

SEXUAL CONSENT LAW REFORM - FAQs

2 May 2022

ABOUT THE CHANGES

What process has this Bill followed in being developed and drafted?

The Bill has had a long history – commencing in 2018 when similar law reforms were proposed by a former MLA in the ACT. While law reform did not eventuate at that time, there was considerable stakeholder and community consultation, as well as legislative and government scrutiny, all of which helped define the most appropriate legislative response in the ACT context to achieve the policy intent.

The policy intent is to introduce an affirmative model of sexual consent in the ACT, to reduce sexual violence in our community and to hold perpetrators to account.

Recent law reforms in other jurisdictions have also informed the development of this Bill – in particular, the Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021 which was passed by both houses of New South Wales' Parliament in December 2021. Those reforms were informed by a robust and lengthy process of legislative scrutiny and government response. This Bill aligns closely with those reforms.

This Bill has been carefully prepared by expert legislative drafters at the ACT Parliamentary Counsel's Office. During that process, and over a period of 12 months, further stakeholder and community consultation has occurred. Importantly, the ACT Government's Sexual Assault Prevention and Response Steering Committee has considered an earlier Draft Exposure version of this Bill and provided expert input.

What has changed since the Bill was tabled in February 2022?

The development of this Bill has been an iterative process, strengthened at each step of the way by comments, consultation and input from key stakeholders, community members and those with lived experience.

Key changes that have as a result of the JACS Scrutiny Committee report and Government Response following tabling of the Bill are:

- Amending the section 'principles of consent' to 'Objects - pt 3' to provide greater clarity for the interpretation and application of this part;
- providing a definition of 'sexual act';

- Creating clarity at various sections that ‘a person’ means the ‘accused person’;
- extending the reporting period for the review of the provisions of the Bill from 6 to 12 months.

The following revisions have been made to the Explanatory Statement:

- Further analysis against Sections 22 and 28 of the *Human Rights Act 2004* – regrading a right to be presumed innocent until proved guilty and limits on human rights.
- Further clarification in relation to the ACTs Criminal Code 2002 and the absolution of criminal responsibility in cases of cognitive or mental impairment;
- Amended language regarding people of diverse gender identity or expression;
- Greater recognition about a surrender response; and
- Clarification that the test of intoxication level negating consent is not higher than in current legislation.

Who has been consulted?

This Bill has been informed and strengthened through input from:

- the ACT Government’s Sexual Assault Prevention and Assault Program and Steering Committee, including the report presented to the ACT Government on 6 December 2021;
- sexual consent law reforms passed in NSW in December 2021, and in other jurisdictions in recent years;
- consultation since the introduction of similar legislation to the ACTs Legislative Assembly in 2018;
- intensive stakeholder and community consultation since the release of a public exposure draft in June 2021 and the tabling of the Bill in February 2022;
- the Legislative Assembly’s Justice and Community Safety (Bills Scrutiny) Committee report of 15 March 2021; and
- the ACT Government’s Response, which includes the views and comments from:
 - ACT Corrective Services
 - ACT Courts and Tribunal
 - ACT Director of Public Prosecutions
 - ACT Policing
 - Human Rights Commission (including Victims of Crime Commissioner)
 - A gender Agenda
 - ACT Council of Social Service
 - ACT Law Society
 - Canberra Rape Crisis Centre
 - Domestic Violence Crisis Service
 - Women’s Legal Centre
 - The Office of the Co-Ordinator General for Family Safety and Legal Aid.

At each of these steps, I have considered in detail the comments provided, and have worked closely with the legislative drafters at Parliamentary Counsel's Office to finesse and refine the provisions of this Bill. The policy intent has not changed. The changes simply ensure that there are no unintended consequences from the Bill, ensure alignment – as best as possible – with law reforms of New South Wales, and provide further clarity to achieve the Bill's policy intent and our criminal justice system.

In addition to the inputs above, the following groups and organisations have also provided input at various stages:

- ACTCOSS
- ACT Law Society
- ACT Human Rights Commissioner
- ACT Victims of Crimes Commissioner
- Advocacy for inclusion
- Canberra Rape Crisis Centre
- Canberra Hospital, Forensic and Medical Sexual Assault Care
- Director of Public Prosecutions
- Domestic Violence Crisis Service
- Legal Aid ACT
- Meridian Community Health Action
- Womens Legal Centre ACT
- Women with Disabilities ACT
- YWCA Canberra

Throughout these consultations and stakeholder feedback there has been overwhelming support for the Bill. In particular, there is broad consensus on the need for the ACT to adopt an affirmative model of consent. There has been some difference of opinion on some provisions of the Bill, most notably those provisions that relate to technical matters and wording of the Bill, most of which have been finessed and addressed throughout the iterative drafting process and better clarified in the Explanatory Statement. In addition, there was some concern around the right to remain innocent until proven guilty. Further clarifications in the Explanatory Statement have addressed these concerns.

