



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SERVICES
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Submission Cover Sheet

Crimes (Consent) Amendment Bill 2018

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Amendment Bill 2018

ACT Legislative Assembly Standing
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Safety

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About ACTCOSS

ACTCOSS acknowledges Canberra has been built on the land of the Ngunnawal people. We pay respects to their Elders and recognise the strength and resilience of Aboriginal and Torres Strait Islander peoples. We celebrate Aboriginal and Torres Strait Islander cultures and ongoing contribution to the ACT community.

The ACT Council of Social Service Inc. (ACTCOSS) is the peak representative body for not-for-profit community organisations, people living with disadvantage and low-income citizens of the Territory.

ACTCOSS is a member of the nationwide COSS network, made up of each of the state and territory Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS' vision is to live in a fair and equitable community that respects and values diversity, human rights and sustainability and promotes justice, equity, reconciliation and social inclusion.

The membership of the Council includes the majority of community based service providers in the social welfare area, a range of community associations and networks, self-help and consumer groups and interested individuals.

ACTCOSS advises that this document may be publicly distributed, including by placing a copy on our website.

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Acronyms

ACTCOSS	ACT Council of Social Service Inc.
ANU	Australian National University
CALD	Culturally and Linguistically Diverse
ERA	Equality Rights Alliance
FPDN	First Peoples Disability Network
LGBTQI	Lesbian, Gay, Bisexual, Transgender, Queer and Intersex
PWDA	People With Disabilities Australia
SHFPACT	Sexual Health and Family Planning ACT
WCHM	Women's Centre for Health Matters
WWDA	Women With Disabilities Australia

Introduction

The ACT Council of Social Service Inc. (ACTCOSS) welcomes the opportunity to provide feedback on the proposed amendments to the *Crimes Act 1900* (ACT). ACTCOSS has supported the proposal to reform the ACT's criminal law to adopt a new definition of consent since Ms Caroline Le Couteur MLA announced her intention to introduce the Bill. In March 2018, we responded to the ACT Greens Discussion Paper: Consent in Sexual Violence Laws, welcoming the proposed amendments and providing a series of recommendations on work to enhance the protections afforded by the legislation. We have attached this document for your information.

Our views have been developed in collaboration with the Women's Centre for Health Matters (WCHM), the Youth Coalition of the ACT, Legal Aid ACT, Sexual Health and Family Planning ACT (SHFPACT), and the Australian National University (ANU) Students' Association, and the Australia National University (ANU) Women's Department.

ACTCOSS affirms our support for Ms Le Couteur's proposed legislation, and we would like to see the Standing Committee endorse the amendments. We particularly support the move towards affirmative model of consent in the ACT. An affirmative model of consent:

- Is based on either, free agreement; free and voluntary agreement; or consent freely and voluntarily given;¹
- Places an obligation on the defendant to prove consent was given, thereby removing the presumption of consent;² and
- Protects victims/survivors by essentialising a 'positive obligation for a person to take a positive action and get a positive response from another person'.³

The legislation aligns with our advocacy on the need for greater attention to sexual violence in the ACT. We have noted the need for both institutional reform (through the implementation of recommendations from the Evaluation of the ACT Sexual Assault Reform Program⁴), and work to build a community understanding of sexual violence and the needs of victims/survivors.

The successful implementation of these laws is important at a legal and conceptual level. And we agree with the ACT Greens that this legislation, as it has a role in determining legal and cultural understandings of consent, plays an

¹ Australian Law Reform Commission, *Family Violence – A National Legal Response*, Australian Government, 2010, accessed 9 September 2018, <https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf>.

² ACT Greens, *Discussion Paper: Consent in Sexual Violence Laws*, ACT Greens, 2018, pp 5-6.

³ ACT Greens, *Discussion Paper: Consent in Sexual Violence Laws*, ACT Greens, 2018, pp 6.

