NORTHERN TERRITORY LAW REFORM COMMITTEE

INQUIRY INTO AFFIRMATIVE CONSENT IN SEXUAL OFFENCES

FINAL REPORT

Report No 49
23 November 2023

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE

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TABLE OF CONTENTS

ABBREVIATIONS

AJA	Aboriginal Justice Agreement
ALRC	Australian Law Reform Commission
ANROWS	Australian National Research Organisation for Women's Safety
CAWLS	Central Australian Women's Legal Service
CLC	Central Land Council
KWILS	Katherine Women's Information & Legal Service
MCCOC	Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General
NCAS	National Community Attitudes towards Violence against Women Survey
NT	Northern Territory
NTAHC	Northern Territory Aids and Hepatitis Council
NTCOSS	Northern Territory Council of Social Services
DPP	Northern Territory Director of Public Prosecutions
NTLAC	Northern Territory Legal Aid Commission
NTPF	Northern Territory Police Force
NTWLS	Northern Territory Women's Legal Service
TEWLS	Top End Women's Legal Service
WLSA	Women's Legal Services Australia
WWDA	Women With Disabilities Australia

RECOMMENDATIONS

RECOMMENDATION 1

The Northern Territory Law Reform Committee ('the Committee') recommends that the definition of consent be amended to reflect that consent means free and voluntary agreement, mutual communication and decision making. That consent must be communicated through words or actions, and a person must take active steps, by words or actions, to find out whether the other person consents before engaging in sexual activity. That consent must be sought and agreed for each sexual act, and a person may, by words or conduct, withdraw consent to a sexual activity at any time, and sexual activity which occurs after consent has been withdrawn occurs without consent.

RECOMMENDATION 2

The Committee recommends that "the person does not say or do anything to communicate consent" be added under the current s 192(2) of the *Criminal Code 1983* (NT) ('the Criminal Code') as a circumstance in which a person does not consent, and that the circumstances which vitiate consent be expanded to explicitly include economic or financial harm, reputational harm, harm to animals or items, harm to the person's employment, sexual harassment and psychological harm to a person's health and safety or harm to the person's family, cultural or community relationships, or a course of action amounting to coercive control.

RECOMMENDATION 3

The Committee recommends that the excuse of mistake of fact established by s 43AW of the Criminal Code should be made inapplicable to sexual offences that include a fault element that the accused knows about or is reckless to the lack of consent.

Alternatively, if the foregoing recommendation is not adopted, s 43AW of the Criminal Code should be amended by providing that an accused person can only rely on a mistake of fact in relation to this fault element for sexual offences if the mistake was reasonable.

RECOMMENDATION 4

The Committee recommends that the Criminal Code be amended to provide that when determining whether a person charged with a sexual offence was reckless as to the lack of consent of the other person, regard must be had to the standard of a reasonable person who is not intoxicated.

RECOMMENDATION 5

The Committee recommends that the Criminal Code be amended to insert a provision along the lines of ss 292 to 292E of the *Criminal Procedure Act 1986* (NSW) in order to address common misconceptions about consent and to ensure a complainant's evidence is assessed fairly and impartially by the tribunal of fact.

RECOMMENDATION 6

The Committee recommends that resources be allocated to develop and maintain a Criminal Trials Bench Book specifically for the Northern Territory.

Chapter I: Introduction to the Inquiry

1.1. Sexual assault is one of the most serious health and welfare problems in Australia. It is estimated that 2 million adult Australians, 80 per cent of them women, have experienced at least one sexual assault since the age of 15.[1] Notwithstanding the resulting widespread and severe harm, the criminal justice system's response has been largely ineffective: it is reported that as few as one per cent of alleged sexual assaults committed in Australia lead to a criminal conviction.[2] In the face of this failure, governments around Australia have in recent years embarked on numerous law reform initiatives, several of which are currently underway, with the objective of improving justice outcomes in sexual offending cases.

1.2. As the Australian Senate Legal and Constitutional Affairs References Committee recently stated:[3]

> *Sexual violence is a national crisis. It is a crisis that disproportionately affects women and young people. It is a crisis the true extent of which we do not know, given how few incidences of sexual violence are reported, and fewer still brought before the courts. However, based on the disturbing results of detailed research and the testimony of victim-survivors, it is a crisis which requires action across the whole of Australian society. The scale of human tragedy is unacceptable. Every Australian has a responsibility to understand the true extent of the crisis and to do everything within their domain to address the issue. Victim-survivors deserve nothing less.*

1.3. For its part, the Northern Territory Government is in the process of reforming sexual offence law in two stages. Firstly, following community consultation, on 27 July 2023 the Legislative Assembly passed the *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023*, which was assented to on 17 August 2023.[4] At the date of this report the legislation has not yet commenced.

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[1] Australian Institute for Health and Welfare, *Sexual Assault in Australia* (August 2020), 1 and 3. Australian Bureau of Statistics, 'Personal Safety, Australia', 15 March 2023, www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release (accessed 23 November 2023).

[2] Patrick Tidmarsh and Gemma Hamilton, *Misconceptions of sexual crimes against adult victims: Barriers to justice*, Australian Institute for Criminology (2020), 4.

[3] Australian Senate Legal and Constitutional Affairs References Committee, *Current and proposed sexual consent laws in Australia* (Commonwealth of Australia, 2023) **(Senate Committee Report),** at [5.2]

[4] Available at https://legislation.nt.gov.au/en/LegislationPortal/Acts/~/link.aspx?_id=9FF8C5FBC42F4780B1048717B8023DA8&_z=z&format=assented.

1.4. In preparation for the second stage of these reforms, the Attorney-General and Minister for Justice the Hon. Chansey Paech MLA asked the Northern Territory Law Reform Committee (the 'Committee') to inquire into the topic of consent in sexual offences. Specifically, the Committee has been asked to report on the following matters:

(i) whether the Northern Territory should adopt 'affirmative consent' to apply in relation to Criminal Code sexual offences;

(ii) if the answer to the first question is yes, what form this should take;

(iii) whether evidence of self-induced intoxication should be able to be taken into consideration in determining an accused's state of mind with respect to consent; and

(iv) whether any other amendments would improve the operation of consent in sexual offences in the Northern Territory.

