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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# Submission to the Inquiry into the Crimes (Consent) Amendment Bill 2018

# September 2018

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# Introduction

The Women's Centre for Health Matters Inc. (WCHM) welcomes the opportunity to make a submission to the Standing Committee on Justice and Community Safety's Inquiry into the *Crimes (Consent) Amendment Bill 2018*.

WCHM is a community-based organisation that works in the ACT and surrounding region to improve women's health and wellbeing. WCHM believes that health is determined not only by biological factors, but by a broad range of social, environmental and economic factors known as the 'social determinants of health'. We acknowledge that the environment and life circumstances that each woman experiences have a direct impact on her health, and in many cases, women's poor health is rooted in social disadvantage. For these reasons, WCHM is committed to taking a whole-of-life and social approach to women's health that is also firmly situated within a human rights framework.

WCHM focuses on groups of women who experience disadvantage, social isolation and marginalisation and uses social research, community development, advocacy and health promotion to:

- Provide women with access to reliable and broad ranging health-related information which allows informed choices to be made about each woman's own health and wellbeing; and

- Advocate to influence change in health-related services to ensure responsiveness to women's needs.

This submission focuses on the following terms of reference:

1. *What will be the effect of the proposed definition (as drafted) of consent applying under the sexual offence provisions of the Crimes Act 1900 (ACT)?*

    ii. *Is this definition of consent preferable to the current statutory/common law formulations, in particular s67 of the Crimes Act 1900 (ACT)?*

3. *The Committee has been advised that the Bill, as currently drafted, effectively reverses the onus of proof. This places an onus upon the person accused (rather than the prosecution), not just to prove an honest belief that consent was given, but to prove a higher standard of proof; that the accused either knows or 'is satisfied on reasonable grounds that the agreement was freely and voluntarily given'.*
    ii. *Does the Bill raise the burden of the onus of proof to a standard that is too high?*

7. *What are the social implications of the Bill?*
    i. *What measures may be required to effectively implement the intentions of the Bill in addition to a change to the law?*
    ii. *How will the Bill impact personal and sexual relationships?*

These are the issues about which WCHM is able to provide advice, based on our consultations with ACT women regarding sexual and reproductive health, and violence against women. We also discussed our submission with ACTCOSS and Youth Coalition ACT. Parts of this submission are a repeat of information previously provided in a submission to the office of Caroline Le Couteur, MLA during her consultations on the draft Bill, and are included in this submission because of their relevance to the terms of reference above.

Further information on the impact of consent legislation on women in the ACT can be provided, if required.

# Active Consent

1. *What will be the effect of the proposed definition (as drafted) of consent applying under the sexual offence provisions of the Crimes Act 1900 (ACT)?*

    iii. *Is this definition of consent preferable to the current statutory/common law formulations, in particular s67 of the Crimes Act 1900 (ACT)?*

WCHM are pleased to see an amendment to the *Crimes Act 1900* to change the definition of consent to "free and voluntary agreement" rather than focusing solely on factors that negate consent. This is an improvement on the existing definition in the *Crimes Act 1900 (ACT)*.

The change to active consent supports a growing community awareness that sexual assault is more likely to be perpetrated by someone the victim knows, rather than a stranger on the street. While it has been well accepted that "no means no", it has not been well accepted by everyone in the community that "not saying yes also means no". Moving to an understanding that "yes means yes", that consent must be freely and clearly given, represents a major shift in community attitudes towards what is accepted as consenting activity. Situations in which consent was not considered to be negated because the victim did not verbally state their non-consent should, with this change in definition, be considered a sexual offence.

This change will make the ACT consistent with other Australian jurisdictions, meaning that the definition of consent does not change whether the act occurred in an apartment in Queanbeyan or in Campbell.

However, there are still situations in which subjective decisions may need to be made about whether there was consent, or whether the alleged offender could reasonably have been satisfied that consent had been given. It would be helpful to include examples of these situations, and whether it is the Assembly's intention that this should constitute consent, in the Explanatory Statement for the Amendment. This will be of assistance to courts when cases come before it.

## Ongoing consent

One example that would be helpful is "rape freeze". Women who may have actively consented prior to sexual activity beginning, may in fact find that the activity is not what they thought they were consenting to, and may experience "rape freeze", in which they do not demonstrate ongoing consent, nor do they physically act to try and stop the activity.

