhood history of disadvantage including time in foster care. The Court accepted the offender had a number of mental health conditions and disabilities. While the Bugmy principles applied due to the disrupted nature of the offender’s childhood and experience of foster care, ‘these mitigating factors outbalanced by need to</p>

	protect victim-survivor from offending in future and protection of others with whom he may have an intimate relationship’. [para 78]
4. <i>DPP v Best (a pseudonym)</i> [2024] ACTSC 334	<p>The victim-survivor was 14 and the offender was 15 at the time of the offending. They were in the same broader group of friends at the same high school. They had become friends approximately a month prior, and using Snapchat engaged in flirtatious communications that were sexual in nature.</p> <p>The offending occurred in early 2023. Initially, the victim-survivor consented to sexual intercourse. When the offender sought to engage in sexual intercourse again, she said no, stop and attempted to move away. However, the offender persisted with sexual intercourse, including without a condom, despite the victim-survivor previously stating that she was unwilling to have sex without a condom. The victim-survivor and offender then engaged in other sexual acts with consent, that did not include sexual intercourse.</p> <p>The young person initially told police in interview that the sexual intercourse had been consensual. The offender was then charged with sexual intercourse without consent under s 54(1). He entered a plea of guilty.</p> <p>The offender claimed a disrupted childhood, including chronic and severe neglect at an early age, abandonment and family instability. He also had ‘several intellectual disabilities and mental health challenges’. It was accepted that as a collective impact of multiple diagnoses, it was likely that it created, amongst other things, ‘risk-taking behaviours such as early and problematic sexual activity’. Because of the application of Bugmy and Verdins principles in sentencing, the young person’s culpability was reduced.</p>
5. <i>DPP v Ware</i> [2024] ACTSC 52	<p>The offender was charged with 2 offences of sexual intercourse without consent. The offender pleaded not guilty, but after a short jury trial, he was found guilty of both charges.</p> <p>The victim-survivor had a history of substance abuse. In late 2022, the victim-survivor contacted the offender and went fishing and consumed methamphetamine together. The victim-survivor redeveloped her dependency to that drug. They continued to spend time together and consume drugs. The offender expressed feelings for the victim-survivor, although she did not reciprocate.</p> <p>In early 2023, at the victim-survivor’s house, they consumed drugs and fell asleep on the couch. When she woke up, she said she was unable to move. The offender then engaged in sexual intercourse, without her consent and without a condom. She continued to associate with the offender, and their relationship revolved around the use of drugs. Further acts of sexual intercourse occurred, without her consent. A few weeks later, they consumed drugs, and the offender approached and commenced sexual intercourse. The offender asked the victim-survivor to do things. The facts note that ‘she did what he asked because she was afraid of him’. She also ‘neither said nor did anything to indicate that she was consenting to what was happening’ [para 6].</p>

	<p>In sentencing the offender, it was noted that the offending on in early 2023 occurred when the victim-survivor was under the influence of drugs and the offender knew that she was not consenting [para 11].</p> <p>The offender experienced childhood disadvantage and several other tragedies. He has experienced trouble with drugs, and related mental health concerns.</p> <p>See subsequent appeal case below.</p>
<p>6. <i>DPP v Hartas</i> [2024] ACTSC 21</p>	<p>The offender was arrested and charged with several offences, including aggravated sexual intercourse without consent under s 54(1).</p> <p>The victim-survivor and offender had been in an ‘on again off again’ relationship for between one and five months. In September 2022, after consuming alcohol, they had an argument which continued for some time. The offender then grabbed the victim-survivor and forced her to go to his residence. When she attempted to escape, he grabbed her and dragged her back into his residence. He then punched her. The offender then held her, choked her, and forced her clothes off to engage in sexual intercourse. The victim-survivor was crying and then lay still. The offence was interrupted by a knock on the door from neighbours, during which the victim-survivor was able to escape. The police were called, and the victim-survivor attended hospital.</p> <p>It was noted in sentencing that: ‘The offender told the author of the PSR that he only pled guilty to the offences on the advice of his legal representative, denying that he sexually assaulted the victim and maintaining that any sexual activity that did occur was consensual’ [para 59]. However, the offender nonetheless pleaded guilty. At para 77 of the judgement, it is noted that ‘he did unequivocally accept responsibility for the offending, but there was no real exploration or explanation for the comments attributed to him in the PSR about the consent of the victim. It seemed to me, observing and listening to him carefully, that the offender views the sexual offence he accepts he committed through the prism of more generally being in a “consensual” relationship with the victim, as though this overarching circumstance provides some justification for his conduct. It reflects a sense of entitlement to behave in the way that he did. It is an attitude consistent with the conduct the offender engaged in – asserting physical domination over the victim, controlling her actions despite her protestations, and degrading the victim.</p> <p>The judge also noted that:</p> <p>‘The offender forcibly removed her clothes to facilitate the intercourse. This was not a matter of recklessness, in the context of an ongoing relationship, borne of miscommunication. The victim made plain that the sexual intercourse was occurring without her consent, and I am satisfied beyond reasonable doubt that the offender knew this to be the case. Demonstrating complete disregard for her physical and emotional wellbeing, the offender went ahead nonetheless.’ [para 43].</p>

