

10 September 2018

The Committee Secretary
Standing Committee on Justice and Community Safety
GPO Box 1020
Canberra ACT 2601

Dear Committee Secretary

RE: Crimes (Consent) Amendment Bill 2018

Thank you for the opportunity for YWCA Canberra to respond to the Justice and Community Safety Committee's Inquiry into the Crimes (Consent) Amendment Bill.

With the exception of the ACT, every Australian jurisdiction has a statutory definition of consent based on one of three approaches; a free agreement, a free and voluntary agreement or consent freely and voluntarily given. YWCA Canberra supports the inclusion of a positive definition of consent, based on the concept of free and voluntary agreement, in the *Crimes Act 1900* (ACT).

We understand the NSW Law Reform Commission is currently reviewing the applicability of the free and voluntary sexual consent provisions in the *Crimes Act 1900* (NSW). YWCA Canberra believes that when reinforced with public education campaigns emphasising respect in relationships, the inclusion of a positive consent provision can serve as a reference point for young people unfamiliar with appropriate behaviours or inexperienced in communicating effectively in intimate relationships.

Our comments are primarily concerned with broader feminist research, legal reform and policy developments in the context of defining consent. This submission focuses on three key issues. Firstly, the positive definition of consent defined as a free and voluntary agreement, secondly, how the consent provision may impact on diverse and vulnerable groups of women and finally, the importance of public education campaigns in supporting legislative changes.

Overview of Recommendations

YWCA Canberra recommends that:

1. a statutory, positive definition of consent, based on the concept of a free and voluntary agreement should be enacted in the *Crimes Act 1900* (ACT).
2. legislative reform is accompanied by consultation with Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women and women with disability to determine the specialist support most appropriate to their needs.
3. the ACT government fund the implementation of Respectful Relationships education for all students from kindergarten to year 12 in order to implement the intentions of the Bill in the community.
4. fund and roll-out a public education campaign on the definition of consent and the meaning of the '2-year rule', targeted at young people.

Introduction

YWCA Canberra has a long history of working with both women and young people in Canberra — providing outreach services, youth engagement programs and housing services to women and their children.

YWCA Canberra delivers its own Respectful Relationships curriculum aimed at challenging gender stereotypes and educating young people on issues such as consent and power dynamics in intimate relationships. YWCA Canberra's practice and policy is focused on the importance of primary prevention to challenge gender stereotypes which enable and perpetuate violence against women.

It is widely held that sexual assault cases are one of the most complex, if not most difficult offences to successfully obtain convictions.¹ According to Larcombe, in Australia, low rates of sexual assault reporting (estimated at 1 in 5) coupled with the difficulties in legal prosecution have resulted in a national conviction rate of less than 5 per cent.² However, as is widely recognised, this may not reflect the actual occurrence of sexual assault, but instead, the fact that there are cultural and systemic factors which contribute to the failure of our institutions to 'adequately acknowledge, report and address sexual violence'.³

YWCA Canberra believes the existing legislative framework conveys the message that submission is effectively consent, reinforcing stereotypes about women's sexual passivity. The absence of a complaint however — particularly when a complaint interrupts another's desires — is not consent. The shift to include what is effectively a "yes-means-yes" definition of consent, we believe, recalibrates socially entrenched stereotypes of sexual behaviours into one where a woman can be an active and enthusiastic participant in an encounter. Rather than passive participants whose only role is to say 'no', if indeed they are in a position to say 'no', an affirmative model of consent removes presumptions that are built into some trauma responses such as freezing or submitting.

Positive definition of consent: free and voluntary agreement

During consultations for the Australian Law Reform Commission's (ALRC) *Family Violence — A National Legal Response* report, the majority of stakeholders expressed support for the introduction of a positive statutory definition of consent based on the concept of a 'free and voluntary agreement'.⁴ This definition is also consistent with the Model Criminal Code.⁵ At the time of the Inquiry, the ACT was the only jurisdiction without a statutory definition of consent based on the concepts of either 'free agreement', 'free and voluntary agreement' or 'consent freely and voluntarily given'.⁶ As noted by the ALRC, these definitions align with the 2009 recommendation by the United Nations Division for the Advancement of

¹ Fileborn, B. (2011). *Sexual assault laws in Australia* (ACSSA Resource Sheets). Melbourne: Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, p. 1.

² Larcombe, W, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 145.