Overview of the Report

1.5. Chapter 1 deals with matters introductory to the inquiry, including the law reform process. Chapter 2 provides an overview of existing affirmative consent laws in sexual offending in other Australian jurisdictions. In Chapter 3, matters relevant to consent are discussed, and a recommendation is made that the Northern Territory adopt an affirmative consent model. Chapter 4 considers matters relevant to the state of mind of the accused, and in particular, the question of mistake. The Committee recommends that the excuse of mistake of fact established by section 43AW of the *Criminal Code 1983* (NT) ('the Criminal Code') should be made inapplicable to sexual offences that include a fault element that the accused knows about or is reckless to the lack of consent. In Chapter 5, the role, if any, that self-induced intoxication should play when determining whether a person charged with a sexual offence was reckless as to the lack of consent of the other person is discussed. Chapter 6 discusses the role jury directions should play in a trial of a person charged with a sexual offence. Finally, Chapter 7 considers the cost implications of implementing the recommendations for reform contained in this report.

The Law Reform Process

1.6. The Committee is a volunteer, non-statutory body established to advise the Attorney-General on law reform in the Northern Territory. The members of the Committee are noted at the beginning of this report. It is the role of the Committee to

make recommendations for reform of the law relevant to the inquiry. Implementation of such recommendations is a matter for the Northern Territory Government.

1.7. The initial draft of Committee reports is prepared by a sub-committee of the full Committee. In addition, if required as in this inquiry, the sub-committee may second persons with relevant expertise to serve on the sub-committee. The members of the sub-committee for this inquiry are noted at the beginning of this report. This report was approved by a majority of the full Committee before submission to the Attorney-General.

1.8. In recognition of the importance of the subject-matter of this inquiry to the residents of the Northern Territory, a Discussion Paper was prepared to inform submissions to the inquiry. The questions for stakeholder comment contained in the Discussion Paper are attached to this report as Appendix 1.

1.9. The Committee received submissions from:

(i) Central Land Council;
(ii) Australian National Research Organisation for Women's Safety (ANROWS);
(iii) Northern Territory Council of Social Services;
(iv) Northern Territory Police Force;
(v) Women's Legal Services Australia;
(vi) Northern Territory Women's Legal Services;
(vii) Northern Territory Legal Aid Commission;
(viii) North Australian Aboriginal Family Legal Service and Central Australian Aboriginal Family Legal Unit (joint submission);
(ix) Northern Territory Director of Public Prosecutions;
(x) Northern Territory AIDS and Hepatitis Council; and
(xi) Beth Wild, Barrister.

1.10. The Committee also conducted stakeholder consultations attended by representatives from the Criminal Lawyers Association of the Northern Territory and the Northern Territory Bar Association.

Conclusion

1.11. The principal question considered in conducting this inquiry is whether or not the Northern Territory should adopt an "affirmative consent" model, which has been conveniently summarised as follows:[5]

[5] Senate Committee Report, at [1.19], citing ANROWS submission.

> *The affirmative consent model requires individuals to communicate their consent and to take steps to ensure that the other person is also consenting. The model reflects that consent is an ongoing process and must be present for every sexual act. This marks a shift away from a "no means no" model of consent whereby silence can be interpreted as consent. This is important, as victims and survivors may experience the "freeze" response in non-consensual situations and be unable to verbally communicate that they are not consenting.*

1.12. The Committee is mindful of the note of caution sounded by the Law Council of Australia:[6]

> *The area of sexual offences has been subject to significant and ongoing reform across multiple jurisdictions, particularly in the last decade. Changes introduced by legislation take time to have practical effect on criminal charges before the courts…[I]t can take four to five years to ascertain whether legislative changes are having their intended effect…The experience of practitioners in this area is that frequent legislative amendment of sexual assault offence provisions and the definition of consent has resulted in the diminished applicability of case law guidance in interpreting the meaning of key provisions. This has the potential to undermine legal certainty for all parties involved. It is necessary to ensure that any reforms are evidence-based, principled, carefully considered to avoid unintended consequences, and designed to minimise the likelihood of further legislative tinkering.*

1.13. However, the Committee has determined to recommend that the Northern Territory adopt an affirmative consent model, in part because of its recognition of the importance and value of harmonising principles of criminal law across Australia.[7]

1.14. Although this Report deals primarily with the opportunities to address the crisis of sexual violence in our community by means of statutory reform of the Criminal Code, the Committee is firmly of the view that solutions outside the criminal justice system should also be explored. As stated by the Senate Standing Committee: [8]

> *[O]ne such alternative could be restorative justice options. The [Senate] committee understands this may be a controversial suggestion; however, the committee accepts that it could offer some victim-survivors the redress and justice that they are seeking. The choice of whether to utilise restorative justice must be that of the victim-survivor. It is also essential that the implementation and use of restorative justice mechanisms does not come at the expense of genuine reform of the criminal justice system.*

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[6] Cited in Senate Committee Report, at [2.62].
[7] See, for example, Guzyal Hill and Jonathan Crowe, "Harmonising Sexual Consent Law in Australia: Goals, Risks and Challenges" (2024) 49(3) *Monash University Law Review (forthcoming).*
[8] Senate Committee Report, at [5.47].

1.15. If the recommendations in this Report are adopted, it is likely that in some instances, sexual misconduct that does not currently result in conviction will result in conviction, and that more persons accused of sexual offences will be convicted. In at least some such cases, it is reasonably foreseeable that the moral culpability of the offender will be toward the lower end of the range of seriousness for offences of this type. In the Northern Territory, the offence of sexual intercourse without consent carries a maximum penalty of life imprisonment. In its *Mandatory Sentencing and Community-Based Sentencing Options Report* (2021), the Committee recommended that the mandatory 70 per cent non-parole period for an offence against s 192(3) of the Criminal Code be repealed (Recommendation 4-5). In the view of the Committee, in the context of the current Report that recommendation is all the more important, and should be given renewed consideration.

