



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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The Committee Secretary
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Legislative Assembly for the ACT
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13 September 2018

Dear Committee Secretary

Inquiry into the Crimes (Consent) Amendment Bill 2018

Civil Liberties Australia would like to demonstrate support for the ACT Greens' proposal regarding updating the law to change the definition of consent to be positive: "a clear, unequivocal and freely given 'yes'".

The Territory is the last place in Australia where consent is defined by when it is taken away, and not when it is actually demonstrated. Briefly, the reasons why the ACT needs a definition of consent based on free and voluntary agreement are:

- The ACT is the only jurisdiction that confounds the burden of proof in its current definition: a victim must prove consent was NOT given;
- There are already effective examples of this legislation operating successfully throughout the rest of Australia; and
- By supporting a positive, 'yes'-means-'yes' definition of sexual consent, the government would be reinforcing the individual right of ACT citizens, as outlined in the ACT Human Rights Act.

Moving from my Victorian home to begin at ANU in Canberra this year, the recently released Red Zone Report that investigated sexual harassment on Australian university campuses – and highlighted ACT universities as 'hot beds' of violence and harassment – was preliminary reading more important to my life here than anything set by my lecturers.

Nonetheless, I was somewhat impressed by the rape and sexual conduct education students were provided with in the first week, with sessions focused on ideas such as 'Yes means Yes', 'No means No', 'we are all here for you' etc. Thus, I settled into a naïve sense of safety and hope.

The walls of our shared bathrooms are lined with posters stating that ‘My Anaconda don’t want none, unless I’ve got your clear consent hun’, ‘Consent is BAE; Before Anything Else’, ‘Consent is the presence of a Yes, not the absence of a No’ and many more. Hence, I hope you can imagine how it hurt, and the shock of genuine fear that went through me when I found out, via the Greens’ campaign and this review, that I had been naively relying on the protection of ideas that – not for my siblings back home, but only for me and my friends here in Canberra – were no more than empty words on cold tiles.

Per reports released by the Australian Institute of Family Studies, authorised by the Australian Government, the centrality of the concept of consent in what is legally considered to be sexual assault and the culpability of the defendant has long been a source of difficulty. Hence, extensive reforms have been and are occurring Australia-wide and internationally in an attempt to resolve these difficulties.

The proposed introduction of **‘positive consent’** in ACT legislation has been tried, tested and praised in communities around Australia and the world. This concept requires:

- free agreement between all parties involved, with no coercion, force or intimidation of any kind; and
- an individual must actively display his/her willingness to participate in and consent to sexual activity.

Consequently, ‘positive consent’ demands more than simply submitting to a sexual activity, or not actively saying ‘no’. The consent of the other party in a sexual encounter should never be assumed, but should be actively sought in advance and affirmed.

The recent legislative changes elsewhere demonstrate an empathic and important attempt to move away from previous and unendingly flawed **‘passive consent’** models, which were based on the assumption that unless there is active resistance (i.e. fighting, screaming etc.), consent can be assumed. This out-dated and threatening model risks the safety and freedom of all Territorians, borne from the queasy stomachs of individuals who once thought the act of demonstrating/asking for a real ‘Yes’ more distasteful and awkward than facing criminal trial.

Indeed, it is important to acknowledge the concerns of individuals that likely do reflect a portion of the community, such as trepidation about the ‘unenforceability’ of affirmative consent laws and the burden of enacting this reform.

However, arguments that claim this proposal lacks ‘specifics on “how” a person is to obtain affirmative consent for sex’, claims this bill amendment ‘opens Pandora’s box by reversing the premise of innocent until proved guilty’, and ‘fails to acknowledge that consent can be “implied” by reciprocating or enabling an act’ are ignorant and not supported by evidence. There already exists common and statutory law structures in Australian jurisdictions, and

across the world, that provide tested and reliable processes for the ACT to mirror this positive reform!

If introduced, ACT laws will merely require that, in order to establish that the complainant was consenting, it must be demonstrated that they actively communicated their consent, either verbally or through their actions. Hence, the onus in criminal trial will remain placed on the actions of the complainant and the 'proof beyond reasonable doubt' concept that supports our justice system will not be endangered; the only danger is the one looming over all those vulnerable to Canberra's currently regressive consent laws.

Ultimately, the arguments opposing this reform are malignant, un-evidenced and damaging to Canberra and the country moving forward. Together, we have an opportunity to change ACT consent laws to be clear and affirmative, thus better safeguarding individuals, families and communities important in all our lives.

Reframing the **Crimes (Consent) Amendment Bill 2018** must be a priority of the Assembly if we as a society are to continue in a positive direction regarding protection and justice, options for victims and the vulnerable, and prevention of violence. Our current framework is anachronistic, unsafe and unsustainable, and hence Civil Liberties Australia urges the Assembly to continue strengthening legislation and legal processes in relation to sexual conduct and consent for greater equality in Australia's justice system.

We believe all MLAs should support the Greens' submission and show active support for all victims and vulnerable people of the ACT. Please do it for your mothers and sisters and aunts, and all people who believe sex without consent is a crime. Please give real meaning to those posters on our walls at universities in the ACT.

Thank you for your time and consideration,

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