³ Australian Women Against Violence Alliance (AWAVA), *Sexual Violence: Law Reform and Access to Justice*, Issues Paper, 17 May 2017, p. 16 (AWAVA, *Sexual Violence Issues Paper*).

⁴ Australian Law Reform Commission, (2010), Chapter 25: Sexual Offences, *Family Violence — A National Legal Response*, p. 1149 (ALRC, *Family Violence Report*).

⁵ Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, Model Criminal Code—Chapter 5: Sexual Offences Against the Person (1999), 41–47 cited in ALRC, *Family Violence Report*, p. 1149.

⁶ ALRC, *Family Violence Report*, p. 1148.

Women, that legislation should define consent as ‘unequivocal and voluntary agreement’ and that onus should be on the defendant to prove that consent was given.⁷

A key factor raised in the ALRC report was that the introduction of a nationally consistent, positive definition of consent, would provide legal clarity and set a benchmark for appropriate sexual behaviour.⁸ Further, it was considered by the Australian Institute of Family Studies as an important legislative step because it would contribute to ‘a shift in how the offence of sexual assault is understood’ in Australian society.⁹ The ALRC further noted that a definition of consent based on the concept of agreement ‘properly reflects the two objectives of sexual offences law’ — to protect the sexual autonomy and freedom of choice of two adults.¹⁰

The evidence presented by the ALRC aligns with feminist research on the experiences of survivors/victims of sexual assault in the criminal justice system — that ‘the historical treatment of sexual offences, and particularly consent, is often said to epitomise the justice system’s inherent bias against women’.¹¹ According to reports from the ACT Victims of Crime Coordinator, survivors/victims of sexual assault are frequently disappointed by the outcome of their cases due to no conviction or because they do not reach prosecution.¹² Furthermore, survivors/victims report feeling traumatised and judged by the experience of being in court and report that their transition from being a survivor/victim to a witness in their own sexual assault case was ‘disempowering and confusing’.¹³

However, as noted by the ALRC, the Victorian Law Reform Commission and feminist research, decades of policy and legal reform to improve responses to the needs of sexual assault survivors/victims has resulted in very little change, both for conviction rates and for the experience of complainants.¹⁴ Despite these shortcomings of the criminal justice system for survivors/victims of sexual assault, YWCA Canberra considers the ALRC’s recommendation 25—4 for all jurisdictions to ‘include a statutory definition of consent based on the concept of a free and voluntary agreement’ should be enacted in the ACT.¹⁵ This would enable the law in the ACT to reflect the benchmark of appropriate sexual behavior, meet the key objectives of sexual assault law and bring the ACT in line with all other states and territories on this issue.¹⁶ For this reason, YWCA Canberra supports the inclusion of a positive definition of consent as outlined in the exposure draft of the *Crimes (Consent) Amendment Bill 2018*.

⁷ ALRC, *Family Violence Report*, p. 1148; United Nations Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women* (2009), 27 cited in ALRC, *Family Violence Report*, p. 1148.

⁸ ALRC, *Family Violence Report*, p. 1147; Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 33, 35 cited in ALRC, *Family Violence Report*, p. 1147.

⁹ Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010 cited in ALRC, *Family Violence Report*, p. 1149.

¹⁰ Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 43 cited in ALRC, *Family Violence Report*, p. 1150.

¹¹ AWAVA, *Sexual Violence Issues Paper*, p. 12.

¹² ACT Victims of Crime Coordinator (2009) *A rollercoaster ride: Victims of sexual assault – their experiences with and views about the criminal justice process in the ACT*, Canberra: ACT Government cited in K. Daly, (2011) *Conventional and innovative responses to sexual violence* (ACSSA Issues) Melbourne: Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, p. 7.

¹³ ACT Victims of Crime Coordinator (2009) *A rollercoaster ride: Victims of sexual assault – their experiences with and views about the criminal justice process in the ACT*, Canberra: ACT Government cited in K. Daly, (2011) *Conventional and innovative responses to sexual violence* (ACSSA Issues) Melbourne: Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, p. 7.

¹⁴ AWAVA, *Sexual Violence Issues Paper*, pp. 13-14; Victorian Law Reform Commission (2003), *Sexual Offences: Interim Report*, Section 4.4 cited in AWAVA, *Sexual Violence Issues Paper*, p. 13; ALRC, *Family Violence Report*, p. 1115 cited in AWAVA, *Sexual Violence Issues Paper*, p. 13.