Resources aimed at educating people about active consent do not always address this issue of ongoing active consent. An example of checking in for active consent can be found in the Consent Matters training resources delivered to students at Australian National University and University of Canberra. In the training resource, two people actively consent to engage in sexual activity with each other, and the activity commences. But after this, the body language of one of the participants changes, and they seem less enthusiastic about the activity. In the training resource, it is made clear that the participant who wants to continue the activity should check for ongoing active consent, giving their partner the opportunity to negate consent and cease the activity.

In this situation, it is not clear whether the new legal definition of active consent has been met. A woman might give consent, freely and voluntarily, before activity begins, and may not physically resist ongoing activity after she has realised she wants to withdraw consent because of rape freeze. An example that describes such a situation, and makes it clear that there is a legal obligation to check for ongoing active consent if the woman is not demonstrating this through her body language, would be helpful for the courts.

## Impact on young people

Young people under the age of 18 years in the ACT are engaging in sexual activity. This includes sharing intimate images, which occurs frequently with young people who have not yet reached the age at which they can consent to sexual activity.

However, there is a legal age of consent below which a young person cannot be considered capable of giving active consent. While this amendment does not change the age of consent, there are still matters to consider in how the age of consent impacts on young people.

Research by the Office of the eSafety Commissioner shows that nearly one in three young people aged 14 to 17 years in Australia had some experience with sexting in the twelve months to June 2017. This included sending, being asked and asking, sharing or showing nude or nearly nude images or videos. This was lower for males, 22 per cent and higher for females, 35 per cent[1].

A recent survey of ACT women's sexual and reproductive health needs by WCHM found that 71% of young women aged 15 to 18 years, and 94% of women aged 19 to 29 years, had sexual activity with another person in the past 12 months. Further analysis of the WCHM survey results is ongoing, and a detailed report is expected to be released later in 2018.

It is therefore important to consider the implications for young people of any changes to laws relating to sexual behaviour. This includes sharing intimate images, for which consent is also required, and the definition for which is also affected by this amendment to the *Crimes Act 1900 (ACT)*.

Two year rule

The two year rule is that a sexual offence is not committed under various sections of the *Crimes Act 1900* provided that the younger person involved is over a certain age (varying between 10 and 16 years, depending on the section of the Act) and the other person is no more than two years older than them. The wording of the amendment Bill ensures that the two year rule will be applied to offences relating to intimate images in a way that is, for the most part, consistent with other sexual offences.

The two year rule is an arbitrary measure of the power imbalance that may exist between a young person and the person they are engaging in activity with. In addition, s72D sets the age of consent for sharing intimate images at 16, regardless of the age of the person the images are shared with.

There are situations in which a 16 or 17 year old may be engaging in consenting sexual activity with a person who is more than two years old than them, such as a 17 year old in a relationship with a 20 year old. For example, some first year university students are still 17 years old when they begin their studies, and may be meeting and socialising with other first or second year students who are a little more than two years older. This can also happen in workplaces where there are numbers of young people in entry level positions, or in any social setting where the basis of being present is not that they are in the same school grade or were born in the same year.

The age difference may not, in itself, equate to an imbalance in power between the two people. This is based on an outdated social norm that the relationship will be between two people of different genders, and that the woman will be the younger person in the relationship. Differences in the power within the relationship may stem from knowledge and experience of systems,

[1] Office of the eSafety Commissioner (Australia), Netsafe (New Zealand), UK Safer Internet Centre (UK), *Young People and Sexting – Attitudes and Behaviours*, 2017, p. 14, viewed online 14 September 2018, https://www.esafety.gov.au/about-the-office/research-library

positions of authority in workplaces or education settings, or socio-economic status. For example, two young people within two years of each other may:

- Work in the same fast food store, where one is a supervisor (although not the supervisor of the other young person).
- Attend the same school, where one student is a prefect or member of the Student Representative Council and the other is not.
- Be from very different socio-economic backgrounds, where the person from the lower socio-economic background feels a level of shame or stigma related to economic class.
- Both be the same gender, but one may be openly participating in the LGBTIQ community while the other would prefer not to be known to be in a same-sex relationship.

In any of these situations, it may be possible for one person to obtain consent from the other because of the power imbalance in the relationship, without having committed an offence, even though they are both young people of a very similar age.

Relying on an age of consent as the legal basis for whether an offence has occurred may no longer be an accurate reflection of the ways in which young people may be coerced into giving consent. It would be an improvement on the current law to have a definition of active consent that requires consent to be free and voluntary, and examples in the Explanatory Statement that make it clear that coercion through threat to humiliate or shame a person, or threat to end the relationship, do not constitute free and voluntary consent.

