

**2019**

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

**GOVERNMENT RESPONSE TO THE  
STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY  
REPORT ON *INQUIRY INTO THE CRIMES (CONSENT) AMENDMENT BILL 2018***

**Presented by  
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## Introduction

On 11 April 2018 Ms Caroline Le Couteur MLA introduced the Crimes (Consent) Amendment Bill 2018 (Bill) in the Legislative Assembly.

On 8 May 2018 the Legislative Assembly referred the Bill to the Standing Committee on Justice and Community Safety (Committee) for inquiry and report. The Committee tabled the *Report on Inquiry into the Crimes (Consent) Amendment Bill 2018* (Report) in the Legislative Assembly on 31 October 2018.

The ACT Government welcomes the Committee's Report, which provides 10 recommendations directed at the definition of consent for ACT sexual offences and social and cultural understandings of sexual consent in the ACT community.

The Report highlights the need for careful deliberation about how the law may be improved to support just outcomes for the prosecution of sexual offences involving issues of consent. This is clearly a complex issue, not only in relation to the legislative technicalities in this area, but also with regard to how this issue is impacted by social understandings of acceptable behaviour standards for personal and sexual interactions.

It is important that the ACT community has the opportunity to engage in issues of consent, and the Government acknowledges the valuable evidence provided by witnesses and submitters to the inquiry, which contributed to informing the content of the final report. The views of society must be heard to allow development of laws that reflect current community standards, which in turn can support broad cultural shifts for the improvement of community safety and wellbeing.

In light of the significant impact of sexual consent and related issues on individuals and communities, it is important that there is space for comprehensive, reasoned and informed consideration of issues. The ACT Government is grateful that this opportunity can be provided through the introduction of the Bill by Ms Le Couteur MLA and the presentation of the Committee's Report.

## Summary

The ACT Government remains committed to protecting people from sexual abuse and ensuring that those who commit sexual offences are appropriately held to account. A strong criminal justice response to sexual offending is important not just for victims and survivors but also for the entire community.

The Government also acknowledges that there are limits to what law reform can achieve. Sexual assault is a complex problem and social and cultural understandings of consent and

sexual assault need to change in order to prevent harm in the community and to support a holistic response to sexual offending.

Community awareness and education about the importance of respectful relationships and targeting the underlying causes of sexual assault is therefore a key feature for facilitating positive change in the ACT community.

In responding to the Report and considering issues of sexual consent, the Government is focused on how the ACT can:

- reduce rates of sexual offending;
- improve prosecution outcomes for victims of sexual assault;
- improve supports for victims within and outside of the criminal justice system; and
- support respectful relationships and positive understandings of sexual consent in the ACT community.

Changes to laws around consent and sexual offending should provide a clear expression of criminal liability and must also carefully balance the rights of the accused, which must only be limited where reasonably justified and in accordance with the law.

The ACT Government has considered the Report's 10 recommendations and agrees to nine recommendations and notes one recommendation. A summary of the recommendations and the Government's response is provided in the table below.

<b>Recommendation</b>	<b>Theme</b>	<b>Response</b>
1	Do not proceed with the Crimes (Consent) Amendment Bill 2018 in its current form	Agreed
2	Await findings of the New South Wales Law Reform Commission (NSWLRC) Review	Agreed
3	Separate perpetrator knowledge from consent definition	Agreed
4	Consider affirmative and communicative consent definition	Agreed
5	Amend s 67 of the <i>Crimes Act 1900</i>	Noted
6	Retain the presumption of innocence	Agreed
7	Seek legal advice on the defence of 'honest mistake'	Agreed
8	Establish education program on consent	Agreed
9	Seek advice from a cross-government, cross-sector working group	Agreed
10	Law reform to deliver best possible outcome for victims	Agreed

## Government Response

### *Recommendation 1*

That the Crimes (Consent) Amendment Bill 2018 as introduced into the Legislative Assembly on 11 April 2018 not be proceeded with in its current form.

