

**2021**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (CONSENT) AMENDMENT BILL 2021**

**EXPOSURE DRAFT  
FOR PUBLIC CONSULTATION**

**EXPLANATORY STATEMENT**

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# CRIMES (CONSENT) AMENDMENT BILL 2021

The Bill **is not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

This explanatory statement relates to the Crimes (Consent) Amendment Bill 2021. It has been prepared to assist the reader of the Bill and to help inform public comment on an Exposure Draft prior to tabling the Bill in the ACT Legislative Assembly. This explanatory statement does not form part of the Bill and has not been endorsed by the Assembly. The statement is to provide assistance to the reader of the Bill and is to be read in conjunction with the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

## OVERVIEW OF THE BILL

### Purpose

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.

The Bill:

1. outlines the **principles of consent** – every person has a right to choose whether or not to participate in a sexual act, and it involves ongoing and mutual communication, decision-making and free and voluntary agreement between the people participating;
2. provides a **meaning of consent** – freely and voluntarily saying or doing something to communicate agreement to the act, at the time of the act;
3. clearly articulates a set of **circumstances under which consent is not deemed given**. This is a non-exhaustive list that has been updated from the current *Crimes Act 1900*. It changes the nuance of this set of circumstances to ensure that consent is something that is unassumed and must be given; and
4. introduces the concept of **reasonable belief** – the current legislation provides that an accused person is guilty of an offence if they know another person does not consent to a sexual act or are reckless as to consent. These are subjective standards. This Bill will introduce the principle that any belief an

accused person may hold about another person's consent must be reasonable under all the circumstances, according to an objective standard. In cases where an accused person does nothing to ascertain another person's consent, they will not be able to rely on a defence of genuinely but mistakenly having believed the other person consented.

The proposed legislative changes will provide greater clarity and awareness about the principles and definition of consent. The changes are, ultimately, intended to better protect the community and ensure that it is absolutely clear that a person must – freely and voluntarily – communicate their consent in relation to a sexual act. Where this does not occur, a crime is being committed.

The proposed legislative changes are not complex – a person must communicate consent.

A strong criminal justice response to sexual offending is important not just for victim-survivors but also for the entire community.

The Bill makes separate provisions for the distinct elements of the principles of consent, the definition of consent, and the matters which a trier of fact must apply in determining an accused person's knowledge or recklessness about consent, and whether there was reasonable belief that consent had been given.

## **Background**

Currently the *Crimes Act 1900* defines 'consent' as negated if there is force, violence, humiliation, abuse, intoxication or other circumstance outlined at Section 67(1).

A former MLA brought the Crimes (Consent) Amendment Bill 2018 to the Legislative Assembly in 2018. That Amendment Bill was sent to the Standing Committee for Justice and Community Safety and an Inquiry was held.

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; and
- 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;
  - that 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.

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 Bill responds to, and aligns with, the Inquiry recommendations, the ACT Government’s response, and the recommendations of the NSW Report.

Many stakeholders within the sector in the ACT have requested law reform to introduce a communicative model and a statutory definition of consent. This proposed Bill responds to those requests.

This Bill forms part of significant, holistic Government reform in the prevention of sexual violence in our community. The Bill will have input from Ms Yvette Berry MLA – Minister for Women – and the Sexual Assault Prevention and Response Group to ensure coordination in the broader context of cultural and educative change across all groups within our community.

## **CONSISTENCY WITH HUMAN RIGHTS**

During the development of this Bill due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (the HR Act). The Bill engages positively with human rights in criminal justice proceedings (section 22 of the HR Act).

The Bill has a positive impact on the rights of sexual assault victim-survivors in the ACT, whereby criminal justice proceedings relating to matters of sexual assault must apply consideration that consent to a sexual act *must be given*, rather than relying on consent *being denied*. This is a subtle and nuanced, but important, difference whereby the implied or presumed consent of a victim-survivor – in the absence of a clear ‘no’ – is not an acceptable defence by an accused person. Rather, free and voluntary consent must be communicated – verbally or non-verbally.

The amended definition of consent provided in this Bill helps protect victim-survivors of sexual offences by ensuring that the communicative aspect of consent is relevant to a prosecution and removes the possibility that consent can be “assumed”.

Through this Bill, the onus is placed on consent being expressed, rather than non-consent being expressed. The problem with reliance on non-consent being the default position is the reality that many victim-survivors of sexual assault feel unsafe or are unable to resist.

This Bill removes the inference of sexual assault being a violent act, to a much more nuanced approach, whereby the reality of sexual assault can occur in many different scenarios.

