



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

Submission Number: 19

Date Authorised for Publication: 25 September 2018

Submission to the ACT Legislative Assembly Standing Committee on Justice and Community Safety Inquiry on the *Crimes (Consent) Amendment Bill 2018*

Contact:

Tim Bavinton
Executive Director
Sexual Health and Family Planning ACT Inc (SHFPACT)
GPO Box 1317
Canberra ACT 2601

Email: ed@shfpact.org.au
Tel: (02) 6247 3077
Fax: (02) 6257 5710
Web: www.shfpact.org.au

12 September 2018



Sexual Health and Family Planning ACT Inc

SHFPACT welcomes the opportunity to provide a response and brief comments to the Standing Committee on Justice and Community Safety on the proposed legislative reforms outlined in the *Crimes (Consent) Amendment Bill 2018*.

About SHFPACT

Sexual Health and Family Planning ACT (SHFPACT) is a non-government, not-for-profit organisation and ATO-endorsed Health Promotion Charity working in the Canberra community for over 45 years. SHFPACT's purpose is improved sexual and reproductive health for the Canberra community, within a human rights and social justice framework. SHFPACT is a member of Family Planning Alliance Australia (FPAA), and through FPAA affiliated with the International Planned Parenthood Federation (IPPF).

SHFPACT currently provides a suite of clinical services, professional development training programs for the health, education & community services workforces, community education and health promotion, and information services in the areas of reproductive and sexual health. Further information about SHFPACT's services and programs can be found at www.shfpact.org.au.

For many decades, SHFPACT has been at the forefront promoting the sexual and reproductive health, rights and wellbeing of people in the Australian Capital Territory and region.

In addition to clinical services in reproductive and sexual health, SHFPACT is a prominent community-based provider of in-school education services to children and young people through its suite of age- and developmentally-appropriate programs. SHFPACT also provides workforce development and training services for workers in the education, health, and community services industries. SHFPACT also supports parents/carers as the first educators of their children in the area of relationships, sexuality, reproductive and sexual health.

SHFPACT's work in community education and schools-based education aligns with other education and community service organisations who share an interest in supporting healthy and respectful relationships, reducing interpersonal violence including sexual assault, and promoting health and wellbeing. Every year, SHFPACT works with thousands of children and young people, their parents/carers, and other professionals who support them to achieve these goals.

Reported sexual offences consistently reflect:

- men's exercise of power and domination through sexual acts over women, children and other men;
- adults' exercise of power and domination over children and young people;
- the exploitation of vulnerabilities created or exacerbated by age and developmental disparity, (dis)ability, and institutional authority.

SHFPACT views recognition of and appropriate responses to the emotional, psychological and physical impacts of sexual violence for all victims/survivors as an important part of comprehensive reproductive and sexual health care, and affirms the right of all people to enjoy their lives and make choices free from force, threat, coercion and violence.

Support for law reform

SHFPACT supports the principle that laws governing sexual consent and sexual crimes should reflect an ‘affirmative and communicative’ standard for sexual consent.

SHFPACT does not assert any technical legal expertise on the implementation and operation of the bill as drafted, and defers to the advice of those with appropriate legal qualification and experience to ensure that the intention of the proposed definition is given genuine effect.

SHFPACT observes that other Australian, as well as international, jurisdictions have adopted an approach which is consistent with recommendations of the 2010 Australian Law Reform Commission Report on Family Violence regarding a statutory definition of consent.

The 2010 ALRC Report into Family Violence provided numerous recommendations regarding the legislation and prosecution of sexual offences. ACT sexual offences legislation has been progressively updated over the years both prior and subsequent to the release of the report, particularly in clarifying and confirming protections for children and young people, and for adults with cognitive impairment. These reforms have better reflected community expectations regarding sexual interactions that are potentially exploitative in situations and relationships where an imbalance of power exists, even where a person involved may otherwise have capacity to consent to mutual sexual interactions. It remains a glaring gap in the ACT’s laws for sexual offences that a statutory definition of consent based on free and voluntary agreement has not been legislated to date. The Crimes (Consent) Amendment Bill 2018 addresses this gap.

