



**SUBMISSION ON THE CRIMES (CONSENT)
AMENDMENT BILL 2018**

MARCH 2018

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The Youth Coalition of the ACT acknowledges the Ngunnawal people as the traditional owners and continuing custodians of the lands of the ACT and we pay our respects to the Elders, families and ancestors.

We acknowledge that the effect of forced removal of Indigenous children from their families as well as past racist policies and actions continues today.

We acknowledge that the Indigenous people hold distinctive rights as the original people of modern day Australia including the right to a distinct status and culture, self-determination and land. The Youth Coalition of the ACT celebrates Indigenous cultures and the invaluable contribution they make to our community.

Submission on the Crimes (Consent) Amendment Bill 2018

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The Youth Coalition would like to acknowledge the input of ACT Council of Social Services, Women's Centre for Health Matters, and Legal Aid ACT to this submission.

The Youth Coalition receives funding for peak activity (policy development, sector development, advocacy & representation) from the ACT Government - Community Services Directorate.

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1. INTRODUCTION

Section 1 of this submission provides contextual information about the Youth Coalition of the ACT ('Youth Coalition'), young people, and the process for developing and format of this submission.

1.1 About the Youth Coalition

The Youth Coalition is the peak youth affairs body in the ACT. As a membership based organisation, the Youth Coalition is responsible for representing and promoting the interests and wellbeing of young people aged 12 to 25 years and those who work with them.

The general activities of the Youth Coalition fall under four themes: policy; sector development; advocacy and representation; and, projects that respond to ongoing and current issues.

A key role of the Youth Coalition is the development and analysis of ACT social policy and program decisions that affect young people and youth services. The Youth Coalition facilitates the development of strong linkages and promotes collaboration between the community, government and private sectors to achieve better outcomes for young people in the ACT.

1.2 About Young People in the ACT

Young people are a distinct population group aged between 12 and 25 years. Although diverse, as a group young people frequently experience systemic disadvantage, discrimination and unequal access to resources. This means that young people who experience other forms of disadvantage, such as poverty or low educational attainment, are amongst the most vulnerable members of the ACT community.

Canberra has one of the youngest populations of any Australian State or Territory, with approximately 78,000 people aged between 10-24 years residing in the ACT, representing more than 20% of Canberra's population. With over one fifth of Canberra's population comprised of young people, it is important that the wellbeing of young people be regarded as an indicator of the ACT's future population health and development.

1.3 About the ACT Youth Sector

The youth sector in the ACT is both diverse and unique in its composition and delivery of services to young people aged between 12 and 25, and their families. A range of professionals work within the youth sector, including generalist youth workers, specialist youth workers, health workers, mental health workers, alcohol and other drug workers, social workers, counsellors, statutory workers, nurses and doctors, educators, psychologists, family workers, lawyers, volunteers, and management staff.

The youth sector uses a range of service delivery models to support young people. These include centre-based, outreach, street outreach, in-reach, case management, case work, residential, crisis support, group-based work, recreation-based activities, and education.

1.4 About the Submission

The Youth Coalition welcomes the opportunity to provide feedback to the office of Caroline Le Couteur on the proposed Crimes (Consent) Amendment Bill 2018 ('the Amendment Bill').

This submission is based on:

- Ongoing collaborative work with ACT partner agencies, in particular ACTCOSS, Women's Centre for Health Matter, and Legal Aid ACT gave specific feedback to this submission;
- Previous Youth Coalition research and submissions to the ACT Government;
- Current and topical research on youth affairs, including research specifically related to ACT and Commonwealth consent legislation.

This submission provides a number of recommendations regarding the proposed legislation changes. The Youth Coalition would be happy to provide further information on the proposed legislation, and our recommendations, if required.

2. SUMMARY OF RECOMMENDATIONS

Section 2 provides a summary of the recommendations for this Submission. It is vital that these recommendations be referred to in the context of the broader Submission.

The Youth Coalition's recommendations regarding the Amendment Bill are:

Recommendation 1: Proceed with introducing a definition of consent as written in section 67(1) of the Crimes (Consent) Amendment Bill 2018.

Recommendation 2: Provide examples in the explanatory statement, attached to section 67(1) of the Crimes (Consent) Amendment Bill 2018, of when consent is present, not present, revoked, and steps that can be taken to understand whether it is present.

