



Submission on draft Crimes (Consent) Amendment Bill 2018

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Introduction

The Women's Centre for Health Matters Inc. (WCHM) welcomes the opportunity to make a submission to the office of Caroline Le Couteur on the draft *Crimes (Consent) Amendment Bill 2018*.

WCHM is a community-based organisation that works in the ACT and surrounding region to improve women's health and wellbeing. WCHM believes that health is determined not only by biological factors, but by a broad range of social, environmental and economic factors known as the 'social determinants of health'. We acknowledge that the environment and life circumstances that each woman experiences have a direct impact on her health, and in many cases, women's poor health is rooted in social disadvantage. For these reasons, WCHM is committed to taking a whole-of-life and social approach to women's health that is also firmly situated within a human rights framework.

WCHM focuses on groups of women who experience disadvantage, social isolation and marginalisation and uses social research, community development, advocacy and health promotion to:

- Provide women with access to reliable and broad ranging health-related information which allows informed choices to be made about each woman's own health and wellbeing; and
- Advocate to influence change in health-related services to ensure responsiveness to women's needs.

Further information on the impact of consent legislation on women in the ACT can be provided, if required.

Active Consent

WCHM are pleased to see an amendment to the *Crimes Act 1900* to change the definition of consent to “free and voluntary agreement” rather than focusing solely on factors that negate consent.

This change will make the ACT consistent with other Australian jurisdictions, meaning that the definition of consent does not change whether the act occurred in an apartment in Queanbeyan or in Campbell.

This change from negating consent to active consent represents a major shift in community attitudes towards what is accepted as consenting activity. Situations in which consent was not considered to be negated because the victim did not verbally state their non-consent should, with this change in definition, be considered a sexual offence.

However, there are still situations in which subjective decisions may need to be made about whether there was consent. It would be helpful to include examples of these situations, and whether it is the Assembly’s intention that this should constitute consent, in the Explanatory Statement for the Amendment. This will be of assistance to courts when cases come before it.

Ongoing consent

One example that would be helpful is “rape freeze”. Women who may have actively consented prior to sexual activity beginning, may in fact find that the activity is not what they thought they were consenting to, and may experience “rape freeze”, in which they do not demonstrate ongoing consent, nor do they physically act to try and stop the activity.

Resources aimed at educating people about active consent do not always address this issue of ongoing active consent. An example of checking in for active consent can be found in the Consent Matters training resources delivered to students at Australian National University and University of Canberra. In the training resource, two people actively consent to engage in sexual activity with each other, and the activity commences. But after this, the body language of one of the participants changes, and they seem less enthusiastic about the activity. In the training resource, it is made clear that the participant who wants to continue the activity should check for ongoing active consent, giving their partner the opportunity to negate consent and cease the activity.

In this situation, it is not clear whether the new legal definition of active consent has been met. A woman might give consent, freely and voluntarily, before activity begins, and may not physically resist ongoing activity after she has realised she wants to withdraw consent because of rape freeze. An example that describes such a situation, and makes it clear that there is a legal obligation to check for ongoing active consent if the woman is not demonstrating this through her body language, would be helpful for the courts.

Education resources about consent

The most recent Australian Bureau of Statistics’ *Personal Safety Survey 2016* found that one in five women, and one in twenty men, had experienced sexual violence since the age of 15. These numbers are the same as the results from the *Personal Safety Study 2012*. However, the proportion of women of women experiencing sexual violence in the 12 months prior to the survey has increased from 1.2% in 2012 to 1.8% in 2016.¹ What this shows is that a stronger definition

¹ Australian Bureau of Statistics, 2017, *Personal Safety, Australia*, cat. no. 4906.0, viewed 22 March 2018: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>

of consent in other States and Territories around Australia has not, in itself, led to a reduction in women's experience of sexual violence.

To assist in reducing the prevalence of sexual violence in the community, it would be helpful to fund the creation and distribution of resources that will help people understand active consent, including ongoing consent.