#### **Response: Agreed**

The Government agrees that the Crimes (Consent) Amendment Bill 2018 (Bill) should not be proceeded with in its current form. The Government notes the Committee's conclusion that there are clear technical issues with the Bill, particularly in relation to the construction of the definition of consent, which was considered to be contrary to the basic structure of sexual offences. The Government notes that this conclusion was also reflected in submissions to the inquiry from the legal profession and the ACT Human Rights Commission. The submission by Ms Le Couteur MLA also acknowledges that 'a new Bill will be needed to effectively deliver a strengthened legal model for consent'.<sup>1</sup>

### *Recommendation 2*

The Committee recommends that the ACT not consider or enact legislative change to introduce a definition of affirmative consent until the report from the current NSW Law Reform Commission (NSWLRC) inquiry in relation to sexual offences is presented.

#### **Response: Agreed**

The Government agrees to wait for the release of the NSWLRC inquiry report before developing or enacting legislative changes to consent in the ACT. The NSWLRC inquiry involves a detailed review of NSW consent laws, with specific consideration of the utility of introducing an 'affirmative model of consent' into NSW law.<sup>2</sup> The Review has produced a 136 page consultation paper and has published 44 preliminary submissions. The findings of the NSWLRC inquiry can reasonably be expected to apply to all aspects of the issue of consent in the ACT.

The Government will consider in detail the NSWLRC inquiry report once released in order to inform possible legislative changes to the definition of consent in the ACT and other related reforms, in consultation with stakeholders.

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<sup>1</sup> Caroline Le Couteur MLA, *Submission 23*, p. 1.

<sup>2</sup> New South Wales Law Reform Commission, *Consent in relation to sexual offences*. Consultation Paper 21, p.29-45.

### **Recommendation 3**

The Committee recommends that, any legislative changes under ACT law proposing a definition of consent in relation to sexual offences, not include any element that requires proof that a perpetrator knew or should have known consent was given.

#### **Response: Agreed**

The Government agrees that a legislated definition of consent in relation to sexual offences in the ACT should not include any element that requires proof of the state of mind of the accused. This recommendation reflects the fundamental structure of sexual offences, which usually consist of:

- a physical element (i.e. whether the victim/complainant actually consented to the sexual activity), and
- a mental element (i.e. whether the accused knew or was reckless to the fact that the complainant did not consent to the sexual activity).

According to this basic structure of offences, questions about what the defendant *thought* about consent cannot be part of the definition of consent itself. Where questions about the attitude of the defendant to the facts of consent are relevant, they form part of the mental element of the offence. The Government considers that maintaining this basic structure of sexual offences will avoid confusion and difficulty for the prosecution of offences.

### **Recommendation 4**

The Committee recommends that a definition of consent based on a concept of free and voluntary agreement, and affirmative and communicative consent be considered for enactment into ACT law.

#### **Response: Agreed**

The Government agrees that a definition of consent based on a concept of free and voluntary agreement, and affirmative and communicative consent, be considered for enactment into ACT law. The Government notes that this recommendation supports the Australian Law Reform Commission (ALRC) recommendation that ACT sexual offence provisions should ‘include a statutory definition of consent based on the concept of free and voluntary agreement’ (recommendation 25-4).<sup>3</sup> In addition, the Government acknowledges that all other States and the Northern Territory have enacted statutory definitions of

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<sup>3</sup> Australian Law Reform Commission (2010), Final Report *Family Violence – A National Legal Response*.

consent that are variations on the concept of ‘free and voluntary agreement’,<sup>4</sup> which aligns with the definition recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC) in 1999.<sup>5</sup>

It is important that ACT laws reflect community standards and expectations. Adopting a legislative definition of consent based on ‘free and voluntary’ agreement for sexual offences aims to establish a positive model of consent which reflects the reasonable views of contemporary society and promotes respect and communication in relation to the issue of consent. The use of the word ‘agreement’ in the definition emphasises that ‘consent should be seen as a positive state of mind’, and something to be sought and communicated, rather than assumed.<sup>6</sup>

The *communicative* element of the positive model of consent aims to clearly establish that consent exists only where there is an active display of willingness to participate in sexual activity. It affirms that a lack of consent does not require verbal or physical resistance, and that submission to sexual advances cannot alone demonstrate consent.<sup>7</sup> A communicative model would mean consent would be negated where a person does not say or do anything to communicate consent.

