



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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

## Submission Cover Sheet

Crimes (Consent) Amendment Bill 2018

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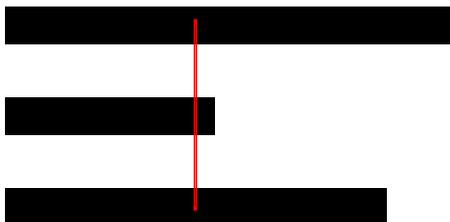
**Standing Committee on Justice and Community Safety**

**Inquiry into the  
Crimes (Consent) Amendment Bill 2018**

**Formal submission**

**by Greg Tannahill**

**(private citizen)**



## **Summary of submission**

\* I support the intention of the Crimes (Consent) Amendment Bill to change the definition of consent to sexual behaviour to require positive consent.

\* I have specific concerns that proposed section 67(1)(a), relating to the objective existence of consent, produces a perverse and unfair outcome, and the intent of the Bill would be better achieved if it were deleted.

\* Subject to those concerns, I support the passage of the Bill in its current form.

\* In future I would like to see the ACT go further and require consent to be positive, explicit and enthusiastic.

## **Background of submitter**

My name is Greg Tannahill, and I make this submission representing only myself. I am a man, aged 38, and an enrolled voter in the ACT.

I have worked professionally in the field of transcript production at various times under contract for the ACT Law Courts and the Australian Federal Police, and a significant portion of that work has been in sexual assault matters, including victim complaint, offender arrest and interview, committal, trial and sentencing. I speak from that personal professional experience, but not on behalf of any of those bodies.

## **My understanding of the proposed changes**

Ms Le Couteur's proposed Crimes (Consent) Amendment Bill has the primary effect of changing the definition of consent under ACT law in relation to sexual offences.

Currently, the ACT uses a common law definition of consent which may be described as "negative consent". To establish guilt under this model a defendant must be shown to have known the victim did not consent, or be reckless as to that knowledge.

The current "negative consent" model has two primary arguable flaws:

- (i) The burden is on the prosecution to adduce evidence that the defendant had reason to believe the victim did not consent.
- (ii) The prosecution must prove a state of mind of the defendant - that the defendant was unaware of a lack of consent - which is often difficult, especially to the criminal standard.

Ms Le Couteur's Bill changes the definition to a statutory "positive consent" model, under which:

- (a) consent must actually exist, and be "freely and voluntarily given"; and
- (b) the defendant must either know the existence of such consent, or be satisfied as to the existence of such consent.

## **I strongly support the Bill in principle**

Positive consent should be the model we enshrine in legislation, teach in schools, and advocate for from positions of leadership.

There is no good reason for anyone to ever engage in sexual activity without explicit knowledge their partner consents. That consent may consist of direct discussion before activity; an earlier discussion about what may be consented to later and what would still need to be negotiated; explicitly checking for continued consent when circumstances change; or combinations of all of the above plus other methods.

We should refute the idea that the absence of protest equals consent. This definition fails to protect many victims, does line up with what we know about the reality of sexual assault, and builds a culture that enables predatory behaviour and disrespect for the boundaries of others. Further, the negative consent model has no strong offsetting benefits.

We need to teach that sexual consent only exists if it's explicit and enthusiastic. This also teaches a culture of respect for women, respect for boundaries, and the skills necessary for good communication and relationships. It's a change that benefits everybody.

Regardless of whether the Crimes (Consent) Amendment Bill is passed in its current form, the Assembly should definitely legislate for a positive statutory definition of consent at the earliest practical opportunity.

## **Detailed concerns with the Bill**

I have some concerns with the specific drafting of the Bill, although these should be dealt with through amendment and should not prevent the Assembly passing it.

If the Bill were not amended, I will still rather see it passed than not passed, as I believe it still represents an improvement over the current situation.

### *(a) “know, or be satisfied”*

The Bill amends section 67(1) of the Crimes Act 1900 specifies that consent to an act exists where (a) the person gives free and voluntary agreement; and (b) the other person (i) knows that agreement was freely and voluntarily given, or (ii) is satisfied on reasonable grounds that agreement was freely and voluntarily given.

I suspect this section may be clearer if 67(1)(b)(i) were omitted, and require only that the person be satisfied on reasonable grounds. I find it hard to imagine under what circumstances a person may know agreement is given, but not be satisfied as to it on reasonable grounds.

### *(b) objective existence of consent*

Proposed section 67(1)(a) requires that consent must objectively have been given by a complainant before consent exists. I note this is a departure from current law, where consent is assessed only by reference to the defendant’s belief as to such consent. This could lead to a situation where a judge or jury finds that a defendant was satisfied on reasonable grounds that consent existed - and yet because they were objectively wrong, and no such consent existed, they are nevertheless guilty.

Given that in such a circumstance we have accepted the defendant’s belief is reasonably held, I wonder as to what further we expect the defendant to do in this situation to avoid guilt. I support the general intent here to create a strong incentive to seek explicit consent, but I don’t feel that this implementation achieves it, or is in step with the criminal law elsewhere in our statute book or elsewhere in the world. Further, I don’t believe it is fundamentally fair.

I recommend the Bill be amended to remove a requirement for objective consent by deleting proposed section 67(1)(a). **This is my only serious concern with the Bill as drafted.**

*(c) “reasonable grounds”*

Proposed section 67(1) requires that an offender’s belief as to consent be based on “reasonable grounds”. As I understand it, “reasonableness” is not further defined, and is intended to be assessed by a judge or jury with reference to prevailing community standards.

This is not a fatal problem as drafted, but I don’t believe that our current culture and understanding of consent is sufficient to achieve the result Ms Le Couteur intends from the Bill. I would like to see reasonableness non-exhaustively defined in the Bill.