Recommendation 3: ACT Government to fund a program which educates young people about the new definition of consent.

Recommendation 4: ACT Government to fund an education initiative in all ACT schools which highlights the broader culture of sexual violence in the ACT and teaches young people about respectful relationships, as well as the development of resources for youth services and programs.

Recommendation 5: ACT Government to request changes to Commonwealth legislation so that young people, aged 16-17 years, cannot be charged with distributing/possessing child exploitation material for consensually sharing intimate images via mobile phone/internet, bringing federal law into line the States and Territories.

Recommendation 6: Proceed with extending the "2-year rule" defence, as written in sections 64(1), 64(3), 65(1), 66(1) and 66(2) of the Crimes (Consent) Amendment Bill 2018.

Recommendation 7: Include, in the judgement of cases which concern the consensual distribution/possession of intimate imagery and young people, an independent third-party mediator such as the Public Advocate or the ACT Children and Young People's Commissioner.

Recommendation 8: Provide examples in the explanatory statement, attached to sections: 64(1), 64(3), 65(1), 66(1) and 66(2) of the Crimes (Consent) Amendment Bill 2018, of when consent is present, withdrawn and the steps required to be taken upon withdrawal of consent.

Recommendation 9: ACT Government to fund an education initiative in all ACT schools to inform young people of what constitutes the consensual distribution of intimate imagery, when consent is present, withdrawn and the steps required to be taken upon withdrawal of consent, as well as the development of resources for youth services and programs, parents and the community.

3. CONSENT AND SEXUAL INTERCOURSE IN THE ACT

3.1 Introduction

Defendants' presumption of innocence¹ and the onus that is placed on the state to prove guilt beyond a reasonable doubt in order to record a guilty verdict² are fundamental to criminal prosecutions in both Australia and the Australian Capital Territory (ACT), including in cases of alleged sexual assaults. These standards are pillars of the criminal justice system and are key to minimising the likelihood that individuals are incorrectly and unjustly penalised. It is therefore important that neither the presumption of innocence nor the state's burden of proof is undermined when proposing any amendments to legislation. At the same time, it is vital that the ACT introduces an objective definition of consent, not only to bring it in line with every other state/territory in Australia, but to be able to better understand what consent means, when it is present, and when it is not. It will also help, from a legal perspective, determine whether a sexual assault has taken place.

3.2 The issue with 'consent' legislation in the ACT

The presence or absence of consent is the central focus in cases of alleged sexual assault, but the lack of an objective, legal definition of consent in the ACT's *Criminal Code 2002* has been problematic for prosecuting sexual assault. Currently, the ACT defines sexual intercourse without consent as sex '*without the consent of the other person and who is reckless as to whether that person consents*',³ however, it fails to include an affirmative definition of what 'consent' entails, instead, listing factors which negate consent (e.g. violence, intoxication, etc.).⁴ This is an issue for victims of sexual assault as the occurrence of negating factors in a given scenario becomes largely a matter of the defendant's word against their own. Furthermore, the presence of such factors may not explicitly vitiate consent, therefore making it harder to prosecute perpetrators of sexual violence.

In jurisdictions without an affirmative definition of consent, such as the ACT, the prosecution of sexual assault predominantly rests upon one issue: the mental state of the accused. As sexual assault falls under the criminal code, and *mens rea*⁵ is typically required in order to find criminal responsibility, the onus is on the prosecution to prove that the accused had knowledge of non-consent. Furthermore, as held in *DPP v Morgan*⁶ - a case which is recognised in common law jurisdictions in Australia - a mistaken but honest belief that the complainant consented, however unreasonable, is enough to negate the mental element and can be used as a defence to sexual assault ('the *Morgan* defence'). Consequently, sexual assault becomes less a matter of whether the complainant believes that they were sexually assaulted, but rather if the defendant genuinely believed that consent was present.