1.16. A concern frequently expressed both to this Committee and to bodies conducting similar inquiries around Australia has been that the establishment of an affirmative consent model for sexual offences may derogate from the right to silence, the presumption of innocence, and the onus on the Crown to prove guilt beyond reasonable doubt.[9] In the view of the Committee, any statutory reforms arising from this Report should be carefully drafted so as not to impair the enjoyment of these protections by persons accused of serious criminal offences, which are fundamental features of the Australian criminal justice system.

[9] For example, see the Senate Report, at [2.41] to [2.44].

Chapter II: Overview of the Existing Law for Affirmative Consent

2.1. Affirmative consent laws have been adopted in four jurisdictions,[10] a fifth jurisdiction is in the process of establishing an affirmative consent model,[11] and the issue is under consideration in a sixth jurisdiction.[12] Where affirmative consent laws have been adopted in interstate jurisdictions, legislation generally includes similar matters but also provides that consent involves some or all of the following additional features:

- consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity;

- consent to sexual activity can be withdrawn at any time by words or conduct;

- a person does not consent to a sexual activity if —

    - the person does not say or do anything to communicate consent;

    - the person participates in the sexual activity because of force, fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of —
        - when the force or the conduct giving rise to the fear occurs, or
        - whether it occurs as a single instance or as part of an ongoing pattern; or

    - the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—
        - when the coercion, blackmail or intimidation occurs, or
        - whether it occurs as a single instance or as part of an ongoing pattern; or

    - the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence; or

    - the person participates in the sexual activity because of a fraudulent inducement (which does not include a misrepresentation about a person's income, wealth or feelings); or

[10] New South Wales, Victoria and the Australian Capital Territory introduced affirmative consent models in 2022, and Tasmania introduced an affirmative consent model in 2004.
[11] On 11 October 2023, Queensland introduced the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023*.
[12] Whether affirmative consent laws should be introduced in Western Australia is currently being considered by the Law Reform Commission of Western Australia: Law Reform Commission of Western Australia, Project 113: Sexual Offences Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact (December 2022) available at: https://www.wa.gov.au/system/files/2022-12/LRC-Project-113-Discussion-Paper-Vol-1.pdf.

- consent is obtained by a mistaken belief, induced by the accused, that there will be monetary exchange for the sexual act;

- the list of factors relevant to determining consent does not limit the grounds on which it may be established that a person does not consent to the sexual activity.

2.2. By way of example, the affirmative consent legislation in force in New South Wales (NSW) is set out below. The salient differences in approach to affirmative consent laws in Victoria, the Australian Capital Territory (ACT) and Tasmania are then discussed. First, the existing consent laws passed in the Northern Territory are discussed.

Northern Territory

2.3. When it comes into force, the *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* (NT) will substantially change the law relating to consent. Currently, section 192 of the Criminal Code, which establishes the offence of sexual intercourse or gross indecency without consent, defines "consent" as follows:

> (1) *For this section, consent means free and voluntary agreement.*
>
> (2) *Circumstances in which a person does not consent to sexual intercourse or an act of gross indecency include circumstances where:*
>
> (a) *the person submits because of force, fear of force, or fear of harm of any type, to himself or herself or another person;*
>
> (b) *the person submits because he or she is unlawfully detained;*
>
> (c) *the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing;*
>
> (d) *the person is incapable of understanding the sexual nature of the act;*
>
> (e) *the person is mistaken about the sexual nature of the act or the identity of the other person;*
>
> (f) *the person mistakenly believes that the act is for medical or hygienic purposes; or*
>
> (g) *the person submits because of a false representation as to the nature or purpose of the act.*

2.4. Once the *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* commences, section 192 of the Criminal Code will be repealed,[13] and a new "Part VIA – Sexual Offences", will be inserted after section 208F.[14] "Division 1 – Interpretation" of Part VIA will contain a new definition of consent in section 208GA. The definition provides that:

> (1) *"Consent", to a sexual act, means free and voluntary agreement to the act.*
>
> (2) *Circumstances in which a person does not consent to a sexual act include circumstances in which:*
>
> (a) *the person submits to the act because of force or the fear to the person or to someone else; or*
>
> (b) *the person submits to the act because the person is unlawfully detained; or*
>
> (c) *the person submits to the act because of a false representation as to the nature of the proposed act; or*
>
> (d) *the person is asleep or unconscious or is so affected by alcohol, a drug or another substance as to be incapable of consenting; or*
>
> (e) *the person is incapable of understanding the sexual nature of the act; or*
>
> (f) *the person is mistaken about the sexual nature of the act; or*
>
> (g) *the person is mistaken about the identity of another person involved in the act; or*
>
> (h) *the person consents to the act with a condom, but another person involved in the act does not use or intentionally disrupts or removes the condom without the person's consent.*

2.5. Of note, the new section 208GA(2)(h) of the Criminal Code will criminalise conduct colloquially known as "stealthing". Stealthing is the secret removal or sabotaging of a condom without the consent of the other person to participating in sexual activity without a condom.

2.6. Under current Northern Territory law, "harm" is defined in section 1A of the Criminal Code to include serious harm to mental health and physical harm to the person or another person. It does not include economic or financial harm, reputational harm, harm to animals or items, harm to the person's employment, sexual harassment, or harm to the person's family, cultural or community relationships, or a course of action amounting to coercive control.

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[13] *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023*, s 11.
[14] *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023*, s 13.

