

SEXUAL CONSENT LAW REFORM IN THE ACT



Presentation to the ACT Government's Law Reform Working Group
7 July 2021

PURPOSE OF REFORM

- The purpose of the Crimes (Consent) Amendment Bill 2021 (the Bill) is to update the Crimes Act 1900 to align with contemporary community understandings and expectations of consensual sexual activity.
- The amendments shift the current legislation from the point of sexual assault being a violent act, to a much more nuanced and defined set of parameters around what consent is and is not.
- The amendments shift the principle, meaning and definition of consent from something that is presumed and can be negated, to something that is unassumed and must be given. This is a communicative model of consent.

WHY ARE THESE CHANGES IMPORTANT?

- The proposed changes will give individuals clear agency in decision making around participation in a sexual act.
- The legislation will align with community expectations and understandings of consent
- The proposed changes provide clarity to help victim-survivors identify a matter of sexual assault and to feel confident in reporting these matters. The proposed legislation makes it very clear what consent is, and what it is not.
- It is anticipated these changes will: 1. reduce the number of sexual assaults occurring within our community through community education; 2. encourage more people to come forward to report instances of sexual assault; and 3. hold perpetrators to account through a greater number of successful prosecutions.

HISTORY OF CONSENT LAW REFORM

- A former MLA brought the Crimes (Consent) Amendment Bill 2018 to the Legislative Assembly in 2018. That Bill was sent to the Standing Committee for Justice and Community Safety who subsequently held an Inquiry.
- The key recommendations from the Standing Committee on Justice and Community Safety Inquiry into the Crimes (Consent) Amendment Bill 2018 included:
 - that the ACT not consider or enact legislative change until the NSW Law Reform Commission inquiry into sexual offences is presented (This report has subsequently been released (November 2020));
 - that a definition of consent be based on a concept of free and voluntary agreement, and affirmative and communicative consent be considered for enactment into ACT law;
 - that legislative change retain the fundamental presumption of innocence until proven guilty.
- The ACT Government's response to the Inquiry into the Crimes (Consent) Amendment Bill 2018 included:
 - agreement to the above recommendations, noting also: there was a technical issue with the definition of consent as proposed;
 - the need to await and consider the outcomes of the NSW Law Reform Commission Report on Consent in Relation to Sexual Offences;
 - the ACT Government supports a 'communicative' model of consent – that is, every person has a right to choose whether or not to participate in a sexual act;
 - and the need for a substantial community educational/awareness campaign.

NSW LAW REFORM INQUIRY

- The NSW Law Reform Commission Report (the Report) recommendations were publicly released in November 2020.
- The objective of the recommendations is to recognise a ‘communicative’ model of consent through:
 - introducing a new subdivision of Part 3, Division 10 of the NSW Crimes Act 1900 which deals with the law of consent and knowledge of consent.
- This subdivision:
 - would amend and/or introduce new meanings, circumstances and knowledge of consent and of non-consent;
 - would apply to the offences of sexual assault, sexual touching, sexual acts and their aggravated versions; and
 - would continue to recognise three states of mind by which an accused person’s knowledge of the absence of consent may be proved. The three states of mind are: ■ the person knows that the alleged victim does not consent to the sexual activity, or ■ the person is reckless as to whether the alleged victim consents to the sexual activity, or ■ the person has no reasonable belief that the alleged victim consents to the sexual activity.
- **This 2021 Bill responds to, and aligns with, the Inquiry recommendations, the ACT Government’s response, and the recommendations of the NSW Report.**

PRINCIPLES OF CONSENT

49F Principles of consent

The principles of consent are the following:

- (a) a consensual sexual act involves ongoing and mutual communication, decision-making and free and voluntary agreement between the people participating in the sexual act;
- (b) every person has a right to choose not to participate in a sexual act;
- (c) consent to participate in a sexual act is not to be presumed.

MEANING OF CONSENT

49G **Meaning of *consent*—pt 3**

In this part:

consent, to an act, means freely and voluntarily saying or doing something to communicate agreement to the act, at the time of the act.

Note See s 67 for when a person does not consent to an act.