This highlights several egregious problems with the ACT's current consent legislation. Firstly, with no definition, consent has become highly subjective and open to varying

¹ see s22 *Human Rights Act 2004* (ACT)

² see s52 *Criminal Code 2002* (ACT)

³ see s54 *Crimes Act 1990* (ACT)

⁴ see s65 *Crimes Act 1990* (ACT)

⁵ The intention or knowledge of wrongdoing that constitutes part of a crime

⁶ *DPP v Morgan* [1976] AC

interpretations. This has seen to be particularly difficult for jury trials due to jurors' inability to comprehend and form a unanimous understanding of its meaning. Secondly, in having to prove that the accused had knowledge of or intention to act with non-consent (without physical evidence or witnesses), an examination of whether the accused actively sought to obtain consent is neglected in favour of whether the complainant demonstrated non-consent. While juries are informed that an absence of verbal or physical resistance does not constitute consent - there is no 'implied consent'⁷ - legislation does not consider whether positive steps were taken to obtain consent.

Although not intended, due to the way that the ACT's consent laws are currently written, sexual assault can only truly be proven if the claimant can demonstrate non-consent. This reinforces an archaic view of what constitutes sexual assault: an act of forcible sexual intercourse where the onus is upon the claimant to show that they resisted advances. It also undermines the affirmative model of consent - a positive agreement to engage in sexual activity is made between parties - which is widely supported by advocates.⁸ Ultimately, legislation needs to: firstly, abandon its preoccupation with a singular paradigm of sexual assault victim which 'functions to disqualify many complainants' accounts of their sexual assault experiences' and 'works to undermine the credibility of those women who are seen to deviate too far from stereotypical notions of "authentic" victims, and from what are assumed to be "reasonable" victim responses'.⁹ Secondly, it needs to shift its attention from complainants' displays of non-consent to the accused's understanding of and the steps taken to actively seek, clarify or confirm consent.

3.3 Defining 'consent' in ACT's Crimes Act

Recommendation 1: Proceed with introducing a definition of consent as written in section 67(1) of the Crimes (Consent) Amendment Bill 2018.

The Youth Coalition of the ACT ('Youth Coalition') recommends introducing an objective, affirmative definition of consent as it has been defined in the exposure draft of the *Crimes (Consent) Amendment Bill 2018*. Introducing the 'free and voluntary agreement' component in the definition of consent in part (a) brings the ACT in line with other states/territories and countries' definitions of consent.¹⁰ More importantly, the terminology in Part B of the Bill places more responsibility on the person pursuing sexual activity to ensure that he or she:

- (i) 'knows' that the other person 'freely and voluntarily' gave consent; or
- (ii) 'is satisfied on reasonable grounds' that the other person 'freely and voluntarily' gave consent

The inclusion of this affirmative definition is significant as it firstly assists juries in establishing an informed and unanimous understanding of what constitutes consent; and

⁷ see s72 *Evidence Act 1991* (ACT)

⁸ see e.g. Anderson, M.J (2005), 'Negotiating Consent', *Southern California Law Review*, 78(6)

⁹ Randall, M (2010), 'Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming', *Canadian Journal of Women and the Law*, 22(2):398

¹⁰ New Zealand, England, Canada and all Australian states/territories, with the exception of the ACT, currently have an affirmative definition of consent which defines it as either a 'free agreement' or an agreement entered in to 'freely and voluntarily'.

secondly, it reframes the perceptions of consent in cases of sexual intercourse to focus on the positive steps taken to obtain consent rather than those taken to display non-consent.

3.4 Inclusion of explanatory statement

Recommendation 2: Provide examples in the explanatory statement, attached to section 67(1) of the Crimes (Consent) Amendment Bill 2018, of when consent is present, not present, revoked, and steps that can be taken to understand whether it is present.

To supplement the *Crimes (Consent) Amendment Bill 2018*, The Youth Coalition supports the attachment of an explanatory note that clarifies the purpose of the bill: to place greater consideration on the steps taken by a defendant to acquire 'free and voluntary' consent rather than the actions taken by the complainant to communicate non-consent. To reinforce its purpose, the Youth Coalition recommends the inclusion of anecdotal examples of when consent is present, not present, revoked, and steps that can be taken to understand whether it is in fact present.

3.5 Ongoing problems with the legislation

Recommendation 3: ACT Government to fund a program which educates young people about the new definition of consent.

Recommendation 4: ACT Government to fund an education initiative in all ACT schools which highlights the broader culture of sexual violence in the ACT and teaches young people about respectful relationships, as well as the development of resources for youth services and programs.