2.7. Section 192A of the Criminal Code requires that in relevant cases the judge must direct the jury that a person is not to be regarded as having consented to an act of sexual intercourse or to an act of gross indecency only because the person:

- did not protest or physically resist;
- did not sustain physical injury; or
- had, on that or an earlier occasion, consented to sexual intercourse or an act of gross indecency whether or not of the same type, with the accused.

2.8. Once the *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* comes into force, the following will be added to the above list, "the person did not say or do anything to indicate that the person did not consent".

New South Wales

2.9. In September 2020, the New South Wales Law Reform Commission released its report, *Consent in Relation to Sexual Offences* (Report 148), which advocated for the adoption of affirmative consent laws. In 2021, such laws were adopted in NSW when Subdivision 1A was inserted into the *Crimes Act 1900* (NSW) pursuant to the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW).

2.10. Section 61HF of the *Crimes Act 1900* (NSW) provides that:

> *An objective of [Subdivision 1A] is to recognise the following –*
>
> (a) *every person has a right to choose whether or not to participate in a sexual activity,*
>
> (b) *consent to a sexual activity is not to be presumed,*
>
> (c) *consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.*

2.11. Section 61HI of the *Crimes Act 1900* (NSW) defines consent to a sexual activity as follows:

> (1) *A person*
>
> *"consents" to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.*
>
> (2) *A person may, by words or conduct, withdraw consent to a sexual activity at any time.*

(3) *Sexual activity that occurs after consent has been withdrawn occurs without consent.*

(4) *A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.*

(5) *A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. …*

(6) *A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with –*

(a) *that person on another occasion, or*

(b) *another person on that or another occasion.*

2.12. The circumstances in which a person does not consent to sexual activity are set out in section 61HJ of the *Crimes Act 1900* (NSW) as follows:

(1) *A person does not consent to a sexual activity if –*

(a) *the person does not say or do anything to communicate consent, or*

(b) *the person does not have the capacity to consent to the sexual activity, or*

(c) *the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or*

(d) *the person is unconscious or asleep, or*

(e) *the person participates in the sexual activity because of force, fear or fear of serious harm of any kind to the person, another person, an animal or property, regardless of –*

(i) *when the force or the conduct giving rise to the fear occurs, or*

(ii) *whether it occurs as a single instance or a part of an ongoing pattern, or*

(f) *the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of –*

(i) *when the coercion, blackmail or intimidation occurs, or*

(ii) *whether it occurs as a single instance or as part of an ongoing pattern, or*

(g) *the person participates in the sexual activity because the person or another person is unlawfully detained, or*

(h) *the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence, or*

(i) *the person participates in the sexual activity because the person is mistaken about –*

(i) *the nature of the sexual activity, or*

(ii) *the purpose of the sexual activity, including whether the sexual activity is for health, hygienic or cosmetic purposes, or*

(j) *the person participates in the sexual activity with another person because the person is mistaken –*

(i) *about the identity of the other person, or*

(ii) *that the person is married to the other person, or*

(k) *the person participates in the sexual activity because of a fraudulent inducement.*

2.13. The circumstances set out in section 61HJ are not exhaustive.[15] Further, "fraudulent inducement" as used in section 61HJ(1)(k) "does not include a misrepresentation about a person's income, wealth or feelings".[16]

Victoria

2.14. In 2022, consent laws in sexual offences were amended by the passage of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic). Section 5 of the amending Act substituted a new section 36 of the *Crimes Act 1958* (Vic) and inserted a new section 36AA. The latter delineates the circumstances when a person does not consent to an act.

2.15. Unlike NSW, in the *Crimes Act 1958* (Vic) the withdrawal of consent by words or conduct at any time is found in section 36AA rather than in the general consent provision (section 36). Further, unlike the NSW legislation, the following enumerated circumstances set out in the provision are identified as examples of the type of harm that can be done to a person, rather than stand-alone acts vitiating consent: [17]

- economic or financial harm;
- reputational harm;
- harm to the person's family, cultural or community relationships;
- harm to the person's employment;
- family violence involving psychological abuse or harm to mental health;
- sexual harassment.

[15] *Crimes Act 1900* (NSW) s 61HJ(2).
[16] *Crimes Act 1900* (NSW) s 61HJ(3).
[17] *Crimes Act 1958* (Vic) (1)(b), Examples (a)-(f).

2.16. In addition, whereas section 61HJ(1)(k) of the *Crimes Act 1900* (NSW) identifies a person's participation in sexual activity because of a fraudulent inducement as a circumstance vitiating consent, section 36AA(1)(m) of the *Crimes Act 1958* (Vic), specifies that a false or misleading inducement is an example of harm relevant only in the context of commercial sexual services. Finally, section 36AA(1)(n) contains a provision relating to an act involving an animal which is not replicated in section 61HJ of the *Crimes Act 1900* (NSW).

Australian Capital Territory

2.17. In the ACT, the meaning of consent is defined in section 50B of the *Crimes Act 1900* (ACT). When a person does not consent to an act is defined in section 67.

2.18. Like Victoria, and unlike NSW, the withdrawal of agreement to an act at any time either before or during the act is found in section 67 rather than in the definition of consent in section 50B. Like section 61HJ(1) of the *Crimes Act 1900* (NSW), and unlike section 36AA(1)(b) of the *Crimes Act 1958* (Vic), section 67(1) of the *Crimes Act 1900* (ACT) includes the circumstances specified in the Victorian provision as examples of types of harm as stand-alone matters vitiating consent.

Tasmania

2.19. While it is generally accepted that Tasmania has adopted an affirmative consent model, it varies substantially from such models in force in NSW, Victoria and the ACT.[18] In fact, the definition of consent in section 2A of the *Criminal Code 1924* (Tas) aligns more closely with the Northern Territory amendments to the Criminal Code brought about by the *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023*, than to the existing affirmative consent provisions in NSW, Victoria and the ACT.