¹⁵ ALRC, *Family Violence Report*, p. 1150.

¹⁶ See ALRC, *Family Violence Report*, pp. 1147, 1148; Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 33, 35, 43 cited in ALRC, *Family Violence Report*, pp. 1147, 1150.

Sexual violence, consent and diverse groups of women

The majority of sexual assaults against women are perpetrated by male family members, former partners, friends or acquaintances.¹⁷ However, despite the poor conviction rates for sexual assault overall, case law demonstrates that justice through the courts is extremely difficult for women who experience intimate partner or family violence, who have mental health difficulties or a criminal record.¹⁸ Similarly, success in the criminal justice system is equally as difficult for cases where the victim did not sustain physical injuries, did not physically resist their attacker or where the victim was heavily intoxicated (but not unconscious).¹⁹ As commentators have identified, the outcomes of sexual assault criminal prosecutions perpetuates the stereotype of the “real rape” which ‘continues to disqualify the majority of women and many members of highly vulnerable groups who experience sexual assault from securing legal redress’.²⁰

The conviction rates statistics are extremely concerning in a context where one in four Australian women have experienced intimate partner violence.²¹ Women at greater risk of family, domestic and/or sexual violence include those most vulnerable — women with disability, Aboriginal and Torres Strait Islander women, young women and women separating from partners.²²

According to the Women’s Services Network, many women (especially those experiencing family and/or intimate partner violence) do not recognise that they have experienced sexual assault or abuse, until a worker provides a definition for them.²³ However, understanding what sexual violence is and recognising their experience is only the first step for many survivors. Alternative pathways to justice for sexual assault victims/survivors are increasingly being explored by law reformers and scholars.²⁴ It is important for women most vulnerable to sexual assault to be consulted regarding how the justice system may be able to effectively address their needs.²⁵

For this reason, YWCA Canberra recommends that any legislative reform is accompanied by consultation with Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women and women with disability to determine the specialist support most appropriate to their needs.

¹⁷ Larcombe, W, ‘Rethinking Rape Law Reform: Challenges and Possibilities’ in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 146.

¹⁸ Larcombe, W, ‘Rethinking Rape Law Reform: Challenges and Possibilities’ in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, pp. 146-147.

¹⁹ Larcombe, W, ‘Rethinking Rape Law Reform: Challenges and Possibilities’ in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, pp. 146-147.

²⁰ Larcombe, W, ‘Rethinking Rape Law Reform: Challenges and Possibilities’ in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 147; S. Estrich, *Real Rape* (1987) Harvard University Press: Harvard cited in Larcombe, W, ‘Rethinking Rape Law Reform: Challenges and Possibilities’ in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 147.

²¹ Australia’s National Research Organisation for Women’s Safety, Personal Safety Survey 2016: Fact Sheet, accessed at <https://anrows.org.au/node/1462> on 22 March 2018.

²² Note: There is limited data available regarding the prevalence of sexual assault in the ACT. See: ACT Victims of Crime Coordinator (2009) *A rollercoaster ride: Victims of sexual assault – their experiences with and views about the criminal justice process in the ACT*, Canberra: ACT Government, p. 5; Australian Institute of Health and Welfare (AIHW), (2018) *Family, domestic and sexual violence in Australia 2018*, Cat. no. FDV 2. Canberra: AIHW, pp. x, 31.

²³ WESNET – The Women’s Services Network, *Submission FV 217*, 2010, cited in ALRC *Family Violence Report*, p. 1193.

²⁴ Larcombe, W, ‘Rethinking Rape Law Reform: Challenges and Possibilities’ in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 151.

²⁵ Larcombe, W, ‘Rethinking Rape Law Reform: Challenges and Possibilities’ in Levy, R et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) ANU Press: Canberra, p. 151.

Legislative reform supported by educational public awareness campaigns

In response to alarming figures of sexual assault on college campuses²⁶, the California state legislature enacted positive consent legislation in 2014. The law requires all state colleges, receiving public funding, to use a 'yes-means-yes' standard when investigating on-campus assaults. The Californian legislation explicitly states, "lack of protest or resistance does not mean consent, nor does silence mean consent".²⁷

Significantly however, since introducing this initial college focused reform, additional legislation has been passed placing affirmative consent into the state's high school curriculum. The focus on high-school students acknowledges that attitudes towards sex and gender begin well before students enrol at college and that early intervention is the most effective route to short circuiting inappropriate behaviours.