The Government supports consideration of this model of consent on the basis that the changes aim to clarify the law on consent and ensure just outcomes for the prosecution of sexual offences.

As acknowledged in the Committee’s report, and by the submissions provided through the inquiry, the complexity of the issue is in how the objectives of the affirmative and communicative model of consent can be achieved in a way which balances the right of the accused to a fair trial with the needs of the complainant and the interests of the community more broadly. In determining how a definition may be enacted into ACT law, the Government will consider the outcomes of the NSWLRC inquiry on NSW consent laws, and will work with justice stakeholders to ensure any legislative changes are developed effectively.

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<sup>4</sup> See *Crimes Act 1900* (NSW) s 61HA(2); *Crimes Act 1958* (VIC) s 36(1), *Criminal Code ACT 1924* (Tas) Sch 1 s 2A(1), *Criminal Code* (WA) s 319(2)(a), *Criminal Code Act* (NT) s 192(1), *Criminal Code* (Qld) s 348(1); *Criminal Law Consolidation Act 1935* (SA) s 46(2).

<sup>5</sup> Model Criminal Code Officers Committee, *Model Criminal Code Chapter 5: Sexual Offences Against the Person*, Report (1999) 43.

<sup>6</sup> Model Criminal Code Officers Committee, *Model Criminal Code Chapter 5: Sexual Offences Against the Person*, Report (1999) 43, 58.

<sup>7</sup> New South Wales Law Reform Commission, *Consent in relation to sexual offences*. Consultation Paper 21, p.18.

### **Recommendation 5**

The Committee recommends that Section 67 of the Crimes Act 1900 be amended to include a provision which states that the fact a person does not say or communicate consent is not, of itself, regarded as consent.

#### **Response: Noted**

This recommendation is related to consideration of an affirmative and communicative model of consent, which is addressed in recommendations 2 and 4. The Government considers that any amendment to section 67 of the *Crimes Act 1900* should be determined in conjunction with any changes to establish a consent definition. As such, the Government notes the recommendation that section 67 of the *Crimes Act 1900* be amended to include a provision which states that the fact that a person does not say or communicate consent is not, of itself, regarded as consent.

The Government will determine whether and how to amend section 67 of the *Crimes Act 1900* once the NSWLRC inquiry report has been released, and following further stakeholder consultation to ensure any proposed changes to consent laws are implemented effectively.

### **Recommendation 6**

The Committee recommends that any legislative changes retain the fundamental presumption of innocence until proven guilty in that the burden of proof beyond reasonable doubt must remain with the prosecution.

#### **Response: Agreed**

The Government agrees that any legislative changes retain the fundamental presumption of innocence until proven guilty in that the burden of proof beyond reasonable doubt must remain with the prosecution.

That the accused is presumed innocent until the prosecution has proved the charge beyond reasonable doubt is a fundamental principle of procedural fairness. This principle is incorporated into our local law through the *Human Rights Act 2004*, which establishes that everyone has the right to a fair trial (section 21), and the right to be presumed innocent until proved guilty according to law (section 22).

The Government notes that this recommendation is not incompatible with legislating for an objective fault test in determining the liability of the accused, which focuses on the requirement that the accused's belief as to consent be 'reasonable'. The Government acknowledges the views of the ACT Human Rights Commission (HRC) that 'all comparable

consent laws incorporate an objective fault test' which 'do not actually give rise to any issues of the presumption of innocence'.<sup>8</sup>

In developing any legislative changes, the Government will consult closely with the HRC and legal professional bodies to ensure this recommendation is upheld.

### **Recommendation 7**

The Committee recommends that legal advice be sought on the potential impacts of legislatively removing the current common law defence of 'honest mistake' ('the Morgan defence').

#### **Response: Agreed**

The Government agrees to seek legal advice on the potential impacts of legislatively removing the current common law defence of 'honest mistake'.