2.20. While section 2A(2)(a) of the *Criminal Code 1924* (Tas) provides that "a person does not freely agree to an act if the person … does not say or do anything to communicate consent", no provision is made in the legislation for the withdrawal of consent at any time. In this regard, the Tasmanian legislation is weaker than section 348(4) of the *Criminal Code 1899* (Qld). The former does, however, criminalise stealthing,[19] which is not yet a feature of Queensland criminal law at the time of this report.[20]

[18] Legal Aid NSW, Current and proposed sexual consent laws in Australia (Legal Aid NSW submission to the Legal and Constitutional Affairs References Committee, May 2023) [2.1].
[19] *Criminal Code 1924* (Tas), s 2A(2A).
[20] The *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* if passed, intends to recognise "stealthing" as rape.

Chapter III: Affirmative Consent

3.1. As discussed in the previous chapter, many other jurisdictions have moved to an affirmative model of consent, or have committed to introduce such a model. While there are differences in implementation in those States or Territories, there is consistency in the requirement that consent involve affirmative communication by words or actions.

Responses Received to the Discussion Paper

3.2. The submissions received overwhelmingly favoured the introduction of an affirmative consent model in the Northern Territory (NT). The Central Land Council (CLC), the NT Council of Social Services (NTCOSS), Australia's National Research Organisation for Women's Safety (ANROWS), Women's Legal Services Australia (WLSA), the NT Police Force (NTPF), NT Women's Legal Service (NTWLS) - comprised of the Central Australian Women's Legal Service (CAWLS), Katherine Women's Information & Legal Service (KWILS), and Top End Women's Legal Service (TEWLS), the NT Aids and Hepatitis Council (NTAHC), the Northern Territory Director of Public Prosecutions (DPP) and the Criminal Lawyers Association of the Northern Territory (CLANT) all expressed support for such a move. The Northern Territory Legal Aid Commission (NTLAC) did not support the introduction of an affirmative consent model, however did express support for a "communicative model of consent". Barrister, Beth Wild, expressed opposition to the introduction of an affirmative consent model.

3.3. NTAHC highlighted the need for an affirmative consent model to include both verbal and non-verbal expressions of consent, so as to not support biases or undermine variants of diverse sexual expression. They also highlighted that an affirmative consent model requiring a person to take active steps in respect of consent would be trauma informed legislation, recognising diverse response to traumatic experiences including 'freeze' or 'fawn' responses. NTAHC also suggested the addition of factors which vitiate consent, in particular suggesting the words 'harm of any type' within the current section 192(2) should explicitly include economic or financial harm, reputational harm, harm to animals or items, harm to the person's employment, sexual harassment, psychosocial hazards and psychological harm to a person's health and safety or harm to the person's family, cultural or community relationships, or a course of action amounting to coercive control.

3.4. ANROWS recommended including affirmative consent as a core component of legislation on consent for sexual offences, noting this should include a requirement that individuals explicitly communicate their consent and take steps to confirm that the other person is consenting. ANROWS highlighted that consent should be seen as an ongoing process, present for every sexual act, which can be withdrawn at any time. In

their submission, an affirmative consent model would involve a shift from a "no means no" model of consent where silence could be interpreted as consent, and where victims and survivors who experience a "freeze" response could be incorrectly interpreted as consenting. In support of their recommendations, ANROWS highlighted that legislative change can serve as an important indicator of acceptable behaviours and as a mechanism to change enduring problematic attitudes towards and understandings of consent, as reflected in troubling statistics from the 2021 the National Community Attitudes towards Violence against Women Survey (NCAS) which ANROWS quoted in their submission.

3.5. Similar to NTAHC, ANROWS recommended expanding the circumstances in which a person does not consent (under the current s 192(2)) to include domestic and family violence, and coercive control, and to expand harm to include harm directed at pets or animals, economic or financial harm, reputational harm, sexual harassment, and harm to the person's family, cultural or community relationships. In particular ANROWS supported the amendment of the law to reflect that recklessness (as to consent) is established where a person does not take any steps to ascertain whether the other person consents. They also raised for consideration the extent to which a mistake of fact (as to consent) intersects with, contradicts and undermines an affirmative consent model. In order to avoid unintended consequences of reform, ANROWS also recommended that services and education be provided to report, respond to and recover from sexual violence.

3.6. The CLC suggested that the definition of consent should be amended to 'free and voluntary agreement throughout the course of conduct.' Consistent with the recommendation of NTAHC and ANROWS, the CLC also suggested that 'coercion', 'intimidation', 'deceit' and 'fraudulent means' should be included as a factors that vitiate consent.

3.7. NTCOSS highlighted that an affirmative consent model is consistent with the United Nations Division for the Advancement of Women's recommendations that legislation should approach consent as an 'unequivocal and voluntary agreement' and that the accused should be required to prove the steps taken to 'ascertain whether the complainant/survivor was consenting.' They also noted that an affirmative consent model reflects current societal standards where consent is a continuous process of mutual decision-making. NTCOSS support the introduction of a model whereby a person must enthusiastically and clearly communicate their willingness to engage in sexual activity through words or actions, noting such a model involves ongoing and mutual communication, and where a passive response is not considered consent.

3.8. NT Police highlighted that placing an onus on a person to actively take steps to ascertain consent is critical in shifting the focus away from the alleged victim and onto what steps were taken to ascertain consent. In their submission, requiring a person to exercise 'consideration' of steps taken to ascertain consent is an unacceptably low threshold, which diminishes the severity of sexual offending.

3.9. WLSA highlighted the need for nationally consistent, strong models of affirmative consent, which would send a powerful message to the community about appropriate sexual conduct, contribute to cultural change, better serve victim-survivors and deter perpetrators. In WLSA's view, the Victorian approach to affirmative consent is the current best practice model, and a requirement to 'say or do something' to check where there is consent. They also support a consent model where consent can be vitiated in the context of family and domestic violence, particularly where sexual activity is submitted to as a result of fear, harm, coercion or intimidation, regardless of when it occurs or whether it is a single incident or part of an ongoing pattern. WLSA noted that in England, Wales and Northern Ireland consent is defined as occurring when a person 'agrees by choice, and had the freedom and capacity to make that choice.'