	<p>The offender had experienced childhood disadvantage, including experiencing domestic and family violence. He also had alcohol, other substance abuse issues, as well as diagnoses of mental health conditions.</p>
<p>7. <i>Police v Beech (a pseudonym)</i> [2025] ACTMC 1</p>	<p>The offender was charged with one count of an act of indecency without consent and one count of sexual intercourse without consent. The incidents occurred on 17 August 2023. The offender argued that he had consent, and if it was found that there was no consent, he was not reckless as to whether she consented.</p> <p>After a decision before Magistrate Temby, he was found not guilty of the act of indecency, but guilty of the second act of sexual intercourse without consent.</p> <p>The facts of the case were that the victim-survivor and the offender were both attending a social event as members of the same sports club at a karaoke bar. The prosecution case was that the victim-survivor was significantly affected by alcohol, such that she could not consent to either sexual act under 67(1)(g).</p> <p>In the decision, the Magistrate referenced the objects section (s 50A), the definition of consent at s 50B, and the principles at s67(2) regarding that a person does not consent only because they did not resist, or because they consented to another act with the accused person. The relevant fault element identified regarding s 67(1) was therefore set out in s 67(3), which included actual knowledge or recklessness. (The new fault element of reasonable belief in s 67(4) and (5) does not apply to s 67(1)).</p> <p>The decision notes the changes to the consent laws in the Amendment Act and that the previous wording of s 67(1)(g) was worded as follows: ‘the consent of a person... to the committing of an act of indecency... is negated if that consent is caused by ... the effect of intoxicating liquor, a drug or an anaesthetic’. It then cites the ACTSC Court of Appeal decision of <i>Agresti v The Queen</i>, noting that this case determined that the ‘complainant’s level of intoxication was so substantial that it caused her to be unable to consent to the act of sexual intercourse.’</p> <p>Importantly, at para [30], Magistrate Temby states:</p> <p style="padding-left: 40px;">‘The language of s 67(1)(g) of the Act differs from how intoxication was previously addressed in s 67(1)(e) in relation to issues of consent, most notably in the way that it deems consent not to have been given rather than providing for circumstances where any apparent or assumed consent is negated. However, the drafting of s 67(1)(g) (in combination with s 50B) reflects the test ultimately articulated in <i>Agresti</i>. Its insertion was certainly not intended to introduce a higher test, as noted in the Revised Explanatory Statement to the <i>Crimes (Consent) Amendment Bill 2022</i>.’</p> <p>Two legal points are raised and considered. First, a distinction is noted that under the Amendment Act, the existence of the circumstances indicates that consent is ‘deemed not to have been given’, rather than ‘negated’. The language of ‘consent deemed not given’ aligns with ss 50A, 50B and 67(2) which emphasise</p>

that consent must be communicated and cannot be presumed. Relevantly, the Revised Explanatory Statement regarding s 67(1) reads:

‘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.’