The specific ALRC recommendation, Recommendation 25–4, should be read in context of the other recommendations, and especially in light of Recommendation 25–8, which states:

“State and territory legislation dealing with sexual offences should state that the objectives of the sexual offence provisions are to:

- (a) uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity; and*
- (b) protect children, young people and persons with a cognitive impairment from sexual exploitation.”*

Questions regarding the likely impact of the Bill on prosecution and conviction rates for sexual offences, on the test of reasonableness, and the human rights implications, should first answer how well these objectives are secured in our criminal justice system.

SHFPACT recognises the social and historical context of our laws and legal system. Sexual offences have been historically very difficult to prosecute, and evidence is subject to bias and prejudice based on implicit assumptions about gender, human sexuality, sex and relationships. It is only in recent decades that Australia law reform efforts have emphasised the reform of sexual offences legislation specifically towards human rights standards and expectations about bodily autonomy, the right of each person to make decisions about their body and sex, and to have those decisions respected by others. In society, these recent efforts are being tested in an era of rapid technological advance that is rapidly changing how humans interact with one other, including sexually.

It is SHFPACT's view that, in conjunction with retaining the extensive and non-exclusive grounds on which consent is negated, the Bill does provide for an affirmative and communicative model of consent. Passage of the *Crimes (Consent) Amendment Bill 2018* would simply bring the ACT into line with other Australian States and Territories in legislating a positive definition for sexual consent, rather than continuing to rely on common law and statutory definitions that focus on when consent is absent or negated.

SHFPACT welcomes leadership to address this particular question of ensuring that laws regarding sexual consent in the Australian Capital Territory reflect the expectations of the Canberra community, and demonstrate an alignment of legal standards with ethical conduct. This is an issue that should interest all representatives of their communities in the ACT Legislative Assembly, and we hope that both Government and Opposition will lend their support and contribution to ensuring that effective legislation is passed.

An affirmative and communicative model of sexual consent

SHFPACT understands and advocates an 'affirmative and communicative' model of consent to mean the free and voluntary agreement to sexual interaction, the presence of a clearly communicated desire for sexual interaction between parties, made before sexual interaction occurs, and again when sexual interactions change during a sexual encounter.

An affirmative and communicative model of sexual consent advances the notion that sexual interactions should always be ethical: that is, considerate of the needs, desires and wants of the parties involved; respectful of their bodily autonomy and right to make decisions about whether or not to have sexual interactions with another or not; and, imposing a responsibility for parties to be clear about what has and has not been consented to.

This stance frequently challenges stereotypical gender notions about men's and women's sexual responsibilities and obligations. It asks people to:

- be accountable for themselves, and for their communication and conduct with sexual partner/s;
- not assume what is desired, wanted or needed by another person;
- to respect when what is desired or wanted changes during a sexual interaction.

An affirmative, communicative model of sexual consent does not reverse the onus of proof or the presumption of innocence. In fact, it merely confirms what many in the community already expect – the ability of sexual partners to offer an account grounded in observable behaviour that sexual partners both wanted and communicated their desire for sexual interaction (not otherwise excluded by other factors or grounds negating consent).

Where sexual offences have been alleged, such an account by the accused should find some common ground with the account of the complainant regarding the objective and circumstantial facts in any particular case, and continues to rely on the credibility of the witness account with regards to the subjective elements that cannot be corroborated – that is, it imposes no change regarding the challenges for courts in establishing an objective account of what is, generally, a subjective experience without corroborating witnesses.

However, providing such an account potentially increases evidence available to the court to establish that the accused knew free and voluntary consent was given, and not just that a subjective belief was held by the accused about the other person's consent without reference or regard to the complainant's communication or not of consent.

It is entirely appropriate (and consistent with how the concept of consent is treated in other laws and contexts) to expect that in the absence of communicated, affirmed consent – or in a situation where that communication is ambiguous – a person should both seek clarity and respect the response that is provided. Only a person invested in or motivated by an outcome that would be denied or diminished by respecting another's free and voluntary agreement would avoid taking such steps.

It is no longer acceptable in our community to rely on the notion that the absence of a communicated negative response (as interpreted by another person, which in the case of alleged sexual offences, is the accused) is equivalent to the presence of an affirmed and positive response.