3.10. NTWLS support an affirmative and communicative consent model for all sexual acts and encounters, noting that fundamental to this position is the understanding that lawful sexual activity can occur only in circumstances where all parties provide free and clear, genuinely voluntary consent to that activity. They advocate that a definition of consent which falls short of affirmative consent is not appropriate and perpetuates patriarchal views that persons are not entitled to be fully in control of their bodies and what happens to them, and that it endorses a view where it is assumed that a victim-survivor was agreeable to, or at least ambivalent towards the sexual encounter. NTWLS submitted that any affirmative consent model introduced should reflect affirmative and clearly communicated, genuinely voluntary consent, which is an ongoing concern throughout a sexual encounter, and where consent should not be assumed or presumed. NTWLS advocate that intercourse which is engaged in despite there being uncertainty should be considered non-consensual. Finally, they support an expanded definition of harm.

3.11. Ms Wild, Barrister, opposed the introduction of an affirmative consent model, submitting that the current law is adequate, advocating that where intoxication was not a factor, people can read each other's cues and it is rarely ambiguous. Ms Wild's position is that where there is ambivalence on the part of one party, it should not result in a conviction for sexual offending.

3.12. NTLAC expressed support for a communicative model of consent, however did not support a move to an affirmative consent model, citing that the current laws are sufficient, that the move would put the focus on the accused's conduct thereby risking

a reversal of the onus of proof, and drawing attention to the potential impact on First Nations accused. In particular NTLAC highlighted that nuances in the definition of consent may cause disadvantage during the Court process to First Nations accused when mounting a defence, giving evidence or following the evidence or proceedings generally.

3.13. NAAFLS and CAAFLU prepared a joint response, noting that Aboriginal women are most impacted by sexual offences. The Australian Bureau of Statistics reported that in 2013 – 2015, 91 per cent of victim-survivors of sexual violence in the NT were Aboriginal women, and more recently the NT Domestic, Family and Sexual Violence (DFSV) Reduction Framework 2018 – 2028 identified that the NT has the highest rate of DFSV in Australia, with nine out of ten victims of DFSV being Aboriginal, and Aboriginal women in the NT recorded as having the highest rate in the world of DFSV perpetrated against them.

3.14. The DPP expressed support for an affirmative consent model, however recommended that the model adopted in the NT not move to a requirement for verbal indications of consent alone. CLANT expressed a similar view.

3.15. CLANT also expressed support for an affirmative consent model, however noted concerns if there were a move towards a reversal of the onus of proof. Their response was underpinned by considerations of community standards when considering how affirmative consent is obtained and the importance of community education to inform community standards.

The Committee's View

3.16. The Committee accepts that the adoption of an affirmative model of consent would be in line with evolving public discourse both in Australia and overseas, and notes the overwhelming support for the introduction of such a model by way of submissions received. Moreover, the Committee notes that such a model represents a step away from the earlier 'passive' model of consent which held that the absence of resistance or 'indicators of non-consent' constituted consent.

3.17. The Committee recognises the unique make-up of the NT population, and the diversity and number of languages spoken by the First Nations people in the NT. It also recognises firstly, the over-incarceration of First Nations people in the NT, and secondly, the over-representation of First Nations people as victims of sexual offending in the NT. The Committee recommends moving towards an affirmative consent model that recognises these complexities, and allows for affirmative consent mutually communicated through words or actions.

RECOMMENDATION 1

The Committee recommends that the definition of consent be amended to reflect that consent means free and voluntary agreement, mutual communication and decision-making. That consent must be communicated through words or actions, and a person must take active steps, by words or actions, to find out whether the other person consents before engaging in sexual activity. That consent must be sought and agreed for each sexual act, and a person may, by words or conduct, withdraw consent to a sexual activity at any time and sexual activity which occurs after consent has been withdrawn occurs without consent.

RECOMMENDATION 2

The Committee recommends that "the person does not say or do anything to communicate consent" be added under the current s 192(2) as a circumstance in which a person does not consent, and that the circumstances which vitiate consent be expanded to explicitly include economic or financial harm, reputational harm, harm to animals or items, harm to the person's employment, sexual harassment and psychological harm to a person's health and safety or harm to the person's family, cultural or community relationships, or a course of action amounting to coercive control.

Chapter IV: Mistake

4.1. In the Northern Territory, a jury is directed to acquit an accused if it finds that there is a reasonable possibility that the accused honestly but mistakenly believed the other person to be consenting.

4.2. Section 43AW of the *Criminal Code 1983* (NT) ('the Criminal Code') provides:

> ***Mistake or ignorance of fact – fault elements other than negligence***
>
> (1) *A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:*
> (a) *at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and*
> (b) *the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.*
>
> (2) *In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.*

4.3. Section 43AW is contained within Part IIAA of the Criminal Code, which applies to "Schedule 1" offences, including the sexual offences the subject of this inquiry. Part IIAA closely follows the Model Criminal Code, and s 43AW is in identical terms to s 9.1 of the *Criminal Code 1995* (Cth).

4.4. When it comes into force, the *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* will insert s 208PB(2) into the Criminal Code, as follows:

> *The Judge must, in an appropriate case, direct the jury that, in deciding whether the accused was under a mistaken belief that a person consented to a sexual act, the jury may consider whether the mistaken belief was reasonable in the circumstances.*

4.5. Although such a direction would tend to make juries more likely to convict than under the current law, it does not go as far as other Australian jurisdictions in which for the accused to rely on the defence of a mistaken belief that the other person was consenting, that belief must be not only honest but also reasonable.

4.6. In New South Wales, a judge is required to direct the jury that an accused person must have a reasonable belief that the other person consents to sexual activity, and that a belief is not reasonable if the accused person did not, within a reasonable time before

or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.

