



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SERVICES
Ms Elizabeth Lee MLA (Chair), Ms Bec Cody MLA (Deputy Chair)
Mr Michael Petterson MLA

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



The Youth Coalition of the ACT acknowledges the Ngunnawal people as the traditional owners and continuing custodians of the lands of the ACT and we pay our respects to the Elders, families and ancestors.

We acknowledge that the effect of forced removal of Indigenous children from their families as well as past racist policies and actions continues today.

We acknowledge that the Indigenous people hold distinctive rights as the original people of modern day Australia including the right to a distinct status and culture, self-determination and land. The Youth Coalition of the ACT celebrates Indigenous cultures and the invaluable contribution they make to our community

Submission on the Crimes (Consent) Amendment Bill 2018

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September 2018

Prepared by Youth Coalition staff members Kieran Chowdry, Erin Barry, Hannah Watts, and Dr Justin Barker.

The Youth Coalition would like to acknowledge the input of ACT Council of Social Service, Women's Centre for Health Matters, and Legal Aid ACT to this submission, and our earlier submission to the Exposure Draft and ACT Greens Discussion Paper.

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Executive Director: Dr Justin Barker

Youth Coalition of the ACT

PO Box 5232, Lyneham, ACT, 2602

Phone (02) 6247 3540

info@youthcoalition.net

www.youthcoalition.net

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

Introduction

The Youth Coalition of the ACT (the Youth Coalition) once again welcomes the opportunity to comment on the *Crimes (Consent) Amendment Bill 2018* (the Bill), having previously provided a submission in March 2018 to Ms Caroline Le Couteur MLA in response to the Bill's exposure draft and the ACT Greens' Discussion Paper. In developing our position, the Youth Coalition sought advice from:

- The ACT Council of Social Service (ACTCOSS);
- The Women's Centre for Health Matters (WCHM);
- Legal Aid ACT (LAACT); and
- Youth Coalition member organisations.

In our first submission, we expressed support for reforms to intimate image distribution and consent laws being proposed under the Bill. The Youth Coalition deems both the extension of the '2-year rule' defence for consensual intimate image distribution involving those under the age of 18 years [s66A(1) *Crimes Act* (ACT)]; and the introduction of a definition of consent [s67(1) *Crimes Act 1900* (ACT)]; as being firmly in the interest of young people in the ACT. **As such, we reaffirm our support for both elements proposed in the Bill.**

The Youth Coalition is the peak body for youth affairs in the ACT, representing and promoting the rights, interests and wellbeing of young Canberrans aged 12 to 25 years, and those who work with them. The Youth Coalition undertakes policy analysis, sector development, advocacy, research and projects that respond to ongoing and current issues. One of our key roles is to develop and analyse the social policy and program decisions that affect young people and youth services in the ACT, and to facilitate linkages and collaboration between the community, government and private sectors to achieve better outcomes for young people.

A summary of the Youth Coalition's rationale for supporting the Bill is outlined below, followed by our more detailed responses to questions 2, 4, 5 and 7 from the Terms of Reference of the Inquiry.

The 'two-year rule' defence

Technology has become a normative component of modern relationships and is increasingly used as a vehicle for people of all ages to express intimacy. Under current legislation, young people under 18 years of age can be charged with child exploitation offences for sharing intimate imagery of themselves or other young people under the age of 18, irrespective of consent. The criminalisation of this common behaviour means that individuals may unwittingly face punishment for engaging in non-exploitative, non-predatory, consensual image sharing that is otherwise permissible between those aged 18 and over. By introducing a defence for consensual image distribution between young people within a two-year age difference, a degree of protection is offered to young people who choose to engage in these activities.

However, we also note that the 'two-year' defence is highly prescriptive and therefore criminalises intimate image sharing between young people where the age difference is greater than two years (e.g. two years and one month). As stated in our previous submission, we recommend that an independent third party - such as the Public Advocate or Children and Young People's Commissioner - be involved in the judgement and resolution of cases concerning the consensual distribution or possession of intimate imagery between young people. Furthermore, due to the permanence of digital imagery, the Bill's explanatory statement should also include a step-by-step guide for how to approach

the revocation of consent for the possession of an intimate image that was previously shared consensually.

Introducing a definition of consent

The Youth Coalition firmly supports legislating a definition of consent within the ACT, and in doing so, adopting an 'affirmative model of consent'; addressing a glaring omission in the Territory's current consent laws. Despite the Australian Law Reform Commission advocating for an affirmative model since 2010¹, the ACT continues to be the only state/territory without an affirmative definition of consent, instead relying on a list of negating factors, which has created confusion for juries in sexual assault trials. Furthermore, the Youth Coalition assents to the overriding purpose of the Bill: to develop a legal lens which places greater onus on the steps taken by defendant to obtain consent, rather than those of the victim to withhold/revoke consent. The Bill seeks to depart from the outdated view of consent as assumed unless explicitly stated - a position that is unequivocally inconsistent with modern understanding of mutual relationships.