Legal and policy reform in isolation are also not enough to improve the experiences of sexual assault survivors/victims in the criminal justice system and/or increase conviction rates. For example, Daly has found that education campaigns targeted at challenging gender norms and violence against women are likely to be more successful at delivering outcomes.²⁸ Similarly, Larcombe has found that without targeted education or 'strict legislative guidance' (including for those included in juries) understandings of consent will continue to be viewed through 'the conventional legal construction of consent as mental permission'.²⁹

The need for consent education contextualised in broader educational programs challenging gender norms is also central to Our Watch's plan of action to eliminate violence against women.³⁰ Their research has found that gender inequality and unequal gender norms are key determinants of violence against women. However, their research has also found that violence is preventable through mutually reinforcing public education campaigns, programs, policy and legislative responses.³¹ In their evidence paper on the inclusion of Respectful Relationships education in schools in Australia, Our Watch established that the education of children and young people in how to develop and maintain respectful relationships is essential to achieve the results of the *National Plan to Reduce Violence Against Women and their Children (2010-2022)*.³²

In considering the social implications of the proposed amendment YWCA Canberra believes that, in conjunction with public education campaigns, the proposed legislative reform will serve to instill awareness and responsibilities about appropriate behaviour in intimate relationships, particularly amongst young people who may have a limited reference point to draw upon.

For this reason, YWCA Canberra recommends that to support the inclusion of a positive definition of consent in the *Crimes Act 1900 (ACT)* and to successfully implement the intentions of the Bill in the community, the ACT government should:

²⁶ Association of American Universities (2015) *Report on the AAU campus climate survey on sexual assault and sexual misconduct*, Prepared by Westat: Maryland.

²⁷ SB967 Student safety: sexual assault 2014 (California) s. 67386.1. Available at https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201320140SB967

²⁸ K. Daly, (2011) *Conventional and innovative responses to sexual violence* (ACSSA Issues) Melbourne: Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, cited in AWAVA, *Sexual Violence Issues Paper*, p. 14.

²⁹ Larcombe, W et al, 'I think it's rape and I think he would be found guilty: Focus group perceptions of (un)reasonable belief in consent in rape law', *Social and Legal Studies* (2016) Vol 25(5), p. 614.

³⁰ Our Watch, Australia's National Research Organisation for Women's Safety and VicHealth (2015) *Change the Story: A shared framework for the primary prevention of violence against women and the children in Australia*, Our Watch: Melbourne.

³¹ Our Watch, Australia's National Research Organisation for Women's Safety and VicHealth (2015) *Change the Story: A shared framework for the primary prevention of violence against women and the children in Australia*, Our Watch: Melbourne.

³² Our Watch, (2015) *Evidence Paper: Respectful Relationships Education in Schools*, 2015, p. 29.

- fund the implementation of Respectful Relationships education for all students from kindergarten to year 12.

Young people, consent and the “2-year rule”

The issue of consent, particularly in relation to sexual conduct, for young people is a complex legal and social concept.³³ According to the ACT Human Rights Commission (ACT HRC), the issue of consent for children and young people ‘will raise issues of maturity and capacity’.³⁴ However, as noted by the ACT HRC and other commentators, any legislation must strike the right balance between respecting young people’s autonomy and protecting their vulnerability without criminalising age-appropriate sexual exploration with their peers.³⁵

In YWCA Canberra’s submission in response to the ACT Greens *Crimes (Invasions of Privacy) Amendment Bill 2017*, we supported the introduction of the “2-year rule” for young people engaging in consensual sexual activity to protect them from criminalisation.³⁶ However, in supporting this change, we also noted that young people need to be provided with holistic sexual education, such as the Respectful Relationships curriculum, which specifically address consent, boundaries in relationships, power dynamics and gender stereotypes.³⁷ Evidence for this stems from research which has found that young people are deeply persuaded by the gendered behaviours, norms of their peers and social environments and that relationships between two young people under the age of consent can also be unequal, non-consensual or coercive.³⁸

Accordingly, YWCA Canberra considers that education, relating to the definition of consent in sexual assault provisions as well as the meaning of the 2-year rule for young people, is critical to prevent the criminalisation of young people engaging the consensual sexual conduct. We similarly recommend education for young people regarding appropriate and legal sexual conduct (as per Respectful Relationships curriculum).³⁹ As noted by Our Watch’s research, violence against women and unequal gender norms can be altered by strategic educational campaigns and programs challenging the root cause of gender-based violence.⁴⁰

Conclusion

³³ ACT Human Rights Commission, Response to ACT Greens Crimes (Invasions of Privacy) Amendment Bill 2017, accessed at http://hrc.act.gov.au/wp-content/uploads/2017/06/Caroline-Le-Couteur-MLA-Crimes-Invasion-of-Privacy-Amendment-Bill_HRC-comments.pdf on 22 March 2018, p. 2.