4.7. The Committee invited responses from stakeholders to the following question:

> ***Should the law provide that for an accused person to raise a defence of mistaken belief that the other person was consenting to sexual activity, the accused person's belief must be not only honest but also reasonable?***

4.8. Most of the stakeholders who responded to this question answered in the affirmative.[21] Several respondents adopted the Australian Law Reform Commission's 2010 recommendation that:

> *Federal, state and territory sexual assault provisions should provide that it is a defence to the charge of 'rape' that the accused held an honest and reasonable belief that the complainant was consenting to the sexual penetration.*[22]

4.9. On the other hand, ANROWS suggested that the mistake of fact excuse should be removed altogether, both because it "undermines the principles and positive duty outlined in the affirmative consent model", and because it "perpetuates common rape myths". Women's Legal Services of Australia responded in similar terms, and submitted that the defence of honest and reasonable mistake "creates a concerning defence loophole".

4.10. One stakeholder, the NT Legal Aid Commission (NTLAC), submitted that the current law on this issue should not be changed. NTLAC submits that the current law, which is based on the Model Criminal Code provision, "strikes the appropriate balance, consistent with principles of criminal responsibility, by focussing the enquiry on the actual belief held by the accused but allowing the determination of that factual issue to be influenced by the reasonableness of the belief". NTLAC, referring to *Willcocks v The Queen* [2021] NTCCA 6, submitted that in any event, in sexual offence cases with a fault element of recklessness as to whether the other person was consenting to sexual activity, "the defence of mistake of fact is subsumed by the fault elements of the offence and is in almost all cases superfluous".

4.11. The DPP, as mentioned above, supported the addition of an objective element to the excuse of mistake, but cautioned that, in light of the controversy that arose about the

[21] CLC, NTCOSS, NT Police, NTWLS, DPP, NTAHC, Beth Wild.
[22] Australian Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114), Recommendation 25-6.

"no reasonable grounds" test in *Lazarus v R* [2016] NSWCCA 52, a new "no reasonable belief" test be drafted that establishes a "clear and… purely objective standard".

The Australian Law Reform Commission / NSW Law Reform Commission Report

4.12. In its 2010 Report *Family Violence – A National Legal Response*, which was written in conjunction with the New South Wales Law Reform Commission, the Australian Law Reform Commission (ALRC) carefully and extensively considered the issues canvassed above,[23] concluding with the following statement of the Commissions' views (footnotes omitted):

> *25.159 'Honest belief' is rarely the main or predominant issue in sexual offence proceedings, but the centrality of consent to sexual assault trials means that it invariably plays some role in how the legal system, its key players and jury members, understand and approach consent. For this and other reasons, the [Victorian Law Reform Commission (**VLRC**)] recommended that the fault element should be changed to ensure that an accused takes reasonable steps to ascertain that the complainant was consenting. In addition, the VLRC recommended that a mandatory jury direction on consent should be required by legislation. Only the latter of these recommendations has been implemented.*
>
> *25.160 In contrast, the [Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (**MCCOC**)] recommended that criminal liability for sexual offences should be determined on the basis of the subjective mental state of the accused. That is, that an accused should not be found guilty of sexual penetration without consent 'unless the prosecution proves' that the accused:*
>
> - *knew that the victim was not consenting;*
> - *was 'reckless to the absence of consent'; or*
> - *'failed to give any thought to the question of consent'.*
>
> *25.161 As such, the MCCOC approach permits an accused to rely on an honest, albeit unreasonable, belief in consent. Its reasons for this were based on the fact that the extent to which such a belief is unreasonable goes to the question of whether it has been established as a genuine or honest belief in consent. The MCCOC, like the VLRC, recommended that juries be directed in relation to whether the mistake or belief in consent was reasonable in all the circumstances.*

[23] Ibid, [25.136] – [25.166].

25.162 In the Commissions' view, the issues are best addressed by legislation providing that it is a defence to the charge of rape that the accused held an honest and reasonable belief that the complainant was consenting. In addition, legislation should require that judges direct juries in relation to the evidence presented about that belief and whether, as part of the honesty requirement, the accused took any steps to ascertain whether consent was present.

25.163 In forming this view, the Commissions have sought to promote the communicative model of consent and reconcile it with the general proposition of law that the onus of proof in criminal trials lies with the prosecution.

25.164 The insertion of an objective fault element, or the modification of the subjective fault element by requiring reasonable steps to ascertain consent, has also been adopted by various overseas jurisdictions, for example, in New Zealand, the United Kingdom and Canada. In the United Kingdom, the fault element is simply that a person commits rape when 'A does not reasonably believe that B consents'.

25.165 The recommendation is consistent with the basic position in the Australian criminal code jurisdictions. For complainants in non-code jurisdictions, it will introduce a second standard to be met by an accused who seeks to avoid criminal culpability because of their belief that the complainant consented. The introduction of an objective fault element discourages the assumption of consent, including in the context of a previous consensual relationship or family violence.

Judicial Consideration

4.13. The Court of Criminal Appeal of the Northern Territory considered these issues in some detail in *Willcocks v The Queen* [2021] NTCCA 6, in which the court heard an application for leave to appeal against conviction on a count of sexual intercourse without consent, one proposed ground of which was "that the trial judge had erred in failing to put the question of 'mistaken belief' to the jury".[24] In granting leave to appeal and dismissing the appeal, the court, after noting commentary by the MCOCC that it was arguably superfluous to retain the excuse of honest mistake of fact in relation to an offence with a fault element of intention, knowledge or recklessness, stated:[25]

> *The discussion of superfluity in that report draws attention to the fact that in the circumstances of this case, in order for the jury to find beyond reasonable doubt that at the time of the act of sexual intercourse the applicant knew that the complainant*

[24] *Willcocks v The Queen* [2021] NTCCA 6 at [1].
[25] *Willcocks v The Queen* [2021] NTCCA 6 at [30].