Ongoing consent and young people

It is our view that there should be no time limit to withdrawing consent, whether to sexual activity or to creating and/or sharing intimate images. Where young people are concerned, this means that it should be possible for a young person over the age of 16 to consent to creating and sharing an intimate image with another person within two years of their own age, but to withdraw their consent some years into the future and require the person who holds the image to delete it.

Where two young people had shared intimate images with each other, and it is now some years after the relationship had ended, one of the people involved no longer wants their former partner to possess their intimate images. If the intimate images depict a young person under the age of 18, they could be committing an offence under s65(1) of the *Crimes Act 1900 (ACT)*. If they move the images to another computer or phone that they own, and the person shown in the images was between 10 and 15 years old at the time but within 2 years of the person that they shared the images with, they could also be committing an offence under s72D.

The person who possesses the images in the above example has no way of knowing that consent has been negated unless the other person gives them this information. The new definition of active consent, that is freely and voluntarily given, also does not provide for ongoing consent or withdrawal of consent. It would therefore be up to police and the courts to decide whether an offence has been committed under s65(1) or s72D.

Examples in the Explanatory Statement accompanying the amendment Bill to demonstrate situations in which consent has clearly been withdrawn, as well as examples where it would be reasonable to believe that consent continued to exist, would help the police and courts.

Training and education resources for young people, their parents or carers, schools, and others who work with young people, to assist them in understanding the importance of communicating withdrawal of consent to possess images and the impact this may have in future, would also be helpful.

# Standard of Burden of Proof

3. *The Committee has been advised that the Bill, as currently drafted, effectively reverses the onus of proof. This places an onus upon the person accused (rather than the prosecution), not just to prove an honest belief that consent was given, but to prove a higher standard of proof; that the accused either knows or 'is satisfied on reasonable grounds that the agreement was freely and voluntarily given'.*
   *iii. Does the Bill raise the burden of the onus of proof to a standard that is too high?*

No.

If it is not too high a standard to ask that a person be clear about having obtained consent before they engage in other activities, such as having a cup of tea or playing a sport together, then it is not too much to ask that people obtain clear and active consent before engaging in sexual activity.

An example of a situation in which it would have been helpful for the courts to have a definition of active consent is the 2017 case involving Luke Lazarus. Judge Tupman had noted that the complainant's physical actions did not imply consent[2]. But he also found that the defendant had reasonable grounds to believe that consent had been given because of a lack of actions by the complainant to negate consent.

In the Lazarus case, the facts about what physically took place that night were not in question. What was in question was whether the complainant had implied consent. Under the proposed definition of active consent in this amendment, implied consent should not be enough for the defendant to be satisfied that he had consent: Lazarus would have needed to convince the courts that he had taken steps to obtain active consent, and by his own account of the event, he did not.

However, in many cases, there are no witnesses to the incident who can corroborate claims about what was said if there is a dispute over the facts about having given consent. In that situation, it becomes a case of who is believed: the defendant who claims active consent was given, or the complainant who claims that they did not give consent. This may mean that victims of sexual assault are still unwilling to go through the court process, as it will still be a distressing experience.

But with a clear definition of active consent, and community education about what this means, we may see a change in people's behaviour. The majority of people, who do want to abide by the law, may take steps to ensure they have obtained active consent before engaging in sexual activity.

For people who have been sexually assaulted and had experienced rape freeze, been coerced into giving consent when they didn't want to, or were not able to clearly give active consent and did not want the activity to happen, this change in the legislation may help them to recognise that what they experienced was not acceptable under the law. Some people in this situation may have felt guilt or shame for not having done enough to negate consent, when in fact it should never have been their responsibility to prevent the assault: it was the responsibility of the offender to not commit the assault. They may still decide not to go through a court process. But whether they report the crime to the police or not, people who have been victims of crime may find it helpful in their recovery from trauma to know that what happened was a crime.

[2] R v Lazarus [2017] NSWCCA 279, 72 (Tupman J)

# Social Implications

8. *What are the social implications of the Bill?*
    iii. *What measures may be required to effectively implement the intentions of the Bill in addition to a change to the law?*
    iv. *How will the Bill impact personal and sexual relationships?*

The change to an active consent definition is a major shift in thinking for many people in our community. This includes police, who will need to be sure of whether consent has been given in order to decide whether they can charge someone; magistrates, who will be making decisions about whether an alleged offender could reasonably have been satisfied that consent had been given; and the community, who need to understand the law in order to act in accordance with it.