The Bill also clearly articulates that consent must be communicated ‘at the time of the act’ and provides clear boundaries around a range of circumstances where consent cannot be assumed. For example a person does not consent to an act only because the person consented to the same act with the same person at a different time or place.

The Bill has positive impacts on the human rights of Aboriginal and Torres Strait Islander people, people with a disability and the LGBTQI+ community in the ACT. These groups are often more vulnerable and susceptible as victim-survivors of sexual assault in the ACT. This legislative reform, coupled with extensive community education, strengthens individual’s knowledge of rights and clearly articulates boundaries of behaviours that are designed to support the most vulnerable in our community, in the most vulnerable of circumstances.

#### Section 22 of the HR Act – the right to be presumed innocent until proven guilty

The 2018 Inquiry and ACT Government’s response to the Crimes (Consent) Amendment Bill 2018 raised concern regarding the conflation of two discrete issues engaging a person’s right to be presumed innocent until proven guilty:

1. consent given by one person; and
2. the responsibility of the other person to take steps to ascertain consent exists.

This conflation resulted in the burden of proof being placed on the accused, whereby they must prove their innocence through evidence that they received consent from

the alleged victim-survivor. This engaged, and was inconsistent with, the right to be presumed innocent until proven guilty, under section 22 (1) of the HR Act.

The Inquiry report recommended that the meaning of consent (free and voluntary agreement) be set out separately to the objective fault test for belief about consent. The ACT Government agreed to this recommendation.

This 2021 Bill groups the law dealing with the meaning of consent, the circumstances in which a person does not consent, and knowledge of non-consent, into three distinct sections. The recommendations of the 2018 Inquiry and the ACT Government recommendations have been incorporated and addressed in the development of this Bill.

## **CONSULTATION ON THE DRAFT BILL**

This draft Bill has been prepared on the findings of extensive consultation undertaken for the Crimes (Consent) Amendment Bill 2018, as well as more recent consultation with key stakeholder groups in the ACT.

Each submission provided in response to the 2018 Bill and the subsequent Inquiry have been reviewed and considered in detail in the preparation of this 2021 Bill. Further to that, the NSW Law Reform Commission inquiry into sexual offence findings have been pivotal in informing the proposed Crimes (Consent) Amendment Bill 2021.

Following release of this draft Bill, a range of key stakeholders in the ACT will be invited to provide feedback. The draft Bill is available online via Dr Marisa Paterson MLAs website, social media channels, and through the issue of a Media Release.

All feedback will be considered before the Bill is tabled in the Assembly.

The ACT Government's Sexual Assault Prevention and Response Steering Group; together with the Law Reform Working Group, will also provide detailed review and input to the draft Bill.

## CLAUSE NOTES

### Clause 1 Name of Act

This clause states that the name of the Act is the *Crimes (Consent) Amendment Bill 2021*.

### Clause 2 Commencement

This clause sets out that the Act commences on the day after its notification day.

### Clause 3 Legislation amended

This clause sets out the legislation that is amended by this Act, being the *Crimes Act 1900*.

### Clause 4 New sections 49F and 49G

This clause inserts new sections 49F and 49G outlining the principles and meaning of consent for a sexual act, which pertain to all of Part 3 of the *Crimes Act 1900*.

#### **New section 49F – Principles of consent**

New section 49F provides the principles of consent. This clause introduces a communicative model of consent in the *Crimes Act 1900*. This model is based upon the principle that every person has a right to choose whether or not to engage in a sexual act.

This Bill does not change the broad scope of what constitutes sexual intercourse or an act of indecency under the current legislation.

Critically, new section 49F ensures that a community understanding of sexual assault is not based on a grievous, physical or violent act and/or active resistance by a complainant – but on a much more nuanced approach whereby consent must be communicated, either verbally or non-verbally.

The principles of consent outlined at Clause 4 provide that consent:

- is a positive decision to engage in a sexual act;
- must be sought and communicated, rather than presumed; and
- is a continuous process of mutual decision-making.

The requirements at section 49F provide that – for example, in a situation where a person freezes (becomes silent or does not resist a sexual act) – consent is not given. Under the current *Crimes Act 1900* a person who is silent or does not actively resist a sexual act may decide not to report their experience. They might doubt whether their experience would be treated as non-consensual under the current law. This new clause will help them identify their experience as non-consensual.

The principles of consent at new section 49F – outlining that there is no consent where a person does not communicate consent – will assist triers of fact with decisions to charge and prosecute these cases.