A recent survey of ACT women's sexual and reproductive health needs by WCHM found that a significant proportion of ACT women do not find it easy to find reliable and relevant information about their sexual and reproductive health. In particular, 37% of women aged 15 to 18 years, 28% of women aged 19 to 29 years, and 28% of women aged 60 years or more answered no to this question.

For young women, education resources to help them understand sexual consent need to be provided before they have reached 15 years of age. WCHM's survey found that 71% of women aged 15 to 18 years, and 94% of women aged 19 to 29 years, had sexual activity with another person in the past 12 months.

In the same survey, 48% of women aged 60 years or more said they do not feel that sexual and reproductive health information is appropriate for their age and stage of life, and 64% of women aged 60 years or more had answered yes when asked if they had sexual activity with another person in the last 12 months. Women aged 60 years or more should continue to have access to information about sexual consent.

Further analysis of the WCHM survey results is ongoing, and a detailed report is expected to be released later in 2018.

While Consent Matters is useful for university students, many young people become sexually active before they reach the age where they might attend university, may not attend university at all, or may attend a university that does not provide access to this resource. The resource was also originally developed for a United Kingdom university age audience.

A resource that uses language, accents, and social situations common to an Australian audience would be a helpful addition to the existing resources that are available. Resources appropriate to younger people of high school age, and young people who may or may not be attending university, would also be appropriate. It may also be helpful to have resources available that are suited to older Australians, for whom issues of consent are still relevant but can be overlooked in health literature aimed at people over 60 years.

Impact on young people

As discussed previously, young people under the age of 18 years in the ACT are engaging in sexual activity. This includes sharing intimate images, which occurs frequently with young people who have not yet reached the age at which they can consent to sexual activity.

However, not all intimate images depict sexual activity. So while a young person under 16 years of age may want to consent to sharing an intimate image with another young person of a similar age, they may not be sharing images that depict sexual activity.

It therefore makes sense that the age of consent for sharing an intimate image with another young person of similar age may be lower than the age of consent for participating in sexual activity with another young person of similar age.

Commonwealth offences

The *Crimes (Invasion of Privacy) Amendment Bill 2017* was intended to provide legal protection for young people from adults exploiting their intimate images, while allowing for a young person to consent to create or share their intimate image with another young person no more than two years older than them without it being a criminal offence.

However, the main form in which young people distribute intimate images is via their mobile phone or online social media. For young people under 18 years, it is an offence under Commonwealth law to use the internet or mobile phones to share their intimate image with another person because it is classified as “child pornography” or an “indecent act”. The penalty is up to 15 years in prison.

The changes proposed in the *Crimes (Consent) Amendment Bill 2018* do not address this issue. The only way to address this issue is through amendments to the Commonwealth legislation.

While there remains this conflict between what is considered an offence in the ACT compared to Federal law, young people may not be clear about their legal responsibilities. Training resources are needed for young people, their parents or carers, schools and others who work with young people, to assist them in understanding the law relating to consenting to sharing intimate images by mobile phone or online.

Subjectivity in intimate images

Based on the amendment Bill, there are some situations in which a young person aged 16 or 17 years may consent to sharing an intimate image with another person who is more than two years older than them, and the image could subjectively be considered to be child exploitation material under s64(3) or 65(1) of the *Crimes Act 1900*, or could be considered not an offence at all under s72D if the image is considered to be an intimate image.

The amendment Bill applies a two year rule to offences under s64(3) and s65(1), as well as s66(1). This means that if a child or young person is creating or sharing an image of sexual activity with another person no more than two years older than them, it is not an offence.

Under s64(3) of the *Crimes Act 1900*, it is an offence for a person to user, offer or procure a child for the production of child exploitation material. The maximum penalty, where the child is 12 years or older, is 10 years in prison. The penalty is higher where the child is under the age of

Under s65(1), it is an offence for a person to possess child exploitation material, with a maximum penalty of 7 years in prison.