⁴ Willis et al, *Evaluation of the ACT Sexual Assault Reform Program: Final Report*, Australian Institute of Criminology, 2013, pp. 43-44.

important part 'in giving the community an understanding of what consent and assault are, and hopefully preventing those cases in the first place'.⁵

Terms of Reference

ACTCOSS is best placed to comment on the socio-legal aspects of the Terms of Reference. As the peak body for community organisations and people experiencing disadvantage in the ACT, we would like to see these amendments supported by strong community education. As a relational issue, the fundamentals and importance of consent must be communicated through strong and effective legislation, but also at the social level. ACTCOSS recommends community services and organisations, as experts in interpersonal relationships and behaviour, are adequately funded and supported to deliver this education.

Finally, we understand the ACT Human Rights Commission has been consulted, and we note that about points 1, 3 and 5 of the Terms of Reference, the Committee should consider that although this legislation is new to the ACT, it has successfully been implemented in other jurisdictions in Australia.

Will the Bill effectively deliver an 'affirmative community model' for consent and are there any preferred alternatives to achieve the same intended outcome?

The ACT's current consent legislation is ineffective at communicating consent as a relational concept relevant across the whole spectrum of sexual relationships.

In the absence of an affirmative model of consent, the legislation simply names factors that negate consent. The onus is therefore overwhelmingly on the victim/survivor to prove they *did not* consent, i.e. through verbal or physical resistance, rather than that they *did*. This creates a serious access to justice issue for victims/survivors who may have felt too unsafe or unable to express non-consent. In contrast, an affirmative model clarifies and strengthens the understanding of consent in the law, and as a result in the community.

This legislation is important to communicating that not saying or doing anything to resist is *not* consent. As such, ACTCOSS believes the Bill will effectively deliver an affirmative community model for consent.

In sexual assault cases where the defense was known to the victim/survivor, establishing non-consent is difficult for the prosecution. The burden of proof resting on the prosecution to prove non-consent

⁵ ACT Greens, *Discussion Paper: Consent in Sexual Violence Laws*, ACT Greens, 2018, pp 4.

*...means that the complainant is effectively treated as consenting unless the prosecution can prove otherwise beyond reasonable doubt... [and] the focus of the trial then is on the physical element of consent.*⁶

This Bill could play an important institutional role in simplifying our understanding of consent, making it more easily communicable in trials, but also in everyday situations in the community.

Instituting these legislative changes will affirm the need for initial and ongoing expressions of consent in all sexual relationships, whether new or existing – legislatively and socially. In a submission to the NSW Law Reform Commission’s review on consent, Professor Patricia Eastal wrote: ‘neither the law nor attempts to reform it exist in isolation. They correlate with and contribute to a myriad of cultural structures, processes and institutions’.⁷ This is reaffirmed by Stubbs, who notes that:

*...the criminal justice system has a profound impact on the lives of those it touches, and in addition to any instrumental effects it may produce, it has an important symbolic role.*⁸

Legislative change is therefore both practically and symbolically positive.

This amendment communicates that consent cannot be assumed, and not saying or doing anything to resist is *not* consent. Instituting these changes offers important institutional recognition of the relational aspect of consent, moving sexual assault discourse away from the ‘stranger in the night’ trope that does not reflect most sexual assault cases. Sexual assault as committed in an attack by a stranger is not the typical Australian experience.⁹ In our legislative and policy approaches, it is therefore necessary to ‘respond to the characteristics of sexual assault, including the knowledge that offenders are commonly known to the victim’.¹⁰

Finally, the United Nations Handbook for Legislation on Violence Against Women affirms the model. It recommends a definition of sexual assault:

*...[require] the existence of “unequivocal and voluntary agreement” and [require] proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting.*¹¹

Introducing the proposed amendments to achieve an affirmative model of consent therefore aligns with the ACT’s commitment to be a human rights compliant jurisdiction.

⁶ P Eastal, *Preliminary submission to NSW Law Reform Commission review: ‘Consent in relation to sexual offences’*, P Eastal, 2018, pp. 5.