### **49G – Meaning of consent – pt 3**

Section 49G introduces a communicative model of consent.

This clause inserts a statutory definition of consent for a sexual act, whereby free and voluntary consent must be given.

Section 49G outlines the circumstances by which consent is given. It clearly articulates that consent is reliant upon free and voluntary agreement to the sexual act. It further articulates that consent must be given *at the time of the act*. This includes immediately before or during the sexual act.

This covers instances where there may be a delay in a harmful behaviour and the sexual act. This provision particularly extends to situations of domestic and family violence.

### **Clause 5 Sexual relationship with child or young person under special care – Section 56 (10)**

This clause omits the word ‘consent’ to substitute ‘agreement’. This amendment is necessary to give effect to the new meaning of consent at new section 49(G).

The context in which this wording is used under Section 65(10) is that in which the director of public prosecutions may ‘agree’ to a proceeding for a charge of an offence under this section (Sexual relationship with a child or young person under special care).

### **Clause 6 Course of conduct charge—child sexual offences – Section 66B (10) and (11)**

This clause omits the word ‘consent’ to substitute ‘agreement’. This amendment is necessary to give effect to the new meaning of consent at new section 49(G).

The context in which this wording is used under Section 66B (10) and (11) is that in which the director of public prosecutions may ‘agree’ to a proceeding for a charge of an offence under this section (course of conduct charges – child sexual offences).



## **Clause 7     Section 67 – When a person does not consent to an act**

### A set of circumstances under which consent is not deemed given

Section 67 (1) updates the existing set of circumstances in the *Crimes Act 1900* whereby a person does not consent to a sexual act, to align with community expectations and with law reform in other Australian jurisdictions.

Importantly, this set of circumstances, and the new title of this section – from ‘consent’ to ‘when a person does not consent to an act’ – establishes provisions under which consent is deemed not to be given, rather than where consent is negated (as is the case under the current *Crimes Act 1900*). This important and nuanced shift is critical in establishing a communicative model of consent.

The circumstances are not exhaustive and there may be other circumstances in which a trier of fact may determine that consent was not given.

Section 67 (1) introduces the wording of ‘a sexual offence consent provision’, amending the existing wording of the *Crimes Act 2001* from specific reference to Sections 54, 55 (3) (b), 60 and 61 (3) (b) to a ‘sexual offence consent provision’. This creates no substantial change, but is a minor, technical amendment to give effect to current drafting practice.

Throughout the set of circumstances at Section 67 (1), the term ‘overborne’ is introduced. In many instances this replaces existing wording in the *Crimes Act 1900* of ‘threat’. Threat is retained in relation to specific circumstances. However, ‘overborne’ is used in other circumstances at Section 67 (1) to create greater clarity and allow for a broader context in which a person does not consent to a sexual act.

Section 67 (1) (a) includes a new circumstance whereby consent may be withdrawn. Under this provision, consent may be withdrawn either before or during the act and, where this occurs, consent is deemed not to be given. A person may withdraw consent for many different reasons, including simply a change of mind.

Section 67 (1) (b) reflects the existing provision in the *Crimes Act 1900* whereby a person may be overborne because of the infliction of violence or force. Wording is amended from ‘a third person who is present or nearby’ to, simply, ‘another person’. Section 67 (1) (b) also introduces provision whereby a person may be overborne by the infliction of violence or force on an animal or property. Both these updates enable the provision to be applied to a broader range of circumstances. The infliction of violence or force might be real or perceived and can include emotional, physical, financial or another form of abuse.

Section 67 (1) (c) reflects the existing provision in the *Crimes Act 1900* whereby a person may be overborne because of a threat to inflict violence or force. Wording is amended from ‘a third person who is present or nearby’ to, simply, ‘another person’.

Section 67 (1) (c) also introduces provision whereby a person may be overborne by the threat to inflict violence or force on an animal or property. Both these updates enable the provision to be applied to a broader range of circumstances. A threat to inflict violence or force might be real or perceived and can include emotional, physical, financial or another form of abuse.

Section 67 (1) (d) applies an update to existing Sections 67 (1) (c) and (d) of the *Crimes Act 1900*. It retains reference to extortion, public humiliation or disgrace of the person or another person, and includes additional circumstances of coercion, blackmail, intimidation or fear of public humiliation or disgrace. The updates at this section, in addition to covering instances of threat, also include circumstances of fear. This might be real or perceived and - as with existing Section 67 (1) (c) and (d) - may apply to the person or to another person. This section is intended to cover a range of behaviours including verbal aggression, begging and nagging, physical persistence, social pressuring, controlling behaviour, emotional manipulation and revenge porn.