How is an affirmative and communicative model of consent enacted and experienced?

Consent to sexual interaction is preferably communicated verbally, especially where factors or circumstances may increase ambiguity of communication or likelihood that non-verbal cues and body language are not mutually understood to mean the same thing (for example, where there is no pre-existing social relationship, or the sexual relationship is new and mutual understanding of sexual body language is developing, or where gestures and body language may have different cultural meanings). But the model itself does not and should not exclude non-verbal forms of communication of consent.

An affirmative and communicative model of consent asks parties to rely on a clear positive statement or action - possibly an enthusiastic verbal 'YES!' – rather than the absence of resistance to a sexual advance, whether verbal or physical, to determine whether consent is present. It rejects the notion that 'hoped-for consent' (especially when it is powerfully, sexually desired by one party) is sufficient. It imposes an obligation on everyone to be responsible for their communication, and to respect that communication from others.

Limits

An affirmative and communicative model of consent will not prevent all sexual violence and sexual offences: sexual violence does not occur due to 'misread signals', it occurs when one person is reckless to the presence or otherwise of non-verbal 'signals' in the communication of consent, and does not respect what another person wants or does not want. This lack of consideration for a sexual partner may occur on a continuum of physical force and violence to coercive verbal pressure.

Sexual offence laws are not, in isolation, a prevention measure. They exist to establish boundaries of conduct, to highlight and affirm community standards, norms and expectations, and to provide an avenue of redress when they are breached. It is a common misconception that sexual offenders are ignorant of the law. From this flows an expectation that merely communicating what the law is will solve the problem. This is contrary to the body of evidence regarding motivation and treatment approach for sexual offenders, who are frequently aware

that their behaviour not only overrides the will and rights of the person they target, but breaches community and social norms, values and expectations. In any case, in other areas of jurisprudence ignorance of the law is not, in and of itself, a defence when laws are broken.

SHFPACT's in principal support for the inclusion of an affirmative, communicative model of sexual consent in ACT laws speaks to the important role laws play in reflecting community values, and their educative value in pointing to expected standards of interpersonal and social conduct.

Laws should reflect the ethical standards and expectations we hold ourselves to as a community. Law reform is an incremental process by which laws are updated to close the gap between the current state and those standards. Ideally, laws that clearly state that a person should and can expect a sexual partner to seek, listen and respect consent to sexual interactions, would have a positive impact on victim reporting rates. And, laws should establish the expectation that a person accused of a sexual offence (where consent provisions are a factor), will be held accountable for providing an explanation of how that consent was sought, communicated and respected.

Limits on the model not a barrier to improving the statutory definition of consent

In principle, SHFPACT supports the view that an affirmative and communicative model of consent is preferable to the current statutory/common law formulation found in ACT laws regarding sexual consent. These, in effect, presume that consent is present when sexual interactions occur unless other factors – such as, particular circumstances or conditions, age, or nature of the relationship between the parties – negate this consent. While current laws explicitly do not limit such factors that negate consent, and these should remain in legislation, current ACT laws would be improved by the addition of a positive, affirmative and communicative approach to establishing consent to sex.

Legislating an affirmative and communicative model of consent articulates in our laws the expectation that parties to sexual interaction can offer an account of how consent was sought, communicated/provided, and respected - at the very least to one another, and, possibly in the very public forum of a court when sexual offences are alleged that hinge on consent.

It is properly the domain of legal practitioners and other actors in and observers of judicial process to provide advice on the likelihood that and degree to which a particular approach to the drafting of laws will change how sexual crimes are prosecuted, or any change to conviction rates. The prevention of unintended and perverse outcomes in this regard is a high priority. History demonstrates that the process of law reform does not always account perfectly for all circumstances, and that deficiencies and unintended consequences are sometimes retrospectively identified and addressed in future legislative review and update.

It is the experience of SHFPACT as a longstanding provider of education and training in the areas of human sexuality and relationships in the ACT, that a knowledge of our laws about sexual offences can be an important component of respectful relationships and anti-violence education programs, but that these must be supplemented by a focus on positive skills and an ethical approach to sex and relationships. There is every reason to amend laws to include an affirmative and communicative model of sexual consent, but it would be ignorant to assume

that this step alone will immediately change either rates or patterns of violence in the community.