### Education resources about consent

The most recent Australian Bureau of Statistics' *Personal Safety Survey 2016* found that one in five women, and one in twenty men, had experienced sexual violence since the age of 15. These numbers are the same as the results from the *Personal Safety Study* 2012. However, the proportion of women of women experiencing sexual violence in the 12 months prior to the survey has increased from 1.2% in 2012 to 1.8% in 2016.[3] What this shows is that a stronger definition of consent in other States and Territories around Australia has not, in itself, led to a reduction in women's experience of sexual violence.

To assist in reducing the prevalence of sexual violence in the community, it would be helpful to fund the creation and distribution of resources that will help people understand active consent, including ongoing consent.

A recent survey of ACT women's sexual and reproductive health needs by WCHM found that a significant proportion of ACT women do not find it easy to find reliable and relevant information about their sexual and reproductive health. In particular, 37% of women aged 15 to 18 years, 28% of women aged 19 to 29 years, and 28% of women aged 60 years or more answered no to this question.

For young women, education resources to help them understand sexual consent need to provided before they have reached 15 years of age. WCHM's survey found that 71% of women aged 15 to 18 years, and 94% of women aged 19 to 29 years, had sexual activity with another person in the past 12 months.

Eight out of twelve young women aged 17 to 26 years old who participated in focus groups during the WCHM research mentioned consent as an important education issue for 14 to 18 year olds. One woman said:

> *"I think consent in hindsight was the number one most important thing that I really lack. There was a lot that they missed but I think consent was the most crucial, the most detrimental not only to my sexual health but every girl my age that I know."*

Another woman commented in the WCHM survey about the need for education about consent for young people:

> *"I feel sexual and reproductive health information is important at most ages. Under the age of 10, perhaps not, but from there on it is important that*

[3] Australian Bureau of Statistics, 2017, *Personal Safety, Australia*, cat. no. 4906.0, viewed 22 March 2018: http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0

*everyone understands what to look out for, what is healthy, consent, safe sex, why people have sex, etc."*

In the same survey, 48% of women aged 60 years or more said they do not feel that sexual and reproductive health information is appropriate for their age and stage of life, and 64% of women aged 60 years or more had answered yes when asked if they had sexual activity with another person in the last 12 months. Women aged 60 years or more should continue to have access to information about sexual consent.

Further analysis of the WCHM survey results is ongoing, and a detailed report is expected to be released later in 2018.

A resource that uses language, accents, and social situations common to an Australian audience would be a helpful addition to the existing resources that are available, such as the Consent Matters online training as used by Australian National University students. Resources appropriate to younger people of high school age, and young people who may or may not be attending university, would also be appropriate. It may also be helpful to have resources available that are suited to older Australians, for whom issues of consent are still relevant but can be overlooked in health literature aimed at people over 60 years.

Commonwealth offences, intimate images, and young people

The *Crimes (Invasion of Privacy) Amendment Bill 2017* was intended to provide legal protection for young people from adults exploiting their intimate images, while allowing for a young person to consent to create or share their intimate image with another young person no more than two years older than them without it being a criminal offence.

However, the main form in which young people distribute intimate images is via their mobile phone or online social media, with 64 per cent of teens using Snapchat to share intimate images or videos in the twelve months to June 2017. Other platforms used by young people to share these images include Facebook/Facebook Messenger, SMS/MMS, Instagram, WhatsApp, KiK, and Skype[4]. For young people under 18 years, it is an offence under Commonwealth law to use the internet or mobile phones to share their intimate image with another person because it is classified as "child pornography" or an "indecent act". The penalty is up to 15 years in prison.

The changes proposed in the *Crimes (Consent) Amendment Bill 2018* do not address this issue. The only way to address this issue is through amendments to the Commonwealth legislation.

While there remains this conflict between what is considered an offence in the ACT compared to Federal law, young people may not be clear about their legal responsibilities. Training resources are needed for young people, their parents or carers, schools and others who work with young people, to assist them in understanding the law relating to consenting to sharing intimate images by mobile phone or online.

Subjectivity in decisions about intimate images

Based on the amendment Bill, there are some situations in which a young person aged 16 or 17 years may consent to sharing an intimate image with another person who is more than two years older than them, and the image could subjectively be considered to be child exploitation material under s64(3) or 65(1) of the *Crimes Act 1900*, or could be considered not an offence at all under s72D if the image is considered to be an intimate image.

[4] Office of the eSafety Commissioner (Australia), Netsafe (New Zealand), UK Safer Internet Centre (UK), *Young People and Sexting – Attitudes and Behaviours*, 2017, p. 15, viewed online 14 September 2018, https://www.esafety.gov.au/about-the-office/research-library

The amendment Bill applies a two year rule to offences under s64(3) and s65(1), as well as s66(1). This means that if a child or young person is creating or sharing an image of sexual activity with another person no more than two years older than them, it is not an offence.