Under s66(1), it is an offence to encourage a young person to commit or take part in, or watch someone else committing or taking part in, an act of a sexual nature. For a first offence against a young person aged 12 years or older, the maximum penalty is 7 years in prison.

If a 17 year old engages in sexual activity with the 20 year old, and shares images of that activity with the 20 year old without the use of a mobile phone or online, the older person in the relationship may be committing offences under s64(3) for production of child exploitation material, and s65(1) for possessing the child exploitation material. This is because there is more than two years between the age of the young person in the images, and the person creating and possessing the images.

But there is no offence under s72D because the young person was over the age of 16 years.

If the image depicts sexual activity between the 17 year old and the 20 year old, the activity itself is also not an offence under s55 because the young person is not under the age of 16 years. But it may be an offence under s66(1) because of the two year rule.

What this means is that police are required to make a subjective decision: is the image created and shared with the 20 year old child exploitation material under s64(3) and s65(1), or is it an intimate image under s72D? Was the older person also committing an offence under s66(1)?

It seems that the safest course of action would be that the creation and/or sharing of intimate images by persons under 18 years should only be done with another person aged at least 10 years and no more than two years older than the younger person, and that images depicting sexual activity should only be created and/or shared by young persons aged at least 16 years and with the other person no more than two years older than the younger person. In any case, these images should not be created or distributed using mobile phones or online.

This subjectivity means that police and the courts will need training resources to help them decide when it is appropriate to charge someone with an offence, and under which section of the Act.

Examples in the Explanatory Statement accompanying the amendment Bill that describe the kind of image that might be considered an intimate image under s72D, but not child exploitation material under s65(1), would also assist the courts in the making these subjective decisions where a person aged 16 or 17 has shared images with someone more than two years older.

Training resources will also be needed for the community to understand the changes to the consent laws, and the areas in which subjective decisions could be made that an offence has occurred, to ensure that people are aware of the risks they may be taking.

Two year rule

The two year rule is that a sexual offence is not committed under various sections of the *Crimes Act 1900* provided that the younger person involved is over a certain age (varying between 10 and 16 years, depending on the section of the Act) and the other person is no more than two years older than them. The wording of the amendment Bill ensures that the two year rule will be applied to offences relating to intimate images in a way that is, for the most part, consistent with other sexual offences.

The two year rule is an arbitrary measure of the power imbalance that may exist between a young person and the person they are engaging in activity with. In addition, s72D sets the age of consent for sharing intimate images at 16, regardless of the age of the person the images are shared with.

There are situations in which a 16 or 17 year old may be engaging in consenting sexual activity with a person who is more than two years old than them, such as a 17 year old in a relationship

with a 20 year old. For example, some first year university students are still 17 years old when they begin their studies, and may be meeting and socialising with other first or second year students who are a little more than two years older. This can also happen in workplaces where there are numbers of young people in entry level positions, or in any social setting where the basis of being present is not that they are in the same school grade or were born in the same year.

The age difference may not, in itself, equate to an imbalance in power between the two people. This is based on an outdated social norm that the relationship will be between two people of different genders, and that the woman will be the younger person in the relationship. Differences in the power within the relationship may stem from knowledge and experience of systems, positions of authority in workplaces or education settings, or socio-economic status. For example, two young people within two years of each other may:

- Work in the same fast food store, where one is a supervisor (although not the supervisor of the other young person).
- Attend the same school, where one student is a prefect or member of the Student Representative Council and the other is not.
- Be from very different socio-economic backgrounds, where the person from the lower socio-economic background feels a level of shame or stigma related to economic class.
- Both be the same gender, but one may be openly participating in the LGBTIQ community while the other would prefer not to be known to be in a same-sex relationship.

In any of these situations, it may be possible for one person to obtain consent from the other because of the power imbalance in the relationship, without having committed an offence, even though they are both young people of a very similar age.

It is also possible that these situations may exist with an age difference of slightly more than three years, and that the person with the greater level of power in the relationship may not be the older person.