Amendments to the Bill

SHFPACT believes the proposed Bill would be enhanced by enlisting the resources and expertise of the ACT Government Solicitor and relevant ACT Government Directorates to ensure the objective and intention of the Bill are achieved, and that any unintended or perverse outcomes are avoided in the operation of the revised laws for sexual offences.

Other comments

SHFPACT understands a review into the operation of New South Wales (NSW) legislation regarding consent is currently underway. To the extent that the Bill and the ACT Legislative Assembly rely on any assessment of the effectiveness and impact of laws in other jurisdictions, a delay in enacting ACT legislation until the review of NSW laws regarding consent is completed and recommendations are known would be prudent. This speaks specifically to the technical issue of legislative drafting and the prevention of unintended consequences in the application of the law.

Given we understand a review is currently being conducted into the effect and impact of NSW laws regarding sexual consent, it would be prudent to delay passing amendments to ACT laws to the extent that they rely on assumptions about the NSW model that are currently being considered.

The Tasmania legislative model includes an expectation that free and voluntary consent is demonstrated by a person saying or doing something to communicate consent. This is consistent with an affirmative and communicative model of consent.

Helen Mary Cockburn's 2012 (PhD thesis) confirmed, inter alia in her extensive review of the practical impact of those laws, that how well the implementation of the new standard for consent is supported and educated, including both with legal practitioners and in the general community, determines whether it makes any difference.

Additional initiatives addressing sexual violence

The passage of the Bill would not create a new need, but draws attention to the continuing need, to invest in and ensure that a range of professional and community education, information and awareness raising strategies are implemented to reduce and eliminate sexual violence.

These include:

- **School based education**
 - Noting that there are specific barriers to systemic and consistent approaches to such education in the ACT context, and that this requires a sustained commitment to sexuality and relationships education for each cohort of students, not just one-off interventions;
 - Noting that schools are a convenient location for such relationships education activities, but not necessarily the best location, nor the school years exclusively the most significant age and stage for skills development regarding the negotiation of consent in sexual relationships;
- **Initiatives focused on addressing and reducing sexual violence at tertiary education institutions**
- **Continuing responses to safeguarding and supporting people with significant care needs and interactions with institutions following the Royal Commission into Institutional Responses to Child Sexual Abuse**
- **Community based initiatives in a community development model** (for sustained impact)
 - For example, in 2017 SHFPACT was pleased to support and contribute to a parent/community initiated and led response to recent reports of sexual violence on university campuses to improve community/parent awareness and discussion of these issues with their children and each other;
- **Continuing professional education for legal practitioners and other professionals regarding the intended consequences of establishing a communicative and affirmative model into the ACT's statutory definition of consent**

Summary

- SHFPACT supports the intention of the *Crimes (Consent) Amendment Bill 2018*.
- SHFPACT believes ACT's laws should include an affirmative and communicative model in its statutory definition of consent to sexual interactions.
- SHFPACT's in principal support for the inclusion of an affirmative, communicative model of sexual consent in ACT laws speaks to the important role laws play in reflecting community values, and their educative value in pointing to expected standards of interpersonal and social conduct.
- SHFPACT encourages all members of the ACT Legislative Assembly to engage actively to ensure the intended outcomes of the Bill are achieved both in legislative drafting, and in other strategies and initiatives to reduce sexual violence in the community.
- SHFPACT asserts that our laws should reflect a positive expectation that the negotiation of consent in sexual encounters is not merely one person's belief that consent is present, nor one person's assessment of the absence of resistance expressed physically or verbally.
- SHFPACT believes the proposed Bill would be enhanced by enlisting the resources and expertise of the ACT Government Solicitor and relevant ACT Government Directorates to ensure the objective and intention of the Bill are achieved, and that any unintended or perverse outcomes are avoided in the operation of the revised laws for sexual offences.
- Passage of the Bill must be accompanied by a continued and renewed investment in initiatives that reduce sexual violence, and support the purpose and intent of the ACT's laws regarding sexual offences.