Once again, the proposed amendment represents a positive change to the legal treatment of consent in theory; however, as evidenced in other states, the introduction of more objective wording has not completely resolved the issue of prosecuting sexual assault. Such issues are highlighted by the infamous conviction (2013) and subsequent acquittal (2017) of Luke Lazarus in NSW¹¹ - a state which in 2007 introduced a definition of consent similar to what being proposed in the ACT. In reasoning her judgement, Judge Tupman held that the accused had reason to believe that the complainant was consenting despite Tupman not accepting *'that the complainant, by her actions, herself meant to consent to sexual intercourse and in her own mind was not consenting to sexual intercourse'*.¹²

Tupman accepted that there were 'reasonable grounds...for the accused to have formed the belief...the complainant was consenting to what was occurring'. The decision was reached based on an assessment that, among others things, '[the complainant] did not say "stop" or "no" [or] take any physical action to move away from the intercourse or attempted intercourse'. This calls into question the extent to which courts do not consider 'implied consent' and how victims can be rendered paralyzed during an assault¹³. Furthermore, at no point in Tupman's analysis of the acquittal appeal was there any discussion of the steps

¹¹ Lazarus v R [2016] NSWCCA 52; R v Lazarus [2017] NSWCCA 279

¹² R v Lazarus [2017] NSWCCA 279, 72 (Tupman J)

¹³ Russo, F (2017), 'Sexual Assault May Trigger Involuntary Paralysis', *Scientific American*, <<https://www.scientificamerican.com/article/sexual-assault-may-trigger-involuntary-paralysis/>>

taken by the accused to actively obtain consent. This judgement, and its reasoning was reached in spite of the amendments to NSW's consent legislation.

By continuing to emphasise non-consent as opposed to consent, this decision failed to accord sufficient weight to the communicative model of consent and hold those who display predatory sexual behaviour responsible for their violation of another's sexual autonomy. Furthermore, Vandervort believes that 'when judges allow [those] accused to use the defence of mistaken belief in consent, they are actually permitting social myths about women's sexual tastes to be treated quite improperly as evidence of consent'¹⁴. While an argument can be made that, in this instance, the accused was not guilty of rape, there is overwhelming evidence to suggest that he exerted strong emotional and physical pressure - into the realm of coercion - over the complainant in order to penetrate her.

While the Youth Coalition strongly supports the Amendment Bill and what it aims to achieve, it recognises that the legislation will not substantially change the way in which criminal matters, including sexual assault, are prosecuted in the court of law. Further measures are required to supplement the proposed amendment legislation that can create large-scale change to the way in which sexual assault is treated both in the ACT and Australia. More needs to be done to combat a culture that condones sexualised aggression and violence against women¹⁵.

The Youth Coalition recommends that the ACT Government fund an education initiative and resources, which teach about respectful relationships, and highlights the problem of a broader culture of sexual violence. This education initiative should be delivered in all ACT schools, and resources be made available for youth services and programs, as well as parents/carers and the broader community.

¹⁴ Vandervort, L (1987), 'Mistake of Law and Sexual Assault: Consent and Mens Rea', *Canadian Journal of Women and the Law*, 2(2):233

¹⁵ Hildebrand, M.M & Najdowski, C.J (2014), 'The potential impact of rape culture on juror decision making: Implications for wrongful acquittals in sexual assault trials', *Albany Law Review*, 78:1059

4. DEFENCES TO CHILD SEX OFFENCES IN THE ACT

4.1 Introduction

In the digital age, where the average child receives their first phone at 11,¹⁶ the way in which children and young people interact has completely transformed. With the increased power and ease of use of smart technologies, including phones, they are increasingly being utilised for means other than verbal and written communication. They are now frequently being used as means of engaging in or pursuing sexual activity. According to the 2017 Australian eSafety Youth Digital Participation Survey, of a sample size of 1,424 teens (aged 14-17), nearly 1 in 3 young people reported having some experience with sexting in the prior year. This included sending, being asked and asking, sharing or showing nude or nearly nude images or videos.¹⁷

Naturally, when it comes to young people an intimate imagery, there are serious concerns over safety and privacy due to the permanence of digital data. So while the legislation needs to criminalise predatory and exploitative behaviours, it need not also criminalise the consensual, normative behaviours of young people.

4.2 The issue with intimate image distribution and young people legislation in the ACT

Recommendation 5: ACT Government to request changes to Commonwealth legislation so that young people, aged 16-17 years, cannot be charged with distributing/possessing child exploitation material for consensually sharing intimate images via mobile phone/internet, bringing federal law into line the States and Territories.