Under s64(3) of the *Crimes Act 1900*, it is an offence for a person to user, offer or procure a child for the production of child exploitation material. The maximum penalty, where the child is 12 years or older, is 10 years in prison. The penalty is higher where the child is under the age of

Under s65(1), it is an offence for a person to possess child exploitation material, with a maximum penalty of 7 years in prison.

Under s66(1), it is an offence to encourage a young person to commit or take part in, or watch someone else committing or taking part in, an act of a sexual nature. For a first offence against a young person aged 12 years or older, the maximum penalty is 7 years in prison.

If a 17 year old engages in sexual activity with a 20 year old, and shares images of that activity with the 20 year old without the use of a mobile phone or online, the older person in the relationship may be committing offences under s64(3) for production of child exploitation material, and s65(1) for possessing the child exploitation material. This is because there is more than two years between the age of the young person in the images, and the person creating and possessing the images.

But there is no offence under s72D because the young person was over the age of 16 years.

If the image depicts sexual activity between the 17 year old and the 20 year old, the activity itself is also not an offence under s55 because the young person is not under the age of 16 years. But it may be an offence under s66(1) because of the two year rule.

What this means is that police are required to make a subjective decision: is the image created and shared with the 20 year old child exploitation material under s64(3) and s65(1), or is it an intimate image under s72D? Was the older person also committing an offence under s66(1)?

It seems that the safest course of action would be that the creation and/or sharing of intimate images by persons under 18 years should only be done with another person aged at least 10 years and no more than two years older than the younger person, and that images depicting sexual activity should only be created and/or shared by young persons aged at least 16 years and with the other person no more than two years older than the younger person. In any case, these images should not be created or distributed using mobile phones or online.

This subjectivity means that police and the courts will need training resources to help them decide when it is appropriate to charge someone with an offence, and under which section of the Act.

Examples in the Explanatory Statement accompanying the amendment Bill that describe the kind of image that might be considered an intimate image under s72D, but not child exploitation material under s65(1), would also assist the courts in the making these subjective decisions where a person aged 16 or 17 has shared images with someone more than two years older.

Training resources will also be needed for the community to understand the changes to the consent laws, and the areas in which subjective decisions could be made that an offence has occurred, to ensure that people are aware of the risks they may be taking.

# Conclusion

WCHM supports the change to an active consent definition in the *Crimes (Consent) Amendment Bill 2018*.

This change will be helpful for the community in understanding that “yes means yes” is what is important, not simply that “no means no”.

WCHM does not believe that requiring active consent will result in defendants having to prove, to a standard that is too high, that they had taken reasonable steps to obtain active consent. It is considered normal behaviour to ask permission before engaging in a wide range of non-sexual activities with other people, therefore it is acceptable to ask permission before engaging in sexual activities with other people. The existing problem of sexual assaults often occurring without witnesses who can corroborate either the defendant or complainant’s version of events will continue, but in the large number of cases where the facts are not disputed, the changed definition of consent should not present a problem regarding burden of proof.

The key to success for this amendment is education and awareness. Resources will be needed by police, courts, and the community to understand:

- what constitutes active consent – that is not implied consent;
- what constitutes coercion, or other factors that may negate the free and voluntary nature of active consent; and
- in what situations a person should ask for consent to be reaffirmed, in case the other person wishes to withdraw consent but has not been able to do so.

Particular attention should be paid to providing resources to members of the community, and people who provide services or support to those members of the community, who are:

- young people, including those under 16 years old, so that they understand the rules regarding age of consent, and coercion;
- older people engaging in sexual activity, such as those over 60 years old, as they may have developed an understanding of consent that is no longer consistent with these laws;
- part of the LGBTIQ community, who may be vulnerable to coercion or for whom other education resources may have focused on heterosexual or cis-gendered situations;
- people with disabilities, who experience very high rates of sexual abuse, and who may need education resources that help them understand ways to communicate or obtain active consent;
- people from culturally and linguistically diverse backgrounds, who may require resources to be translated into other languages, or for whom other education resources may not have felt inclusive of their cultural background; and
- Aboriginal and Torres Strait Islander people, for whom other education resources may not have been inclusive of their cultural background.

These resources would be best developed by community organisations that already have experience working with women, young people, older people, people with disabilities, multicultural community groups, and Aboriginal and Torres Strait Islander peoples. They will know how best to produce and distribute information.

Without education and awareness, the change in law will not result in a change in behaviour. Ultimately, we hope that this change in legislation will lead to a change in the way the community views sexual consent.