⁷ *ibid.*, pp. 2.

⁸ J Stubbs, ‘Sexual assault, criminal justice and law and order’, *Women Against Violence: An Australian Feminist Journal*, No. 14, 2003, pp. 14.

⁹ *ibid.*, pp. 20.

¹⁰ *ibid.*, pp. 23.

¹¹ Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, United Nations, 2010, pp. 26.

We therefore advocate a clearer and more direct model of affirmative consent, as delivered by the Crimes (Consent) Amendment Bill 2018.

What are the implications of the Bill in prosecuting sexual offences and conviction rates in the ACT?

The actual and perceived difficulty of prosecuting sexual assault cases has resulted in a serious access to justice issue for victims/survivors. Victims/survivors often do not report the offences against them, as determining guilt or innocence rests on the word of the accused against the victim/survivor. This often makes legal justice as out of reach, or results in the re-traumatisation of victims/survivors who decide to pursue legal justice.¹²

In sexual assault trials most often the issue of consent – rather than the identity of the perpetrator, or whether the acts took place – is the central matter in dispute.¹³ Insofar as this legislation will establish a simplified, easily understandable and communicable definition of consent (and therefore sexual assault), we believe that the implications of the Bill in prosecuting sexual offences will be positive for victims/survivors.

As noted, our current legislation outlines factors that negate consent, instituting a negative model wherein the onus is on proving non-consent. In this form, the legislation is particularly prohibitive due to the trauma that is often inflicted upon victims/survivors in the legal process. Professor of Criminology Michele Burman describes the trial process of sexual assault cases as ‘harrowing’ for victims/survivors, particularly due to the complexity of consent, and moreover as the defense interrogates the victim/survivor who bears onus to prove non-consent.¹⁴ In contrast, ‘an affirmative consent law would make clear that the absence of affirmative consent indicates rape’.¹⁵

ACTCOSS recognises that the Terms of Reference raise concerns that this legislation puts an onerous pressure on the accused to prove their innocence, therefore eroding the presumption of innocence at the heart of our legal system. We believe that bodies such as the ACT Human Rights Commission have addressed this adequately and are best placed to offer further advice on the issue.

We also note that as it stands in the prosecution of sexual assault, the investigation necessary to prove non-consent is deeply flawed, and actively works against the victim/survivor. In an analysis of Tasmania’s move to an

¹² Willis et al, *Evaluation of the ACT Sexual Assault Reform Program: Final Report*, Australian Institute of Criminology, 2013, pp. 42.

¹³ H Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials*, University of Tasmania, 2012, pp. 8.

¹⁴ M Burman, ‘Evidencing sexual assault: Women in the witness box’, *Probation Journal*, No. 56(4), 2009, pp. 380.; Burman writes in the Scottish context, which is comparable to the ACT.

¹⁵ B Diehl, ‘Affirmative Consent in Sexual Assault: Prosecutors’ Duty’, *Legal Ethics*, No. 503, 2015, pp. 505.

affirmative model Cockburn addresses systems that rely on proving the absence of consent, such as the current model in the ACT:

In cases where absence of consent is contested the fate of the accused rests on whether the chief prosecution witness can convince the jury of her true victim status. It is in the attempt to resolve this issue that the complainant's credibility is vulnerable to attack from the defence. She may be cast as an unreliable or even an untruthful witness, ruthlessly cross-examined in an endeavour to expose inconsistencies in her account. She may be blamed for precipitating the assault or censured for failing to take responsibility for her own sexual safety. The requirement to prove absence of consent may also allow prejudicial assumptions about rape complainants and female sexual behaviour in general to assume probative significance.¹⁶

This speaks to the preventative nature of our current legislation on victims/survivors pursuing legal justice. The clearest implication of introducing these legislative amendments is the clarification of our understanding of the process of consent, therefore positively impacting victims/survivors and reducing the actual or perceived trauma associated with pursuing legal justice.