Ongoing consent and young people

It is our view that there should be no time limit to withdrawing consent, whether to sexual activity or to creating and/or sharing intimate images. Where young people are concerned, this means that it should be possible for a young person over the age of 16 to consent to creating and sharing an intimate image with another person within two years of their own age, but to withdraw their consent some years into the future and require the person who holds the image to delete it.

Where two young people had shared intimate images with each other, and it is now some years after the relationship had ended, one of the people involved no longer wants their former partner to possess their intimate images. If the intimate images depict a young person under the age of 18, they could be committing an offence under s65(1). If they move the images to another computer or phone that they own, and the person shown in the images was between 10 and 15 years old at the time but within 2 years of the person that they shared the images with, they could also be committing an offence under s72D.

The person who possesses the images in the above example has no way of knowing that consent has been negated unless the other person gives them this information. The new definition of active consent, that is freely and voluntarily given, also does not provide for ongoing consent or withdrawal of consent. It would therefore be up to police and the courts to decide whether an offence has been committed under s65(1) or s72D.

Examples in the Explanatory Statement accompanying the amendment Bill to demonstrate situations in which consent has clearly been withdrawn, as well as examples where it would be reasonable to believe that consent continued to exist, would help the police and courts.

Training and education resources for young people, their parents or carers, schools, and others who work with young people, to assist them in understanding the importance of communicating withdrawal of consent to possess images and the impact this may have in future, would also be helpful.

Recommendations

1. ACT Attorney-General to write to the Federal Attorney-General to request that Commonwealth law be changed so that young people aged 16 to 18 years sharing intimate images via mobile phone or internet with consent are not committing a child pornography offence, making Commonwealth law consistent with law in the States and Territories.
2. Provide examples in the Explanatory Statement accompanying the amendment Bill that describe the kind of image that might be considered an intimate image under s72D, but not child exploitation material under s65(1), where a person aged 16 or 17 has shared images with someone more than two years older. Advice should be sought from Legal Aid ACT, Women's Legal Centre ACT, Youth Coalition, and the ACT Human Rights Commissioner for Children and Young People on appropriate examples.
3. Provide examples in the Explanatory Statement accompanying the amendment Bill that describe ways in which consent, freely and voluntarily given, can be provided, as well as situations in which ongoing consent should be sought. Advice should be sought from Legal Aid ACT, Women's Legal Centre ACT, Youth Coalition, and WCHM on appropriate examples.
4. Provide examples in the Explanatory Statement accompanying the amendment Bill that describe situations in which consent to create or distribute an intimate image has been withdrawn, as well as situations in which it would be reasonable to expect that consent was ongoing, where the image depicted a young person aged 16 or 17 years. Advice should be sought from Legal Aid ACT, Women's Legal Centre ACT, Youth Coalition, and the ACT Human Rights Commissioner for Children and Young People on appropriate examples.
5. Request that ACT Government provide funding for training resources to be developed for young people, their parents or carers, schools, and others who work with young people, to assist them in understanding the law relating to consenting to share intimate images by mobile phone or online, and the importance of communicating withdrawal of consent to possess images and the impact this may have in future. Training resources should be developed by community sector organisations who understand the needs of each of these groups within the community, and are able to develop resources that can be delivered in a way that is easily accessible and interesting to the intended audience.
6. Request that ACT Government provide funding for training and education resources for police and courts on when an image depicting a 16 or 17 year old, and shared with a person more than two years older than the young person, should be classed as an intimate image under s72D and when it should be considered child exploitation material under s65(1). Training resources should be developed by community sector organisations who understand the needs and behaviour of young people, and are able to develop resources that can be delivered in a way that is easily accessible and interesting to police and the courts.
7. Request that ACT Government provide funding for training resources appropriate to younger people of high school age, young people who may or may not be attending university, older people aged 60 years or more, and for the Canberra community in general, to assist them in understanding the new definition of consent. Training resources should be developed by community sector organisations who understand the needs of each of these groups within the community, and are able to develop resources that can be delivered in a way that is easily accessible and interesting to the intended audience.