*(d) “satisfaction”*

Proposed section 67(1) requires that an offender be “satisfied” on reasonable grounds as to consent.

Traditionally these sort of offences reference a “belief” on the part of the offender. I note that “satisfaction” is a higher legal standard than “belief”. Personally, I am entirely happy with this higher standard - if someone wants to have sex, the onus should be on them to make sure consent exists, and that onus should be a high one.

However I note from Ms Le Couteur’s prior committee testimony on this Bill that she may not have intended it to be drafted with “satisfaction” instead of “belief”, and it may be that the final Bill is amended accordingly. A phrasing that uses “belief” would also accomplish the aims of the Bill.

## **Reponses to specific questions raised in the terms of reference**

I respond to the numbered questions raised in the committee's terms of reference as follows:

*(1) Interaction of definition of consent with Crimes Act 1900, including specific offences.*

I have detailed above some of the primary differences between the common law and Ms Le Couteur's Bill.

As I understand the proposed Bill, the new definition of consent will only apply to sections 54, 55, 60 and 61 of the existing Crimes Act. I believe the Bill will operate as intended in relation to those offences.

I note that the term "consent" is used elsewhere in the Crimes Act, including in the intimate image offence provisions. Ideally the Act should be further redrafted to allow terms to be used consistently across the statute but this could be dealt with at a later date by specific or omnibus technical amendment.

*(2) Does the Bill achieve an "affirmative consent model"?*

My preferred definitive of consent is "enthusiastic positive unambiguous consent".

The present Bill does not go nearly this far, but is a positive step towards a better culture of consent, and should be implemented.

Changing our culture of consent requires a three-pronged approach of legislation, education and leadership. To most effectively tackle this issue, the passage of this legislation should be accompanied by a government education campaign on positive consent targeted at both teens and adults, along with good public statements in the media from people in positions of leadership - particularly our MLAs - on the benefits and importance of positive consent.

*(3) Reversal of onus of proof*

The Bill does not reverse the onus of proof. As drafted, the onus remains squarely on the prosecution to prove every element of the offence, including proving that the offender did not know consent existed and was not satisfied on reasonable grounds as to consent. The offender is not obliged to offer any evidence as to these facts; the prosecution must make a case to exclude those possibilities beyond a reasonable doubt.

That said, I refer the committee to my concerns over proposed section 67(1)(a) above, which requires that consent must objectively exist, regardless of the defendant's reasonable belief. This is an extremely problematic section. If a complainant testifies that consent did not exist, by what means is a defendant expected to raise a

reasonable doubt as to that? I believe that this may be what is being referred to as a “reversal of the onus of proof”, although that would be a misleading use of that phrase.

As above, I recommend that proposed section 67(1)(a) be deleted, and that consent be tested solely by reference to satisfaction (or belief) of the defendant upon reasonable grounds.

No concerns as to presumption of innocence are raised by any part of this Bill.

I note that the Bill does reverse the onus of establishing consent during sexual activity. It is no longer the obligation of a complainant to protest, but rather the duty of the defendant to actively enquire as to consent. This is appropriate, and is at the heart of a positive consent model. It has no relationship to the legal concept of “onus of proof” and does not raise any issue of justice or rights.

For further detail I refer the committee to my comments under “Detailed concerns with the Bill” above.

#### *(4) Implications of Bill on prosecutions and conviction rates*

The proposed definition of consent creates a simpler standard of conviction. I would expect more cases would reach a successful conviction. Studies show that conviction rates lag well behind the actual incidence of sexual offence, so this is a good outcome in principle.

However, if proposed section 67(1)(a) is retained, I have some concern as to the rights of those very few accused who are genuinely innocent. For reasons detailed above, I recommend this section be removed.

In terms of the remaining portions of the Bill, I think the changes would make prosecution of genuine offenders easier, clearer, and more successful without interfering with the rights of those few who are wrongly accused.

The changes also offer improvements for the *process* of prosecution. An affirmative consent model makes litigation less traumatic for a complainant, by shifting the focus from their failure to protest to the defendant’s failure to obtain explicit consent, and this provides greater justice and equity for victims without unduly impacting the rights of defendants.

#### *(5) Implementation of ALRC recommendation*

I believe the Bill implements the ALRC recommendation appropriately and efficiently.

#### *(6) Tasmanian and NSW models*

I have no comment to offer on interstate models.

#### *(7) Social implications of Bill*

The Bill is a good step in moving the ACT and Australia to a culture of positive consent. People who learn to seek positive consent are also learning to respect their partners, respect boundaries, communicate clearly, and have healthy attitudes towards sexuality, self-image and relationships. Positive consent builds a culture that combats other non-sexual offences including domestic violence.

Positive consent only strengthens relationships. People who are engaging in sexual activity with a partner for the first time or in new relationships *should* seek explicit positive consent, as they can't possibly have the experience with the other person to be sure consent exists in any other way. People in long-term relationships often establish positive consent in other ways - a conversation such as, "I like having sex with you, and if I'm not in the mood I'll tell you" could reasonably be taken as positive consent in advance, especially if accompanied by a partner checking in where body language changes or other signs of enthusiastic consent are absent.

Opponents of positive consent argue that this model is legalistic, absurd, un-sexy, unrealistic, or onerous. However, interrogating these beliefs inevitably reveals that they are rooted in unhealthy or uninformed beliefs about sex and relationships. Positive consent is easy, it's fast, it makes everyone involved feel happier, and it can be sexy and fun. It should be our default approach to consent.

*(8) Any other matters*

I do not wish to raise any other matters.

## **Conclusion**

Thank you for receiving my submission. I would be happy to address the committee further on any of these points if they feel it would be useful to their consideration of the Bill.

With thanks,

Greg Tannahill

27 August 2018