What are the social implications of the Bill?

What measures may be required to effectively implement the intentions of the Bill in addition to a change to the law?

To effectively implement the intentions of the Bill as well as a change in law, the community must be aware of the amendments and have a fundamental understanding of consent as a legislative and socio-relational issue. ACTCOSS asks the Standing Committee to recommend twofold education initiatives; firstly, education to police and others in the justice system; and secondly, community education and resources.

On the introduction of Tasmania's affirmative consent legislation, Cockburn notes:

...the new concept of consent that the reforms have instituted must be addressed by providing education about the meaning and effect of the amended legislation if there is to be any hope of achieving positive attitudinal change within both the criminal justice system.¹⁷

Education within the justice system

The *Evaluation of the ACT Sexual Assault Reform Program* notes that from 2008-2010 the most common causes of attrition at the point of police

¹⁶ H Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials*, University of Tasmania, 2012, pp. 9.

¹⁷ H Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials*, University of Tasmania, 2012, pp. iii.

investigation were insufficient evidence (31.1%) and the victim/survivor withdrawing the complaint (26.6%).¹⁸ These legislative changes should therefore be accompanied by immediate and comprehensive education for police and others within the justice system, particularly those who communicate directly with victims/survivors.

The need for this legislation is an access to justice issue, and it is imperative the ACT Government ensures that the conduct and response of police and others does not dissuade the victim/survivor.

The Evaluation of the ACT Sexual Assault Reform Program report also states that:

...law enforcement, the DPP and the victim support agencies consulted for [the] study recognised that the ways in which they attempt to assist victim/survivors can often conflict, even though these agencies all aim to give the victim/survivor the best outcome.¹⁹

ACTCOSS urges the Standing Committee to recommend coordinated, comprehensive education be delivered to workers across the justice system if the Bill is amended. The impact of this education should be regularly evaluated, and evaluation should consider the lived experience of victims/survivors. As shown in the attrition data, police must be aware of the changes in the burden of evidence/proof. This should include communicating to officers clear examples of cases that constitute sexual violence in the proposed legislation, but which are not currently covered.

Community education

ACTCOSS has noted that we believe this legislation will positively impact community understandings of consent, due to the clarification and simplification of the definition of consent, as well as the symbolic nature of legislative change. We believe this legislative change can reduce rates of sexual violence. Nevertheless, we urge the Standing Committee to include recommendations regarding community education and resources to communicate the legislative changes and enhance understandings of consent and respectful relationships more broadly.

The Equality Rights Alliance (ERA) Young Women Advisory Group report, *A Whole Generation Out of Date: Young People's Stories of Sex Education*, analysed its 2015 national survey of young women aged 16-21. Their key findings point to the strong need and considerable appetite for more comprehensive respectful relationships and sex education. ERA notes that "sex education in school is often a negative and outdated experience for young people," and "young people want their sex education in school to be more comprehensive and inclusive".²⁰

¹⁸ Willis et al, *Evaluation of the ACT Sexual Assault Reform Program: Final Report*, Australian Institute of Criminology, 2013, pp. 43-44.

¹⁹ *ibid.*, pp. 21-22.

²⁰ Equality Rights Alliance, *A Whole Generation Out of Date: Young People's Stories of Sex Education*, Equality Rights Alliance, 2016, Executive Summary.

In addition to instituting minimum respectful relationships education in schools and other programs or resources aimed at young people, there are specific population groups that should receive a targeted response. This includes communities who are vulnerable, or have differing social, cultural, comprehension or communication needs and/or abilities. Sexual violence most commonly affects women, and Aboriginal and/or Torres Strait Islander women, women with a disability, and culturally and linguistically diverse (CALD) women are significantly more vulnerable. Women with intersectional identities across these groups may face compounding vulnerability.