Section 67 (1) (e) updates the circumstance currently provided at Section 67 (1) (d) about physical or mental harassment. It updates wording from this circumstance being a threat, to the person being overborne. This is intended to cover a broader set of circumstances to which this provision may apply.

Section 67 (1) (f) includes provision for any other circumstance whereby a person might be overborne by force or fear of anything else. It is included to ensure applicability across the broadest possible set of circumstances.

Section 67 (1) (g) reflects existing provisions of the *Crimes Act 1900* and amends the wording from 'by the effect of intoxicating liquor, a drug or anaesthetic' to, simply, 'intoxication'. This update enables the provision to be applied to a broader range of circumstances. 'Intoxication' is further defined at Section 67 (6) of the Draft Bill. Intoxication may be self-induced or caused by other means.

Section 67 (1) (h) reflects existing provision in the *Crimes Act 1900* and amends wording to more broadly state 'mistaken about any element'. This update enables the provision to be applied to a broader range of circumstances. This may include, but is not limited to:

- the identity of the other person;
- that the other person is married to the accused person;
- that the sexual act is for:
  - health or hygienic purposes (including cosmetic); or
  - spiritual, cultural or religious purposes.

Section 67 (1) (i) reflects existing provisions in the *Crimes Act 1900* and updates the wording to create greater clarity and a broader set of circumstances to which this section applies. It covers any circumstance in which participation in a sexual act is

dishonestly procured by a false representation or upon a false pretence, known by the maker to be false when it was made. This section includes requirement that the person's mistake is an operative reason (but not necessarily the only reason) for participating in the sexual act.

A trier of fact must prove that the accused person was acting fraudulently or deceptively (intentionally misled the other person). This provision is not intended to capture trivial matters that, while immoral (puffery), should not be regarded as criminal. Among many other examples, this may include stealthing and fraudulence or deception about payment.

Section 67 (1) (j) reflects existing provision in the *Crimes Act 1900* and amends wording to apply to a broader set of circumstances where a person is overborne by the abuse of a relationship of authority, trust or dependence, or a professional relationship. This includes situations whereby a person may participate in a sexual act because they believe it might help progress their career or other prospects; or because they believe not participating in the sexual act might hinder their career or other prospects.

Section 67 (1) (k) reflects existing provision in the *Crimes Act 1900* and amends wording from 'physical helplessness or mental incapacity' to, simply, 'does not have the capacity to agree'. Reasons for incapacity to give consent include physical helplessness, mental incapacity/cognitive impairment and other reasons. Cognitive impairment can include an inability to understand either the sexual nature of the act or the effect of consent. Capacity can fluctuate, and a person may have the capacity to consent to sexual act at some times but not at others.

Section 67 (1) (l) provides that consent is not given if the person is unconscious. This includes instances where a person is unconscious for part or all of the sexual act. Where a person has given consent but subsequently becomes unconscious during the sexual act, they are unable to provide ongoing communication about their consent. This means that consent is no longer given.

Section 67 (1) (m) provides that consent is not given if the person is asleep. This includes instances where a person is asleep for part or all of the sexual act. Where a person has given consent but subsequently falls asleep during the sexual act, they are unable to provide ongoing communication about their consent. This means that consent is no longer given.

Section 67 (1) (n) reflects provisions of the *Crimes Act 1900* and amends wording from 'the unlawful detention of the person' to 'is unlawfully detained or knows that another person is unlawfully detained'. Another person may include a family member and can apply additional protection to people who experience domestic violence and other forms of family sexual assault. This broadens the context in which this provision may apply.

### Further circumstances under which consent is not deemed given

Section 67 (2) updates this existing section in the *Crimes Act 1900*, to align with contemporary community expectations and standards.

Section 67 (2) (a) changes the nuance from ‘a person who does not offer actual physical resistance’ to ‘a person does not say or do something to resist the act’. This is a critical amendment to introduce a communicative model of consent in the ACT. Consent is not to be presumed and silence or lack of resistance is not to be taken as indicating consent.

Section 67 (2) (b) introduces new provisions articulating that consent to one sexual act does not constitute consent to another sexual act. This provision introduces four circumstances in which consent to one sexual act does not provide consent for another. It clarifies that consent must be given for each occasion of a sexual act, at the time of the act.