Second, the case determined that the *Agresti* test applies, being understood as a test that relates to the extent of intoxication that impacts on consent and triggers the deeming provisions in s 67(1)(g).

In applying the law to the facts, the Magistrate held the following.

The first act of indecency was a ‘hallway kiss’. At Magistrate determined at that time, while the victim-survivor was ‘significantly intoxicated’ [38], she was not however incapable of giving consent [149]. Therefore, s 67(1)(g) did not apply to the ‘hallway kiss’.

The Magistrate the considered the issue of consent. The victim-survivor had alleged that the ‘hallway kiss’ was not reciprocated, the offender had pressed her against the wall, that her arms were beside her side, that she was unable to push him away because her arms ‘felt heavy’. These facts were accepted. At para [76] and [77] the judgment states:

[76] Why she would even kiss him minimally in these circumstances is a little hard to understand, although it is perhaps explained by the Complainant’s observation that she was confused and did not immediately appreciate that she was uncomfortable with the situation. I have no doubt that that observation reflects the fact that the Complainant was significantly intoxicated at the time.

[77] My impression is that, as a result of her intoxication and confusion, she went along with what was happening to some extent. It does not appear that the Complainant froze, in the sense that that word might ordinarily be used in the context of an unwanted sexual act, albeit that I accept that the Complainant felt that her arms were heavy and that she was unable to push the Defendant away when she wanted to.

The Magistrate therefore held that the victim-survivor had communicated ‘minimal’ consent through her actions ‘of kissing him back’ to the ‘hallway kiss’ [118]. Since it was found that the victim-survivor’s level of intoxication did not impact on her capacity to consent, and that the victim-survivor did in fact consent, then the issue of recklessness did not apply. The offender was therefore not guilty of an act of indecency without consent.

The act of sexual intercourse occurred in a lockable room in the men’s bathroom, and the Magistrate found that at that time the victim-survivor was ‘highly intoxicated’ when she left the bathroom [112], such that she could not have had

	<p>capacity to consent [149]. Therefore s 67(1)(g) did apply to the ‘bathroom incident’.</p> <p>The Magistrate also considered the meaning of consent in relation to this incident.</p> <p>[126] ‘In all the circumstances, it is not a realistic possibility that the Complainant gave the Defendant verbal consent for him to pull down her pants and underwear and bend her over, nor that she did anything to communicate her consent.’ Further, the fact included the displacement of a menstrual cup such that the seal was broken, which the victim-survivor would not have wanted, nor given consent for the offender to do so. She would have removed it herself if there was consent. Consequently, there was no consent to the bathroom incident.</p> <p>Further, the Magistrate noted that:</p> <p>[129] ‘As a matter of law, the consent that the Complainant might have given the Defendant for him to kiss her outside the men’s bathroom did not extend to the further conduct in which he engaged (s 67(2)(b)(i)). As a matter of fact, in all the circumstances, it also does not support an inference that the Complainant may have consented to the further conduct.’</p> <p>In regards the fault element (recklessness) for the bathroom incident, it was ‘recklessness as the effect of the complainant’s intoxication’ –</p> <p>[193] [...] The combination of matters ... must have caused the Defendant to realise that:</p> <p>(1) the Complainant was not just drunk, but significantly intoxicated; and</p> <p>(2) it was possible that the effect of the Complainant’s intoxication was so substantial that it meant that she was incapable of giving informed, free and voluntary agreement to the acts he engaged in.</p> <p>[194.] Yet, the Defendant went ahead anyway. As I found in relation to Issue 1, he did so despite the fact that the Complainant did not participate in those acts.”</p> <p>The Magistrate found the offender guilty on the count of sexual intercourse without consent.</p>
<p>8. <i>Police v Halarion Urdanivia</i> [2024] ACTMC 27</p>	<p>The offender was charged with two counts of an act of indecency without consent. The offences occurred on two separate occasions involving two different women. The offender pleaded guilty on the first day of the hearing.</p> <p>The offender and both victim-survivors had initially agreed via the dating platform to meet up at the offender’s house for casual sex. Both women, on separate occasions, had gone to the offender’s house and found the lights turned off. The offender had provided information on his Tinder profile about his</p>

