

**2021**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (STEALTHING) AMENDMENT BILL 2021**

**EXPLANATORY STATEMENT**

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## **Crimes (Stealthing) Amendment Bill 2021**

This explanatory statement relates to the *Crimes (Stealthing) Amendment Bill 2021* (the Bill). It has been prepared to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

This explanatory statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

### **Background**

Stealthing is the non-consensual removal of a condom during sexual intercourse.

According to a recent joint study by the Melbourne Sexual Health Centre and Monash University, one in three women and nearly one in five men in Australia have reported being stealthed.

Stealthing risks both physical and psychological health, including the transmission of sexually transmitted infections and disease, unplanned pregnancies, depression, anxiety, and in some cases post-traumatic stress disorder.

Stealthing would require ‘fresh consent’ for intercourse to continue on a consensual basis after the condom has been removed.

### **Overview**

The Bill amends the *Crimes Act 1900* to expressly define stealthing as a factor that would negate consent.

The Bill inserts new paragraph 67 (1) (ga) to expressly state that consent is negated if the consent is caused by an intentional misrepresentation by the other person about the use of a condom.

New paragraph 67 (1) (ga) would ensure that where consent is given on the basis that a condom be used during intercourse, and the alleged offender either removes the condom or does not put on a condom at all, and intentionally does not inform the other person, then the other person’s consent is taken to be negated.

### **Human Rights Considerations**

This human rights consideration will provide an overview of the human rights that may be engaged in this Bill.

Broadly, the Bill engages, and places limitations on, the following *Human Rights Act 2004* (HR Act) rights:

- Section 8 – Recognition and equality before the law.

The Bill also engages, and supports, the following HR Act rights:

- Section 18 – Right to liberty and security of person; and
- Section 21 – Right to a fair trial.

### **Rights engaged and supported**

The Bill engages and supports the rights to liberty and security of person (section 18 HR Act), and fair trial (section 21 HR Act). The purpose of the Bill is to expressly define stealthing as a factor that would negate consent. Stealthing is an emerging area within criminal law, and it is unclear whether it is currently illegal in the ACT.

Expressly stating that consent is negated if the consent is caused by an intentional misrepresentation by the other person about the use of a condom will remove any doubt as to whether stealthing is captured under existing laws. By making this expressly clear, this enhances the right to liberty and security of person under section 18 of the HR Act.

The Bill also engages the right to a fair trial under section 21 (1) of the HR Act. The Bill provides further clarity to this area of criminal law, and does not change or limit a person's rights to have their case handled in accordance with procedural fairness.

### **Rights engaged and limited**

#### **Section 8 – Recognition and equality before the law**

##### **The nature of the right affected (s 28 (2) (a))**

Section 8 of the HR Act states that:

- (1) *Everyone has the right to recognition as a person before the law.*
- (2) *Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.*
- (3) *Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.*

The Bill potentially engages section 8 of the HR Act, by stating that consent is negated if the consent is caused by an intentional misrepresentation by the other person about the use of a condom. The purpose of the Bill is to strengthen existing consent laws for the benefit of everyone. However, the inclusion of the term “condom” in new paragraph 67 (1) (ga) generally relates to males, as the primary users of condoms.

##### **The importance of the purpose of the limitation (s 28 (2) (b))**

The purpose of this potential limitation is to make it clear that an intentional misrepresentation about the use of a condom will negate consent. This clarification

of the existing consent provision is important because it provides much needed clarity to this area of criminal law.

*The nature and extent of the limitation (s 28 (2) (c))*

The nature and extent of the potential limitation is that the new provision may, in practice, primarily target males as the primary users of condoms.

*The relationship between the limitation and its purpose (s 28 (2) (d))*

The limitation is necessary to achieve the purpose of the Bill. The Bill recognises that stealthing is an emerging area within criminal law, and addresses it by expressly stating that consent is negated if the consent is caused by an intentional misrepresentation by the other person about the use of a condom.

*Any less restrictive means reasonably available to achieve the purpose (s 28 (2) (e))*

The limitation on section 8 of the HR Act is justified, and the provision in the Bill that potentially limits this right is the least restrictive means available to achieve the purpose of the Bill. This limitation is consistent with current legislation.

## Clause Notes

### **Clause 1    Name of Act**

This clause sets out the name of the proposed Act as the *Crimes (Stealth) Amendment Act 2021*.

### **Clause 2    Commencement**

This clause provides that the Act will commence the day after its notification on the Legislation Register.

### **Clause 3    Legislation Amended**

This clause states that the Act amends the *Crimes Act 1900*.

### **Clause 4    Consent Paragraph 67 (1) (ga)**

This clause inserts new paragraph 67 (1) (ga) to expressly state that consent is negated if the consent is caused by an intentional misrepresentation by the other person about the use of a condom.

New paragraph 67 (1) (ga) would ensure that where consent is given on the basis that a condom be used during intercourse, and the alleged offender either removes the condom or does not put on a condom at all, and intentionally does not inform the other person, then the other person's consent is taken to be negated.