### Knowledge of non-consent where circumstances of non-consent apply

Section 67(3) reflects existing Section 67(3) of the *Crimes Act 1900*, with amended wording only to apply the updated set of circumstances under which a person is not deemed to have given consent, as provided at Section 67 (1) (a) to (n). Section 67(3) articulates that an accused person knows that consent has not been given where any of the circumstances set out in Section 67 (1) (a) to (n) apply.

### Introduction of an objective test through ‘reasonable belief’ and the steps an accused person may have taken to obtain consent

Sections 67(4) and 67(5) introduce a hybrid objective/subjective test in a trial of fact and remove the Morgan defence principle. These provisions have been drafted to give effect to the recommendations of the ACT Government’s Response to the Justice and Community Safety Inquiry on the draft Crimes (Consent) Amendment Bill 2018, and the subsequent New South Wales’ Law Reform Commission’s Report 148 of 2020, *Consent in relation to sexual offences*.

Section 67 (4) introduces the concept of ‘reasonable belief’ in addition to the fault elements of knowledge and recklessness in the existing legislation. This applies an objective test by a trier of fact to consider and determine whether an accused person’s belief that consent had been given was reasonable in the circumstances. Under this provision, a trier of fact is required to apply a test of reasonable community standards, and consider whether a reasonable person, given all the circumstances of the case, would have reason to believe that consent had been given.

This Section gives effect to the removal of the Morgan defence. Under the Morgan defence an honest but mistaken belief by the accused that consent was given – no matter how misguided or unreasonable – may be used as a defence. Section 67 (4)

makes it clear for a trier of fact, that any belief that consent had been given must be reasonable in the circumstances.

Section 67 (5) introduces new provision whereby – for an accused person’s belief about consent to be deemed reasonable in the circumstances – the accused person must have taken steps to ascertain another person’s consent. This provision is an important component in establishing a communicative model of consent through the Bill.

This new provision makes it clear that the person seeking consent has a responsibility to take steps to ascertain consent exists.

Importantly, the clause shifts the focus of the inquiry at trial. The question is whether the complainant said or did anything to communicate consent, rather than whether the complainant resisted or otherwise demonstrated an absence of consent.

Under sections 67 (4) and (5), where an accused person holds a belief (subjective) that consent was given, but that belief is (objectively) unreasonable by community standards, a trier of fact may find the accused person guilty of the sexual act.

Under these provisions, a trier of fact will be required to consider all the circumstances of the case, including whether an accused person said or did anything, at the time of the act or immediately before it, to find out whether the other person consented to the act and, if so, what the accused person said or did.

A reasonable person’s distorted view about appropriate sexual activity is not an excuse for sexual assault. The objective test prevents an accused person from relying on abhorrent views that fall below the accepted standards of the community.

In considering community standards of reasonableness and ‘all the circumstances of the case’, a trier of fact must consider an accused person’s cognitive capacity or impairment.

*Note:*

*Existing sections 54 and 60 of the Crimes Act 1900 require proof of knowledge or recklessness. These sections continue to apply and relate to new Sections 67 (4) and 67 (5).*

#### Meanings of ‘intoxication’ and ‘sexual offence consent provision’

Section 67(6) provides a definition of ‘intoxication’ to mean the consumption of alcohol, a drug or any other substance. Another substance might include anaesthetic, as per the current provision of the *Crimes Act 1900* pertaining to this matter.

This section also provides a meaning of ‘sexual offence consent provision’. This gives meaning to those offences which are provided for at Sections 54, 55 (3) (b), 60

and 61 (3) (b) of the *Crimes Act 1900*. This is a minor, consequential amendment of a technical nature only.

#### **Clause 8 Section 72F**

This clause is a consequential amendment of a technical nature. Provisions at Section 72F of the *Crimes Act 1900* currently reference the set of circumstances at Section 67 (1) (a) to (j) of the Act under which a person does not consent to the distribution of an intimate image. The amendment provides amendment to reference the updated set of circumstances provided through this Bill at Section 67 (1) (a) to (n).

#### **Clause 9 New section 445 Review of definition of *consent* for pt 3**

This clause requires that the Minister must review the operation of the effects of the provisions of this Bill, as incorporated into the *Crimes Act 1900*, 24 months after its commencement.

The requirement has been introduced to ensure that the amendments made by this Bill achieve the outcomes in relation to consent and prosecution for sexual offences as intended.

The clause contains details for the parameters of what the review must consider, as well as reporting requirements.

#### **Clause 10 Dictionary, new definition of *consent***

This clause gives effect to the new definition of consent for part 3 (sexual offences) as detailed through the amended sections of the Bill.