	<p>appearance which victim-survivors described as inconsistent with his actual appearance. When the victim-survivors became aware of the appearance of the offender, both women withdrew consent (one verbally, the other non-verbally), however the offender had by then engaged in various acts of indecency. Both victim-survivors felt scared and trapped in the dark house when attempting to leave, although they ultimately were able to do so.</p> <p>In the sentencing decision, the judge noted that due to the offender’s attempt to deceive both victim-survivors regarding his identity and features. This deception led to consent being deemed not given. Although the judge noted that deception regarding one’s physical features undermined ‘free and informed consent’, there was no analysis of which of the circumstances in s 67(1) were enlivened, specifically whether it was mistaken identity or a fraudulent representation. The judgment also indicated that in any event, regardless of any initial consent, both women had withdrawn their consent before the acts of indecency occurred.</p> <p>[13] ‘The offending followed a deliberate and methodical attempt to conceal the offender’s identity and features, in circumstances where potential intimacy was dependant on such identity and features. The victims were lured on the promise of engaging with someone other than the offender. When they arrived, the offender attempted to maintain the deception while, abruptly and almost immediately fondling the victims.’</p> <p>[14] ‘Deception about identity and material features violates that choice. Further, that entitlement continues notwithstanding any earlier expression of agreement or intent. Individuals are entitled to change their mind. The offender’s deception attempted to subvert that choice, and his rapid fondling appeared to be for the purpose of taking advantage of that deception before the victims became aware of the deception and or before they changed their minds.’</p>
<p>9. <i>DPP v Aghahosseini</i> [2024] ACTSC 237</p>	<p>The offender was charged with several offences, including 2 counts of sexual intercourse without consent and 2 counts of an act of indecency without consent. He pleaded guilty to all charges.</p> <p>The facts included that the offender and the victim-survivor had met on a dating platform. The victim-survivor had agreed to go to the offender’s house, and to take off his clothes for payment. The offender subsequently committed the offences in a context where the victim-survivor had made it clear that he was not consenting to the acts of sexual intercourse and the acts of indecency. Each time, the offender committed them anyway. At times, offender used some force. For some of the act, the offender made it clear that he had a knife close by.</p> <p>In the sentencing decision, the judge acknowledged that the offender had a psychiatric illness (schizophrenia) which included paranoid ideation. The judge also acknowledged that it was difficult to distinguish whether the symptoms of paranoia were a ‘manifestation of drug-induced psychosis’ or a ‘diagnosis of a psychotic illness’. Ultimately, the judge did take this cognitive disability as a</p>

	<p>mitigating factor, stating that it in part explained the offender’s motivation for the offences of theft and assault and should ‘slightly reduce his responsibility’ for those offences. However, the cognitive disability did not reduce the responsibility for the sexual offences as it was determined that the sexual offences could not be explained by any paranoid ideation.</p>
<p>10. <i>R v Ierfone</i> [2025] ACT SC 60</p>	<p>The offender was charged with one count of indecent assault and one count of sexual intercourse without consent. He pleaded not guilty. At trial, he was found guilty on both counts.</p> <p>The incident occurred on 29 November 2024. The victim-survivor and the offender were work colleagues and had been out drinking at a work function. After other colleagues had left, the offender and the victim-survivor continued to visit bars and chat. The offender continued to consume alcohol. During one conversation in a bar, the offender made sexual remarks and an invitation, which the victim-survivor rejected. The offender also then touched the victim-survivor’s breasts, which the victim-survivor ignored. There was video evidence of this. When it was time to go home, the victim-survivor offered the offender a lift to his home in her car because she was concerned for his safety. While the victim-survivor was driving, the offender touched her breasts again and sexually assaulted her. This caused her to swerve. Again, she verbally rejected the advances and subsequently dropped him off at his home.</p>
<p>11. <i>Ware v DPP</i> [2025] ACTCA 15</p>	<p>The appellant (Ware) applied for leave to appeal the decision <i>DPP v Ware</i> [2024] ACTSC 52. The basis of the appeal ultimately was whether the judge ought to have directed the jury that a) there was an onus on the offender to provide evidence to satisfy the jury on the balance of probability that he honestly believed that the complainant consented and b) what behaviour might have amounted to reasonable grounds for that belief.</p> <p>The ACT Supreme Court of Appeal refused the application for leave to appeal. The Court stated contrary to the submissions from the appellant, it was the prosecution that must prove beyond all reasonable doubt whether the offender believed the complainant consented this was not on reasonable grounds. At [33]</p> <p style="padding-left: 40px;">It is clear from the above that, contrary to the appellant’s submissions, ss 67(4) and (5) should not be conceptualised as a ‘defence’. The onus of establishing that an accused knew or was reckless about a complainant’s lack of consent to the acts of sexual intercourse remains on the prosecution at all times. Even where an accused does not give evidence, the burden remains on the prosecution to establish that the accused did not do or say anything to ascertain consent, or the accused’s honest belief in consent was not “reasonable in the circumstances”.</p> <p>Consequently, the court held that the trial judge did not err in failing to direct the jury as to the onus. The Court also found that the evidence provided by the complainant at trial, which had been accepted beyond all reasonable doubt,</p>

