

SEXUAL CONSENT LAW REFORM - FAQs

18 June 2021

ABOUT THE CHANGES

What is the purpose of the amendments?

The purpose of the proposed legislative amendments is to introduce a new statutory definition of consent in line with contemporary community standards and expectations – one that is based on free and voluntary agreement.

The amended definition brings about a more nuanced definition of consent, shifting it from the position of non-consensual sexual activity being 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 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 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.

Ultimately, these changes are about cultural and behavioural change. They create clarity for a common-sense approach to respectful relationships.

These laws will make it clear that as a community, we expect people to actively seek consent and importantly, that victim-survivors did not have an obligation to say or do anything to refuse consent.

What is communicative consent?

Communicative consent is a model which requires ongoing and mutual communication to give free and voluntary agreement to participate in a sexual act. Communication may be verbal or non-verbal and may be withdrawn at any time.

Why are these changes important?

The proposed changes will help break down the stigma and shame that is often associated with sexual assault victimisation.

Greater clarity is provided 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.

Historically, sexual abuse, sexual assault and rape are in the category of the least reported crimes, not least because of society's tendency to blame the victim-survivor.

Victim-survivors often fear coming forward because:

- the criminal justice system is a traumatic and harrowing journey;
- they are often not believed;
- many are asked how they contributed to the offence; or
- their actions (such as the clothes they are wearing) are analysed and judged and may be considered to have contributed to the assault.

It is anticipated these changes will:

1. reduce the number of sexual assaults occurring within our community;
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.

How do these changes align with other work that's needed in this space?

This work will have input from, and be overseen by, the ACT Government's Sexual Assault Prevention and Response Program, particularly the Law Reform Working Group, to ensure coordination in the broader context of cultural and educative change across all groups within our community. The program has been established by Ms Yvette Berry MLA, Minister for Women

Minister Berry's Sexual Assault Prevention and Response Program will include a working group focusing specifically on cultural change, community education and awareness. Community education and awareness is a significant part of the broader context. Law reform is just one part.

Will the changes kill romance, particularly for young people?

No. The Bill introduces a common sense, human decency approach to respectful relationships. These proposed changes should be viewed as empowering for individuals, to very clearly articulate what they do or do not want to do with another person.

Words or actions may communicate consent. This is not about a contract or an overly prescriptive approach, but one which focuses on decent, respectful human relationships. If a person wants to have sex with another person it is common, human decency to ask for consent.

What prosecution standards are being introduced?

The Bill will introduce an objective test whereby an accused person's belief that consent was given must be reasonable in the circumstances. The onus of proof for this test is the responsibility of the court system.

In line with our Human Rights Act, the burden of proof remains with the prosecution for all elements of a sexual offence under this Bill. This Bill doesn't change basic rights in criminal trials; what it does do is set clear expectations for behaviour.

In these sorts of trials, there will always be an element of conflict between testimonies. It remains the responsibility of the trier of fact to prove a case and determine a finding.

Are the prosecution standards fair?

This Bill retains the presumption of innocence of an accused person until proven guilty.

In line with our *Human Rights Act 2004*, the burden of proof remains with the prosecution for all elements of a sexual offence under this Bill.

This Bill doesn't change basic rights in criminal trials; what it does is do is set clear expectations for decent human behaviour.

There's no excuse for failing to think about consent. Canberrans don't accept that sexual assaults can be accidental or innocently intentioned.

Sexual assault has dramatic and life-changing consequences for victim-survivors. Expecting that people will take steps to ensure their partners consent to sex is common sense and should be viewed as the basis for respectful relationships.

What are the implications for those involved in the judicial system?

Training for police, prosecutors and others will form part of the broader reforms being undertaken by Minister Yvette Berry's Sexual Assault Prevention and Response Program.

This Bill is about making laws to prevent and respond to sexual assault even stronger.

Police, prosecutors and support services work very hard to support vulnerable people and encourage victim-survivors of sexual assault to come forward and be supported.

I respect and acknowledge that work. Introducing this Bill is about strengthening that work and aligning the legislation with community expectations.

How do these changes differ from those proposed in a similar draft Bill in 2018?

In relation to the Crimes (Consent) Amendment Bill that was presented to the Assembly in 2018 the Inquiry held by the Justice and Community Safety Standing Committee provided information about how to best introduce a model of affirmative consent. The recommendations from that work, and the ACT Government's Response, have been taken into account in developing this Bill.

One of the main points the Inquiry made was that the definition of consent needs to be separated from the fault elements of the crime.

In the Bill that came before the Assembly last term, those two issues were combined. That raised questions about whether the burden of proof had been shifted, so that people accused of a crime had an obligation to disprove it.

This Bill (2021) clearly delineates between the definition of consent, and the states of mind that must be proven for sexual offences (knowledge, recklessness and reasonable belief).

It clearly and unambiguously sets out the expectation that people will actively communicate about consent, and that consent to sex is never to just be presumed.

How do these changes compare with legislation in other jurisdictions?

Each State and Territory has its own approach to this legislation, and I've considered the recent national conversation including the NSW Law Reform Commission's report on consent.

This Bill has been drafted to achieve change in the ACT and to ensure that our community has the highest standards of protection.

While this work has been informed by lessons from other jurisdictions, this Bill will differ from legislation in other jurisdictions. Legislation enacted by parliaments in other States and Territories is responding to different legislative frameworks and structures, court systems and local contexts.

This legislation achieves what was recommended by the NSW Law Reform Commission on consent. It's a very strong model of communicative consent, and most importantly, it's been drafted to work well in our jurisdiction.

PUBLIC CONSULTATION

What is an Exposure Draft?

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.

What can I comment on?

Comments may be provided on any or all aspects of the draft Bill.

How and where do I provide comment?

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/>
- making an appointment by email or phone on the above contact details to meet with Dr Paterson

WHAT HAPPENS NEXT?

Following the close of public consultation, all comments will be reviewed and analysed, before considering any edits or revisions, as appropriate, prior to the Bill's finalisation and introduction to the Assembly.

It is anticipated this will occur later this year.

What is the process to progress law reform for sexual consent in the ACT?

After the Bill has been presented to (tabled in) the Legislative Assembly, it will be referred to the Standing Committee on Justice and Community Safety (Scrutiny). It may also be referred to a Committee for Inquiry. The committees will analyse the Bill in detail and provide a report back to the Assembly.

Committees must report back to the Assembly within two months.

At that time, the Bill will be debated by members of the Assembly before a vote is conducted to pass the Bill and enact legislation.

If passed and enacted, the provisions will commence immediately.

SUPPORT

If you or anyone you know needs support, please contact the National Sexual Assault, Domestic and Family Violence Counselling Service on 1800 RESPECT (1800 737 732), available 24 hours or via online chat service at <https://www.1800respect.org.au/>

[Domestic Violence Crisis Service ACT](#) Ph 62 800 900, 24/7 crisis line

[Canberra Rape Crisis Centre](#) Ph 6247 2525, 7 days a week, 7:00am to 11:00pm

[ACT Human Rights Commission](#) Victim Support ACT Ph 6205 2222 Mon-Fri, 9:00am to 5:00pm.

[Women's Legal Centre ACT](#) Ph 6257 4377, Mon-Fri, 9:00am to 5:00pm.

[1800RESPECT](#) (1800 737 732), 24 hours, 7 days a week, for those impacted by sexual or domestic violence

[Legal Aid ACT](#) Helpline Ph 1300 654 314, Mon-Fri, 8:30am to 4.30pm