The Government notes that currently in the ACT, a defendant has a defence to certain sexual offences under ACT law if they held an 'honest mistaken belief' that a complainant was consenting, even if that belief is unreasonable by community standards. In comparison, almost all other jurisdictions in Australia have amended their laws to include an element of 'reasonableness' with respect to a mistaken belief in consent.<sup>9</sup> Such changes were made with the intention to recognise that the law as it previously stood did not adequately protect victims of sexual assault where an offender had a 'genuine but distorted' view about appropriate sexual activity.<sup>10</sup> It was considered that a purely subjective test as to an accused's belief about sexual activity was outdated, and reflected archaic views about sexual activity.

The Government notes the views from legal professional bodies' submissions to the Committee's inquiry that there is scope to provide further certainty in relation to this aspect of consent. Legal advice about this issue will help to clarify how the law may be amended to improve prosecution outcomes for sexual offences.

Following receipt of legal advice on this issue, the Government will consider whether and how legislative changes may be made, in consultation with legal professional bodies and other justice stakeholders.

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<sup>8</sup> ACT Human Rights Commission, *Transcript of Evidence*, 9 October 2018, p. 77.

<sup>9</sup> See *Crimes Act 1900* (NSW) s 61HA(3), *Crimes Act 1958* (VIC) s 36A, *Criminal Code ACT 1924* (Tas) Sch 1 s 2A, *Criminal Code* (WA) s 319(2), *Criminal Code Act* (NT) s 192, *Criminal Code* (Qld) s 348(1).

<sup>10</sup> See e.g. NSW, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3585 (second reading speech for the Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007 (NSW)).

### *Recommendation 8*

The Committee recommends that, in conjunction with legislative change and amendment, that a complementary education program on consent be put in place. The Committee also recommends that such a campaign especially focus on young people.

#### **Response: Agreed**

The Government agrees that, in conjunction with legislative change, a complementary education program on consent be put in place, which includes a particular focus on young people. The Government notes the Committee's conclusion that any changes in the law, by itself, will not alter behaviours or attitudes about sexual violence in the ACT, and that community consultation and ongoing education, particularly for young people, is needed to achieve a broader and better understanding of sexual consent in the ACT community. This was a view strongly supported in all submissions made to the Committee's inquiry.

The Government acknowledges the need for education around the nature of sexual consent issues, socially acceptable behaviour standards, the importance of respectful relationships, the non-consensual sharing of intimate images and other non-consensual sexual acts, and the breaking down of stereotypical myths and beliefs about sexual assault and rape. The development of education opportunities and resources for schools, community groups and the full range of stakeholders in the criminal justice system is also important.

### *Recommendation 9*

The Committee recommends that the ACT Government establish a cross-government, cross-sector working group, which includes representations from women's organisations, sexual assault and domestic violence services and the legal fraternity, or alternatively, that the ACT Government utilise an already existing group to provide advice on how the government can improve prosecution outcomes for victims of sexual assault, specifically with regards to consent.

#### **Response: Agreed**

The Government agrees with this recommendation. The Government will utilise an already existing group, the Sexual Assault Reform Program Reference Group (SARP), to provide advice on how the Government can improve prosecution outcomes for victims of sexual assault, specifically with regards to consent. The SARP consists of representatives from organisations across human rights, legal, government, health and policing sectors, and women's organisations, and is therefore well-positioned to provide informed advice on this issue.

The Government recognises that improving prosecution outcomes for victims is a multifaceted issue that should be addressed through consultation with the range of stakeholders involved.

#### **Recommendation 10**

The Committee recommends that all law reform must provide scope to deliver the best possible outcome for victims of sexual assault as well as the community.

#### **Response: Agreed**

The Government agrees that all law reform must provide scope to deliver the best possible outcome for victims of sexual assault as well as the community. This reflects a key objective of law reform, which must also be consistent with section 28 of the *Human Rights Act 2004* which requires any limitations on an accused's human rights to be reasonably and demonstrably justified, and in accordance with the law.