	<p>included evidence that the offender had not done or said anything to ascertain consent. Therefore, the failure to give any directions regarding the reasonableness of the belief also did not amount to an error.</p> <p>[45] The heart of the appellant’s complaint is that the primary judge did not provide the jury with instructions as to how to go about an assessment of reasonableness in the event that the jury accepted his account, or considered that there was a reasonable possibility that his account was true. In his written submissions in reply, counsel for the appellant submitted:</p> <p>His Honour’s Directions simply do not direct the jury as to how they were to approach the application of s 67(5) to the evidence. Was the appellant’s evidence sufficient to satisfy s 67(5) in the sense that he had said, or done, something to ascertain whether the complainant was consenting? If so, did he bear the onus of proof and if so, upon what standard? What was the required nature of the evidence to satisfy the requirements of s 67(5)? Was it relevant that the prosecution did not put to the applicant what he said occurred did not constitute words, or actions, within s 67(5)?</p> <p>[46]. Each of these rhetorical questions were answered, clearly and succinctly, in the primary judge’s <i>Liberato</i> direction, which, as noted above, instructed the jury that they “must acquit [the appellant] if you believe what he says. You must acquit him if you think what he says might reasonably be true”.</p>
<p>12. <i>DPP v Umunakwe (No 2)</i> [2025] ACTSC 139</p>	<p>The victim-survivor and the offender met at a bar when they were out with friends. They exchanged phone numbers and were dancing and kissing. They went to the male toilets, where sexual intercourse occurred. Shortly after the incident, the victim survivor called police to report a sexual assault, stating that the offender had ‘taken it too far’. CCTV footage captured evidence that at the time, the victim survivor was visibly distraught and sobbing.</p> <p>The offender was charged with 3 counts of sexual intercourse without consent (s 54). Following a trial, the jury found him not guilty of counts 1 and 3, and guilty of count 2. At sentencing, in considering the facts that were proven at trial, the judge noted at [23] in relation to charge 1 that:</p> <p>The jury may also have been prepared to give the offender the benefit of a reasonable doubt, by finding that the offender’s actions (the earlier kissing, entering into the toilet stall, asking the victim for oral sex, and then asking the victim to turn around) amounted to a reasonable attempt to ascertain her consent.</p> <p>In relation to charge 2, the court noted that the prosecution had proven beyond reasonable doubt that the victim-survivor had told the offender to stop, had tried</p>