NEW SECTION 67

7 Section 67

substitute

67 When a person does not consent to an act

- (1) For a sexual offence consent provision, and without limiting the grounds on which it may be established that a person does not consent to an act mentioned in the provision, a person does not consent to an act mentioned in the provision if the person—
- (a) says or does something to communicate withdrawing agreement to the act either before or during the act; or
 - (b) is overborne because of the infliction of violence or force on the person, or another person, an animal or property; or
 - (c) is overborne because of a threat to inflict violence or force on the person, or another person, an animal or property; or
 - (d) is overborne because of extortion, coercion, blackmail, intimidation or a fear of public humiliation or disgrace of the person or another person; or
 - (e) is overborne because of a threat to mentally or physically harass the person or another person; or
 - (f) is overborne because of force or fear of anything else; or
 - (g) is incapable of agreeing to the act because of intoxication; or
 - (h) is mistaken about any element of the act; or
 - (i) is overborne because of fraudulent misrepresentation or deception of any fact in relation to the act made by someone else; or
 - (j) is overborne by abuse of a relationship of authority, trust or dependence, or a professional relationship; or
 - (k) does not have the capacity to agree to the act; or
 - (l) is unconscious; or
 - (m) is asleep; or
 - (n) is unlawfully detained or knows that another person is unlawfully detained.

CURRENT VS AMENDMENT

Crimes Act 1900	Amendment Bill 2021
Section 67 - Consent	Section 67 – When a person does not consent to an act
(1) For sections 54, 55 (3) (b), 60 and 61 (3) (b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused	(1) For a sexual offence consent provision and without limiting the grounds on which it may be established that a person does not consent to an act mentioned in the provision, a person does not consent to an act mentioned in the provision if the person—
	(a) says or does something to communicate withdrawing agreement to the act either before or during the act; or
(a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or	(b) is overborne because of the infliction of violence or force on the person, or another person, an animal or property; or
(b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or	(c) is overborne because of a threat to inflict violence or force on the person, or another person, an animal or property; or
(c) by <u>a threat to inflict violence or force on, or to use</u> extortion against, the person or another person; or	(d) is overborne because of extortion, coercion, blackmail, intimidation or a fear of public humiliation or disgrace of the person or another person; or
(d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or	(e) is overborne because of a threat to mentally or physically harass the person or another person; or
<i>(d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or</i>	(f) is overborne because of force or fear of anything else; or
(e) by the effect of intoxicating liquor, a drug or an anaesthetic; or	(g) is incapable of agreeing, to the act because of intoxication; or
(f) by a mistaken belief as to the identity of that other person; or	(h) is mistaken about any element of the act; or
(g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or	(i) participates in the act on the grounds of fraudulent misrepresentation or deception of any fact in relation to the act made by someone else; or
(h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or	(j) is overborne by abuse of a relationship of authority, trust or dependence, or a professional relationship; or
(i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or	(k) does not have the capacity to agree to the act; or
	(l) is unconscious; or
	(m) is asleep; or
(j) by the unlawful detention of the person.	(n) is unlawfully detained or knows that another person is unlawfully detained.

FURTHER CONSENT PROVISION

- (2) A person also does not *consent* to an act only because the person—
 - (a) does not say or do something to resist the act; or
 - (b) consented to—
 - (i) another act with the same person; or
 - (ii) the same act with the same person at a different time or place; or
 - (iii) the same act with a different person; or
 - (iv) a different act with a different person.

INTRODUCING CONCEPT OF REASONABLE BELIEF

- (3) If it is established that a person who knows the consent of another person to an act mentioned in a sexual offence consent provision has been caused by any of the circumstances set out in subsection (1) (a) to (n), the person is taken to know that the other person does not consent to the act.
- (4) A person (the *accused person*) is taken to know that another person does not consent to an act mentioned in a sexual offence consent provision if any belief that the accused person has, or may have, that the other person consents to the act is not reasonable in the circumstances.
- (5) For subsection (4), without limiting the grounds on which it may be established that an accused person's belief is not reasonable in the circumstances, the accused person's belief is taken not to be reasonable in the circumstances if the accused person did not say or do anything to ascertain whether the other person consented.

PUBLIC CONSULTATION

- This Bill has been released as an Exposure Draft to allow the community and stakeholders opportunity to comment, before it is introduced to the Legislative Assembly.
- I welcome input and comment on the Exposure Draft of the Bill by COB Friday 16 July.
- Comments may be provided on any or all aspects of the draft Bill.
- You can provide comments by: • email to Paterson@parliament.act.gov.au • phone to (02) 6205 1448 • online contact form <https://marisapaterson.com.au/contact/>