SHFPACT has noted to ACTCOSS that consent is a whole-of-community issue which should be met with a whole-of-community response. This means education should be delivered in schools, universities, workplaces, and to families. Both SHFPACT, the ANU Students' Association and the ANU Women's Department stressed that consent education is most effectively delivered in-person.

Aboriginal and/or Torres Strait Islander women and CALD women

Aboriginal and/or Torres Strait Islander women and CALD women require culturally appropriate, safe, and responsive resources and education. Aboriginal and/or Torres Strait Islander women are 12 times more likely to experience sexual assault than non-Indigenous women,²¹ and appropriate resources must address intergenerational trauma and be developed collaboratively with Aboriginal leaders and community-controlled organisations. In response to the specific needs of CALD women, education should consider 'variation in the extent to which [CALD] women have knowledge about the law, ability to access the Australian legal system, [and] willingness to engage with the police and other institutional actors'.²²

People with a disability

People with a disability have a heightened vulnerability to sexual violence in part due to the perception that they are unable to have, or are uninterested in, sexual relationships. Education resources should therefore encourage healthy sexual relationships and work to ensure a full understanding of consent. More than 70% of women with a disability have experienced sexually violent encounters;²³ 90% of women with an intellectual disability have experienced

²¹ Bainbridge et al, 'Responding to Indigenous Australian Sexual Assault: A Systematic Review of the Literature', SAGE, 2014, pp. 1.

²² Australian Law Reform Commission, *Sexual Assault and Family Violence*, Australian Government, 2010, accessed 22 March 2014, <<https://www.alrc.gov.au/publications/24.%20Sexual%20Assault%20and%20Family%20Violence/prevalence-sexual-violence>>.

²³ Women With Disabilities Australia, *Fact Sheet: Violence Against Women With Disabilities*, Women With Disabilities Australia, 2014, pp. 1.

sexual abuse;²⁴ and men with an intellectual disability are also more likely to be victims/survivors of sexually violent crime than the general population.²⁵

It is imperative the ACT government accounts for the differing and specific needs of people with intellectual disabilities, complex communication disabilities, or psycho-social disabilities. Women With Disabilities Australia (WWDA) note that all Australia states and territories must:

*...address the lack of accessible violence response services for women and girls with disabilities. These strategies should ensure that violence response services operate within a framework that requires them to consider the needs of persons with disabilities at each stage of the service delivery model.*²⁶

Effective community education for people with disabilities is best designed in consultation with relevant national Disabled Peoples Organisations, particularly to ensure that this legislation does not perpetuate the overrepresentation of people with a disability as both victims and perpetrators in the justice system. This could include: WWDA, People With Disabilities Australia (PWDA), and First Peoples Disability Network (FPDN).

LGBTQI people

Finally, education should be inclusive across the sexuality and gender spectrum, and developed in consultation with LGBTQI Canberrans, to avoid considering issues of consent and sexual violence exclusively within a heterosexual relationship model. ACTCOSS recommends the WCHM 2017 *Same Love, Same Rules* public awareness campaign on domestic violence in LGBTQI relationships as a useful resource.

²⁴ *ibid.*

²⁵ Australian Institute of Family Studies, *Sexual assault and adults with a disability*, Australian Government, 2018, accessed 22 March 2018, <<https://aifs.gov.au/publications/sexual-assault-and-adultsdisability/prevalence-sexual-assault-adults-disabilities>>

²⁶ Women With Disabilities Australia, *Fact Sheet: Violence Against Women With Disabilities*, Women With Disabilities Australia, 2014, pp. 3.

Recommendations

- The Standing Committee endorse the Bill as an effective legislative mechanism to deliver an affirmative community model of consent.
- The Standing Committee endorse the Bill as a means of improving access to justice for victims/survivors of sexual violence in the ACT.
- The Standing Committee recommend community and institutional education initiatives to enhance the protections afforded by the legislation. Including: resources for workers in the justice system, particularly to police officers; and for population groups who are particularly vulnerable, or who have differing social, cultural, comprehension or communication needs and/or abilities.