What further checks and balances are in place to ensure the Bill achieves its intended outcomes?

The Minister responsible must conduct a review of the provisions of the Amendment Bill as soon as practicable after the end of two years after the amendments commence. The Minister must present a report of the review to the Legislative Assembly within 12 months after the day the review commences.

How will frontline services be resourced and supported to implement the changes?

Law reform is one element in a much broader approach to address sexual violence within our community.

The ACT Government is carefully considering each of the recommendations contained in the Sexual Assault Prevention and Response (SAPR) Steering Committee's report of 6 December 2021 to assess and prioritise a suite of programs, activities, policies and resources to combat sexual violence.

Recommendation 22 of the SAPR report states that: 'The ACT Government should amend the law in relation to consent by establishing an affirmative communicative model of consent. This reform should be accompanied by community education measures'.

I particularly welcome the Committee's recommendations about the important role of training and ongoing education for all frontline workers involved with various aspects of sexual assault and those working in the criminal justice system, resourcing for an ACT Policing Sexual Assault and Child Abuse Team, expanding restorative justice programs, the review of justice procedures, and further recommended areas of law reform - related to penalties, sentencing, bail, workplace and personal protection orders and the wording of offences among other matters.

I further welcome and support the report recommendation that: "The legislative reforms proposed in this report must therefore support and be supported by educative and social measures focused on primary prevention and cultural change, as outlined earlier in this report, that explains how the model of affirmative consent fits within a framework of equal and respectful relationships". I understand that this important work will be carried out through the ACT Government, and I look forward to offering my support and involvement as appropriate.

I will continue to be a strong advocate for the need for broad and far-reaching community education, to achieve a cultural shift in a zero-tolerance approach to sexual violence in the ACT.

How are trans-gender people, people with a disability and other minority groups represented through this Bill?

People with a disability, people of diverse gender identity and expression, Aboriginal and Torres Strait Islanders, and Culturally and Linguistically Diverse (CALD) people experience much higher incidents of sexual assault than other sectors of the community.

Issues about gender identity are complex and sensitive. They are issues of an ethical nature which extend far beyond this Bill.

The Bill is intentionally silent about any particular groups within our community to ensure that each matter brought before the courts is determined on its individual merits; taking into account the particular circumstances and complexities of each case.

Importantly, it remains the responsibility of the prosecution to consider all the matters of a case and determine whether it is of a trivial or criminal nature.

The existing provisions have not been used to convict a person of diverse gender identity in the ACT.

The broad provisions of this Bill further strengthen the rights of gender diverse people, the LGBTQIA+ community, people with a disability, Aboriginal and Torres Strait Islander people, Culturally and Linguistically Diverse People and other minority groups.

- This is achieved through recognition that these groups experience much higher rates of sexual assault than the broad community, and that this Bill will:
 - Provide improved community awareness and cultural change in relation to respectful relationships;
 - Result in higher levels of prosecution where a criminal sex offence has occurred;
 - Reduce the number of instances of sexual assault among these groups due to a cultural change.

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 legislation introduces 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 **objects of consent for a sexual act** – consent is not to be presumed; every person has a right to choose whether or not to participate in a sexual act, and it involves ongoing and mutual communication, informed decision-making and free and voluntary agreement between the people participating;
2. Provides a **definition of consent** – informed agreement that is freely and voluntarily given, and is communicated by saying or doing something;
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 rather than assumed and may be negated; 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

introduces 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/affirmative consent?

Communicative/affirmative consent is a model which requires ongoing and mutual communication to give informed, 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 and have very low conviction rates.

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?

Minister Yvette Berry's Sexual Assault Prevention and Response Program includes working groups focusing on cultural change, community education and awareness; as well as victim-survivor supports, law reform and workplace culture. 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 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 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 determine definitions of sexual assault is clear and concise. Consent is no longer assumed; it is something that has to be given.

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 (2022) 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 and the resulting law reforms that were passed by both houses of NSW Parliament in late 2021.

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 differs from legislation in other jurisdictions, as each jurisdiction's legislative frameworks and structures, court systems and local contexts differ.

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

WHAT HAPPENS NEXT?

The provisions of the Bill come into effect the day after its notification on the ACT's Legislative Register. This is anticipated to be very soon (within days or weeks) after its successful passage (anticipated for 5 May 2022).

Any new sexual violence matters that come before the judicial system will be tried in accordance with the provisions of this Bill.

The Bill does not contain any retrospective provisions.

As soon as practicable after two years of the operation of this Bill, the Minister must conduct a review. A report must be presented to the Legislative Assembly within 12 months after the review is started.

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