	to move away and was crying. As such, the judge notes at [30] that the offender ‘must have been aware that she was not consenting.’
13. <i>DPP v Dhamala</i> [2025] ACTSC 142	<p>The offender and victim survivor first met when the offender employed the victim survivor. The victim survivor was a new migrant who was economically vulnerable due to ‘limited’ English language skills. Subsequently, the offender sexually propositioned the victim survivor, who rejected them. The offender then organised the work schedule such that he was able to be alone with the victim survivor, and committed a number of acts of indecency. Although she resisted and did not consent, the offender said that she would lose her job if she reported him.</p> <p>The offender was charged with 3 acts of indecency (s 60). He pleaded guilty to all 3 charges. At sentencing the judge noted at [13] that</p> <p>‘... this case involved the exploitation of the power disparity inherent in the employment relationship between offender and victim. It also involved the exploitation of the offender’s physical strength and the economic vulnerability of the victim.’</p>
14. <i>DPP v Hojlund (No 2)</i> [2025] ACTTSC 2211	<p>The offender was charged with several counts of sexual intercourse without consent (s 54) in relation to separate incidents with different victim survivors. The offender entered pleas of guilty in relation to the charges. As one incident occurred before the Amendment Act was introduced, it is not discussed here further.</p> <p>In relation to the offending which occurred in September 2022, the victim survivor was in a relationship with the offender at the time. They would use drugs together, and she would lose consciousness and not have any memory of what had occurred. After one night, she woke up sore, with bruising and evidence of blood. Later, she discovered video evidence on the offender’s phone that he had engaged in sexual intercourse with her while she was unconscious. She reported the incident to the police.</p> <p>In sentencing, the court noted at [20] that</p> <p>‘During the entirety of the conduct depicted on the videos, the first victim was unconscious. The offender was aware of this and knew that the first victim was not consenting to sexual intercourse.’</p>
15. <i>DPP v Garcia (a pseudonym)</i> (No 4) [2025] ACTSC 190	<p>After attending a BBQ together, it was agreed that the offender would sleep at the house of the victim-survivor, her partner and their children. During the visit, the offender engaged in several acts of indecency.</p> <p>The offender was charged with acts of indecency against a young person, and an adult (under s 60). After a jury trial, the accused was found guilty regarding the acts against the young person. He then pled guilty to the charges against the</p>

adult. As consent only applies to the charges against the adult, these are the only charges discussed here.

The offending against the victim-survivor occurred when the offender got into bed during the middle of the night. The victim-survivor initially pretended to be asleep, hoping he would stop. However, the offender conducted acts of indecency until the victim-survivor cried out and left the bedroom, locking herself in the bathroom.

The judgment notes that ‘... as [the victim-survivor] initially pretended to be asleep, the victim survivor did not indicate that she might be consenting, the victim survivor did not indicate that she might be consenting’. [para 23]

Appendix C: Legislation

The Amendment Act introduced or modified Section 50A, 50B, 50C, 67(1) – (5). These are set out in full below.

50A Objects—pt 3

An object of this part is to recognise the following in relation to a sexual act:

- (a) consent to participate in a sexual act is not to be presumed;
- (b) every person has a right to choose not to participate in a sexual act;
- (c) a consensual sexual act involves ongoing and mutual communication and decision-making by the people participating in the sexual act.

50B Meaning of *consent*—pt 3

In this part:

consent, to a sexual act, means informed agreement to the sexual act that is—

- (a) freely and voluntarily given; and
- (b) communicated by saying or doing something.

Note See s 67 for when a person does not consent to an act.

50C Meaning of *sexual act*—pt 3

(1) In this part:

sexual act—

- (a) means—
 - (i) sexual intercourse; or
 - (ii) an act of indecency; or
 - (iii) any other act in circumstances where a reasonable person would consider the act to be sexual; but
- (b) does not include—
 - (i) an act carried out for a proper medical purpose; or
 - (ii) an act otherwise authorised by law.

Note The definition of ***sexual act*** applies to all of pt 3 unless another provision of pt 3 provides otherwise or the contrary intention otherwise appears (see [Legislation Act](#), s 155).

(2) The matters to be taken into account in deciding whether a reasonable person would consider an act to be sexual include the following:

- (a) whether the area of the body involved in the act is a person's breasts, genital area or anal area;

- (b) whether the person carrying out the act does so for the purpose of sexual arousal or sexual gratification;
 - (c) whether any other aspect of the act (including the circumstances in which it is carried out) makes it sexual.
- (3) In this section:
object—see section 50 (2).