³⁴ ACT Human Rights Commission, Response to ACT Greens Crimes (Invasions of Privacy) Amendment Bill 2017, accessed at http://hrc.act.gov.au/wp-content/uploads/2017/06/Caroline-Le-Couteur-MLA-Crimes-Invasion-of-Privacy-Amendment-Bill_HRC-comments.pdf on 22 March 2018, p. 2.

³⁵ ACT Human Rights Commission, Response to ACT Greens Crimes (Invasions of Privacy) Amendment Bill 2017, accessed at http://hrc.act.gov.au/wp-content/uploads/2017/06/Caroline-Le-Couteur-MLA-Crimes-Invasion-of-Privacy-Amendment-Bill_HRC-comments.pdf on 22 March 2018, p. 2; Australian Institute of Family Studies, *CFCA Resource Sheet: Age of consent laws*, July 2017, p. 4.

³⁶ YWCA Canberra, *Submission on the Invasion of Privacy and Technology-Facilitated Abuse*, 2017 at <https://ywca-canberra.org.au/wp-content/uploads/2014/08/Submission-on-the-Invasion-of-Privacy-Technology-Facilitated-Abuse1.pdf>, p. 5.

³⁷ YWCA Canberra, *Submission on the Invasion of Privacy and Technology-Facilitated Abuse*, 2017 at <https://ywca-canberra.org.au/wp-content/uploads/2014/08/Submission-on-the-Invasion-of-Privacy-Technology-Facilitated-Abuse1.pdf>, p. 5.

³⁸ M. Templeton et al, ‘A systematic review and qualitative synthesis of adolescents’ views of sexual readiness’ *Journal of Advanced Nursing*, 73(6), p. 1294; Australian Institute of Family Studies, *CFCA Resource Sheet: Age of consent laws*, July 2017, p. 5; YWCA Canberra, *Submission on the Invasion of Privacy and Technology-Facilitated Abuse*, 2017 at <https://ywca-canberra.org.au/wp-content/uploads/2014/08/Submission-on-the-Invasion-of-Privacy-Technology-Facilitated-Abuse1.pdf>, pp. 5-6.

³⁹ See also YWCA Canberra, *Submission on the Invasion of Privacy and Technology-Facilitated Abuse*, 2017 at <https://ywca-canberra.org.au/wp-content/uploads/2014/08/Submission-on-the-Invasion-of-Privacy-Technology-Facilitated-Abuse1.pdf>, pp. 5-6.

⁴⁰ Our Watch, Australia’s National Research Organisation for Women’s Safety and VicHealth (2015) *Change the Story: A shared framework for the primary prevention of violence against women and the children in Australia*, Our Watch: Melbourne.

The introduction of a positive definition of consent in the *Crimes Act 1900* (ACT) would be a progressive step forward for gender equality in the ACT. It would ensure that the sexual assault provision of the Act would meet the key objectives of sexual assault law, provide the ACT community with a benchmark for appropriate sexual behavior and bring the ACT in line with the national standard.⁴¹

However, as noted in this submission, significant educative programs and campaigns for the public, vulnerable groups of women and young people need to accompany legislative changes to ensure that consent is widely understood. Furthermore, to support sexual assault survivors/victims in reporting rape and in improving conviction rates, the ACT government must consult with those women most vulnerable to sexual assault for the criminal justice system to effectively respond to their needs.

I look forward to the results of this inquiry and welcome the opportunity to participate in a public hearing in relation to this submission.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Frances Crimmins', written in black ink on a white background.

Frances Crimmins

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⁴¹ See ALRC, *Family Violence Report*, pp. 1147, 1148; Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 33, 35, 43 cited in ALRC, *Family Violence Report*, pp. 1147, 1150.