In 2017, when discussing the issue of ‘intimate image abuse’, Jeremy Hanson MLA explicitly stated that young people should not face criminal prosecution for engaging in the consensual transmission of intimate imagery with other people of their own age. However, not only does this remain illegal at a Commonwealth level - it is a federal offence for those under 18 to use the internet or mobile phone to share intimate images with another - for a person in the ACT aged under 18, such intimate image sharing can be classed as “child pornography”, “child exploitation” or an “indecent act”, even where the images were distributed consensually. As a consequence, young people who engage in consensual image sharing with other young people, are at risk of criminal prosecution.

4.3 Extending the ‘2-year rule’ defence for child sex offences

Recommendation 6: Proceed with extending the “2-year rule” defence, as written in sections 64(1), 64(3), 65(1), 66(1) and 66(2) of the Crimes (Consent) Amendment Bill 2018.

The Youth Coalition recommends extending the ‘2-year rule’ defence to child sex offences across:

¹⁶ The Guardian (2013), ‘Nearly one in 10 children gets first mobile phone by age five, says study’, <<https://www.theguardian.com/money/2013/aug/23/children-first-mobile-age-five/>>

¹⁷ Office of the eSafety Commissioner (2017), ‘Young people and sexting - attitudes and behaviours’, OeSC, Canberra

- s64(1): Using child for production of child exploitation material etc
- s65(1): Possessing child exploitation material
- s66(1): Using electronic means to suggest a young person commit/watch a sexual act
- s66(2): Using electronic means to send/make available pornography to a young person

4.4 Further issues with intimate image distribution and young people legislation in the ACT

Recommendation 7: Include, in the judgement of cases which concern the consensual distribution /possession of intimate imagery and young people, an independent third-party mediator such as the Public Advocate or the ACT Children and Young People's Commissioner.

Recommendation 8: Provide examples in the explanatory statement, attached to sections: 64(1), 64(3), 65(1), 66(1) and 66(2) of the Crimes (Consent) Amendment Bill 2018, of when consent is present, withdrawn and the steps required to be taken upon withdrawal of consent.

Recommendation 9: ACT Government to fund an education initiative in all ACT schools to inform young people of what constitutes the consensual distribution of intimate imagery, when consent is present, withdrawn and the steps required to be taken upon withdrawal of consent, as well as the development of resources for youth services and programs, parents and the community.

Prescriptive nature of the '2-year rule' defence

Consider the following scenario:

A 17-year-old and a 20-year-old are engaged in an intimate, consensual relationship. The 17-year-old consensually sends a sexually explicit image of themselves to the 20-year-old using a mobile phone. Despite the proposed amendments, the 20-year-old is now in violation of multiple sections of the Criminal Act, including:

- 64(1) and (3) – offence because under 18 and other person is not within 2 years
- 65(1) – offence because under 18 and other person is not within 2 years
- 66 – offence because under 18 and other person is not within 2 years

The Youth Coalition recommends extending the '2-year rule' across the aforementioned child sex offences; however, it has some concerns that its inclusion will unfairly criminalise acts which fall just outside the '2-year' window (i.e. the differences of ages between the young person and adult is 3 years). As stated in its submission on the *Crimes (Intimate Image Abuse) Amendment Bill 2017* (ACT), the Youth Coalition also recommends that an independent third party, such as the Public Advocate or Children and Young People's Commissioner, be included in the resolution and judgement of such scenarios concerning the consensual distribution or possession of intimate imagery.

Consent and intimate imagery

Like with other forms of sexual activity, the sharing of intimate imagery is subject to the laws of consent. Consent for someone to possess an intimate image of another can be withdrawn at any point. However, due to the permanence of digital data, it is often difficult to ensure with complete certainty that all trace of intimate images are deleted. As such, the Youth Coalition recommends that the explanatory statement attached to the Crimes (Consent) Amendment Bill 2018 should also include a step-by-step guide of what to do when consent is revoked for an intimate image that was previously consensually shared.

The Youth Coalition also recommends the ACT Government fund an education program to be delivered in all schools, which informs young people about the intimate image distribution laws and the permanence of online imagery. Resources should also be developed and made available to be available to all youth programs and services, parents, and the broader community.