67 When a person does not consent to an act

- (1) For a sexual offence consent provision, and without limiting the grounds on which it may be established that a person does not consent to an act mentioned in the provision, a person does not consent to an act mentioned in the provision if the person—
- (a) says or does something to communicate withdrawing agreement to the act either before or during the act; or
 - (b) participates in the act because of the infliction of violence or force on the person, or another person, an animal or property; or
 - (c) participates in the act because of a threat to inflict violence or force on the person, or another person, an animal or property; or
 - (d) participates in the act because of extortion, coercion, blackmail, intimidation or a fear of public humiliation or disgrace of the person or another person; or
 - (e) participates in the act because of a threat to mentally or physically harass the person or another person; or
 - (f) participates in the act because of force or fear; or
 - (g) is incapable of agreeing to the act because of intoxication; or
 - (h) is mistaken about the identity of the other person; or
 - (i) participates in the act because of fraudulent misrepresentation of any fact made by someone else; or
 - (j) participates in the act because of an intentional misrepresentation by another person about the use of a condom; or
 - (k) participates in the act as a result of an abuse of—
 - (i) a relationship of authority, trust or dependence; or
 - (ii) a professional relationship; or
 - (l) does not have the capacity to agree to the act; or
 - (m) is unconscious; or
 - (n) is asleep; or
 - (o) is unlawfully detained or knows that another person is unlawfully detained.
- (2) A person also does not consent to an act with another person (the **accused person**) only because the person—
- (a) does not say or do something to resist the act; or
 - (b) consented to—

- (i) another act with the accused person; or
 - (ii) the same act with the accused person at a different time or place; or
 - (iii) the same act with a person other than the accused person; or
 - (iv) a different act with a person other than the accused person.
- (3) If it is established that an accused person who knows, or is reckless about whether, the consent of another person to an act mentioned in a sexual offence consent provision has been caused by any of the circumstances set out in subsection (1) (a) to (o), the accused person is taken to know that the other person does not consent to the act.
- (4) An accused person is taken to know that another person does not consent to an act mentioned in a sexual offence consent provision if any belief that the accused person has, or may have, that the other person consents to the act is not reasonable in the circumstances.
- (5) For subsection (4), without limiting the grounds on which it may be established that an accused person's belief is not reasonable in the circumstances, the accused person's belief is taken not to be reasonable in the circumstances if the accused person did not say or do anything to ascertain whether the other person consented.

Consent to a sexual act is relevant to the two specific criminal sexual offences: sexual intercourse without consent (s 54) and acts of indecency (section 60).¹²³ Noting that the Amendment Act did not alter the wording of either of these criminal offences, Sections 54 and 60 are set out below.

54 Sexual intercourse without consent

- (1) A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.
- (2) However, for an aggravated offence against subsection (1), the maximum penalty is imprisonment for 15 years.

Note Section 72AA (Aggravated offences—pt 3 offences involving family violence) makes provision in relation to an aggravated offence against this section.

- (3) A person who, acting in company with any other person, engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 14 years.
- (4) However, for an aggravated offence against subsection (3), the maximum penalty is imprisonment for 18 years.
- (5) For this section, proof of knowledge or recklessness is sufficient to establish the element of recklessness.

60 Act of indecency without consent

- (1) A person who commits an act of indecency on, or in the presence of, another person without the consent of that person and who is reckless as to whether that other person consents to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 7 years.

¹²³ For although there is an offence of taking intimate images without consent under s 61B, the definition of consent in that part is different.

- (2) However, for an aggravated offence against subsection (1), the maximum penalty is imprisonment for 9 years.

Note Section 72AA (Aggravated offences—pt 3 offences involving family violence) makes provision in relation to an aggravated offence against this section.

- (3) A person who, acting in company with any other person, commits an act of indecency on, or in the presence of, another person without the consent of that other person and who is reckless as to whether that other person consents to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 9 years.
- (4) However, for an aggravated offence against subsection (3), the maximum penalty is imprisonment for 11 years.
- (5) For this section, proof of knowledge or recklessness is sufficient to establish the element of recklessness.