The Youth Coalition's first submission is available at:

<https://youthcoalition.net/wp-content/uploads/2018/07/crimes-consent-amendment-bill-2018-youth-coalition-submission-2.pdf>

Terms of Reference

Question 2: The Committee understands that one of the intentions of the Bill is to propose an 'affirmative community model' for consent. Will the Bill effectively deliver this model, and are there any preferred alternatives to achieve the same intended outcome?

The Bill marks a critical piece of legislature for the ACT which seeks to introduce a statutory definition of consent, and in doing so, creates an 'affirmative community model' of consent (affirmative consent model). The Youth Coalition firmly supports such a model, which we believe will place greater, but not undue onus on individuals pursuing sexual activity to take positive steps to ensure that they expressly obtain consent, whilst shifting focus away from a victim's non-consent, and 'provide greater protection of a person's freedom and autonomy to make decisions about engaging in sexual activity'².

What is affirmative consent?

In order to determine whether the Bill aligns itself with an affirmative consent model, it is important to identify what constitutes such a model. While no official definition exists, the State University of New York (SUNY) provides a comprehensive explanation of the model:

A knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual

¹ Australian Law Reform Commission. (2010). *Family Violence - A National Legal Response*. ALRC Final Report 114, Sydney.

² ACT Humans Rights Commission. (2018). *Submission in response to the Exposure Draft: Crimes (Consent) Amendment Bill 2018 (ACT)*, Canberra.

*activity. Silence or lack of resistance, in and of itself, does not demonstrate consent.*³

SUNY identify the conditions that need to be fulfilled or considered in order for affirmative consent to be achieved:

- Prior consensual sexual activity does not constitute future consent;
- Consent must be obtained, even if under the influence of drugs/alcohol;
- Consent may be initially given but withdrawn at any time; and,
- When consent is withdrawn or can no longer be given, sexual activity must stop.

Implications for the Bill

Therefore, in order to achieve an affirmative model of consent, the legislation is required to include the following elements:

- Participants must be in a state of mind where they are able to knowingly consent;
- Participants must provide consent of their own volition and without coercion;
- All participants must be given the opportunity to express consent;
- Participants must explicitly express consent, either physically or verbally;
- Participants must express consent at the time and during sexual activity;
- Participants must desist engaging in sexual activity the moment consent is revoked; and,
- A participant's silence or inaction cannot be construed as an act of consent.

While we understand that the proposed legislation will for the first time stipulate the conditions required to obtain rather than invalidate consent, we note that the legislation alone does not articulate several of the aforementioned characteristics of an affirmative model. For citizens with no legal comprehension, the proposed legislation may appear confusing or overly burdensome. It is therefore imperative that the legislation is supplemented with literature that provides:

- A rationale of why an affirmative consent model is being introduced;
- An explanation of the terminology (e.g. what is a 'free and voluntary agreement?');
- A description of how it differs from the previous consent model;
- Examples of where consent is and is not present.

Question 4: What are the implications of the Bill in prosecuting sexual offences and conviction rates in the ACT?

Ideally, introducing a statutory definition of consent will create further clarification as to what constitutes consent for the purposes of sexual activity. Furthermore, it is intended to assist juries in sexual assault cases to better understand how consent is affirmed rather than negated. The direct implications of the Bill can be seen in New South Wales (NSW) where a similar amendment was made in 2007⁴. A 5-year review of the amendment found that it had not led to any statistically significant increase in the rates of non-consensual sex conviction or successful appeals for individuals previously convicted of non-consensual sex.⁵ Ultimately, the aim is not to increase the number of

³ The State University of New York. (2018). *Definition of Affirmative Consent*, Sexual Violence Prevention Workgroup - Policies, accessed 14 September 2018. <<http://system.suny.edu/sexual-violence-prevention-workgroup/policies/affirmative-consent/>>

⁴ See, *Crimes Amendment (Consent - Sexual Assault Offences) Bill 2007* [NSW]

⁵ NSW Department of Attorney General & Justice. (2013). *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900*, Sydney.

prosecutions or convictions, but to provide a clear definition of consent to inform sexual activity, and to determine if an individual has engaged in non-consensual sexual activity.

Question 5: The Committee notes the Tasmanian model and the New South Wales model (and the current NSW Law Reform Commission Review into consent for sexual offences). What can we learn from other jurisdictions in legislating for consent ?

As previously noted, the impact of the 2007 amendment to NSW's consent legislation did not impact upon the rates of sexual violence convictions or acquittals. Rather, the review found that victims and victims' representatives strongly support the legislation, and that it aligns with the policy objective to give clearer guidance as to what constitutes consent.⁶ Concerning the Review and the push for an 'enthusiastic' model of consent that is currently being pursued in NSW, the Youth Coalition awaits the findings and recommendations from the NSW Law Reform Commission to further inform our position.

In Tasmania, the introduction of an affirmative consent model has been largely supported, for shifting the focus from a victim's non-consent, to the steps taken by a defendant to obtain consent. However, a review of sexual assault trials in Tasmania revealed that the affirmative model, despite being legislated, is not being adequately implemented by those in legal system, instead, relying on the previous model of consent.

'...judges and counsel continue to rely on a pre-reform notion of consent and the prosecution tailor cases to their understanding of the jury's preconceived views about rape, rape victims and consent to sexual intercourse' and there is a 'general reluctance or inability to engage with the new concept of consent that the reforms have instituted'.⁷

Question 7(2): What measures may be required to effectively implement the intentions of the Bill in addition to a change to the law?

In her review of Tasmania's sexual assault trials, Cockburn found that legal practitioners have not been adequately informed as to the purposes of the amendment, resulting in the new legislation being merely symbolic. She stressed the need for those involved in the legal community to be educated on the reasons for the change in order for it to be effective.

'It is critical to the success of the reforms that the individuals who are directly responsible for implementing the changes understand what those changes are and what implications they have for their legal practice. For real progress to be made in this area there must be broad attitudinal change at the societal level and this change should be driven by the legal community.'⁸

While the Bill represents a momentous step in the right direction toward promoting mutual and respectful relationships, it alone does not address the underlying drivers of sexual violence in the Territory, and will be insufficient to combat the broader culture of sexual violence that permeates Australian society. It is essential that the legislation be supplemented with policies and resources aimed at challenging a culture that enables and excuses sexual violence, to mitigate the likelihood of it occurring in the first place, and to support individuals, including young people, to develop respectful relationships.

⁶ Ibid

⁷ Cockburn, M. (2012). The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials (PhD Thesis, University of Tasmania), p. iii.

⁸ Ibid, p. 188.

Evidence demonstrates that one-off instances of education around sexual ethics is not an effective means of instilling appropriate behaviour in individuals, pointing towards concerns around inconsistent messaging and definitions, potential 'backlash in attitudes or the reinforcement of problematic stereotypes'⁹. Long-term educational strategies are required, targeted across general and specific populations, including to children and young people. In addition to targeting young to middle-aged men - the largest perpetrators of sexual violence¹⁰ - it is particularly pertinent that these campaigns address children and parents, in order to disrupt the potential for future generations to commit sexual violence, and to increase their capacity to develop respectful relationships.¹¹ Such education strategies should be delivered in a range of settings, such as schools and universities, workplaces, health, youth and community services. In school settings, key components of effective respectful relationships education include a whole-of-school approach; a common framework for understanding and responding to respectful relationships; effective curriculum delivery; reflective, inclusive and culturally sensitive practice and reflection; and evaluation of the impact of strategies on the whole school community.¹² This reinforces the need for community-wide, primary and secondary prevention education to be well planned and resourced, effectively implemented and evaluated.

Question 7(3): How will the Bill impact personal and sexual relationships?

The Youth Coalition believes that the Bill will help to assert the importance of mutual respect in any relationship, if well supported by long-term universal and targeted education strategies. The Bill is designed so as to legislate that sexual activity, even between those in committed relationships, requires clear and uncoerced consent from all participants. Furthermore, the Youth Coalition feels that the Bill is well placed to help educate young people about the importance of consent, and to support them to develop positive attitudes and behaviours that they will implement in their own relationships.

⁹ Women's Health West. (2014). *Best practice in respectful relationships education projects for young people aged 10 to 24 years: Literature review for Women's Health West's You, Me and Us Project*, Women's Health West, Melbourne, p 11.

¹⁰ Tomsen, S, & Gadd, D. (2012). *Violence and Disengagement from Violence in Young Men's Lives*. Factsheet, Institute for Culture and Society, Western Sydney University.

¹¹ Coulson, J. (2016). *Breaking the Cycle of Violence: The Role of Parents*, Australian Government, accessed 18 September 2018, available at: <https://www.respect.gov.au/breaking-the-cycle-of-violence-the-role-of-parents>

¹² Women's Health West. (2014). *ibid*, p 11.