was not consenting to that act, the jury must necessarily have excluded any mistaken belief on the part of the applicant that the complainant was consenting. Similarly, in order for the jury to find beyond reasonable doubt that the applicant was aware of a substantial risk the complainant was not consenting but unjustifiably took that risk, the jury must necessarily have excluded any mistaken belief that there was no such risk. Finally, there is an ex facie incompatibility between a finding beyond reasonable doubt that the applicant did not give any thought as to whether or not the complainant was consenting and a mistaken belief on the part of the applicant in that respect. If that is correct, a direction by the trial judge in relation to mistaken belief would have been otiose, and would not have assisted the applicant's position in terms of the matters which the Crown was required to prove. As one commentator has stated:

> *Section 9.1 [of the Criminal Code (Cth)] provides that a person is not criminally responsible for an offence if a mistaken belief about, or ignorance of, a fact or facts 'negates any fault element' (other than negligence). It is apparent that the provision is superfluous. Even if it did not exist, the situation would be the same – if a fault element cannot be proved because the defendant had a particular mistaken belief about a fact, or was ignorant of a fact, it cannot be proved. The defendant is not guilty if the offence has a fault element that cannot be proved.*[26]

4.14. The Court referred to appellate decisions from South Australia, Western Australia and Queensland in which a similar analysis had been undertaken, and a similar conclusion had been reached.

4.15. However, having found that in this case the trial judge had been correct not to leave the excuse of mistaken belief to the jury, the Court stated:[27]

> *To draw that conclusion in the circumstances of this case is not to say that the legislative formulation of mistaken belief may never have application in the determination of criminal responsibility under the Model Criminal Code provisions. During the course of oral submissions, counsel for the applicant described a hypothetical scenario in which one partner in a long-standing and sexually active relationship performed an act of sexual penetration on the other partner in that relationship in the absence of any express indication of consent. It was said that in those circumstances a mistaken belief that the other partner was consenting could coexist with not giving any thought at the time the act was committed to whether or*

[26] Odgers, *Principles of Federal Criminal Law*, Fourth Edition, Lawbook Co, [9.1.100].
[27] Ibid, at [41].

not the other partner was consenting. That might conceivably be so in those circumstances…

The Committee's View

4.16. In the 13 years that have passed since the ALRC/NSWLRC Report, despite ongoing statutory reform both in the Northern Territory and other Australian jurisdictions, it is apparent that the troublingly low rate of complaints of sexual offending that ultimately result in conviction has not substantially increased. This in itself suggests that further reform is warranted. In addition, the Committee acknowledges the desirability of harmonising the criminal law so as to approach consistency in its operation and application across State and Territory borders.[28]

4.17. In the view of the Committee, the insertion of s 208PB(2) to the Criminal Code is unlikely to effect discernible change. Currently, judges have a discretion whether or not to instruct juries that in determining whether a person's belief as to the existence of consent was honestly mistaken, the jury may consider whether the mistaken belief was reasonable in the circumstances. Following the commencement of the *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023*, judges will be required to give this direction to a jury, but only "in an appropriate case", and accordingly it will continue to be a matter for the exercise of judicial discretion whether a particular case is, for the purpose of this provision, "appropriate".

4.18. The Committee gives substantial weight to the views set out above from the ALRC/NSWLRC Report in relation to the excuse of mistake, and has considered recommending that the scope of the excuse of mistaken belief be limited by a requirement that any mistaken belief of an accused that a complainant was consenting to a sexual act be both honest and reasonable.

4.19. However, the Committee also gives substantial weight to the stakeholders who have advocated for the complete removal of the excuse of mistaken belief, together with the view, which has significant judicial and scholarly support, that the excuse of mistaken belief is in effect superfluous in the context of sexual offences with a fault element of knowledge or recklessness. Also weighing in favour of abolishing this excuse is that to do so would in some cases simplify the directions given to juries, and reduce the complexity of jury deliberations. This in turn would mitigate the risk of a verdict being affected by error and being susceptible to appeal.

[28] See: Hill, Guzyal and Crowe, Jonathan, Harmonising Sexual Consent Law in Australia: Goals, Risks and Challenges (June 14, 2023). (2024) 49(3) *Monash University Law Review* (Forthcoming), Available at SSRN: https://ssrn.com/abstract=4478006

RECOMMENDATION 3

The Committee recommends that the excuse of mistake of fact established by s 43AW of the Criminal Code should be made inapplicable to sexual offences that include a fault element that the accused knows about or is reckless to the lack of consent.

Alternatively, if the foregoing recommendation is not adopted, s 43AW of the Criminal Code should be amended by providing that an accused person can only rely on a mistake of fact in relation to this fault element for sexual offences if the mistake was reasonable.

Chapter V: Intoxication

5.1. The Criminal Code distinguishes between two types of intoxication, "self-induced" and "not self-induced". In summary, self-induced intoxication occurs when a person deliberately and voluntarily drinks or otherwise ingests a drug. Section 43AV of the Criminal Code provides that a person is not criminally responsible for conduct the result of non-self-induced intoxication, for example as a result of drink spiking. None of the stakeholders consulted suggested that this aspect of the law should be reformed, and the Committee agrees.

5.2. By far the most common type of intoxication featuring in Northern Territory sexual offending is self-induced intoxication.

5.3. If a person commits a sexual act while in a state of self-induced intoxication, the Criminal Code provides that evidence of their intoxication cannot be considered when determining whether the person intended to commit the sexual act.

Self-Induced Intoxication and Mistaken Belief

5.4. However, the Criminal Code provides that if on the evidence it is a reasonable possibility that the person gave some thought to whether the other person was consenting, evidence of self-induced intoxication may be considered for the purpose of determining whether or not the accused formed a mistaken belief that the other person was consenting.

5.5. As an illustration of how this law applies in practice, in *R v Willcocks (No 2)* [2018] NTSC 38, the trial judge directed the jury as follows:

> *You are entitled to consider all of the circumstances to determine whether the accused believed that B was consenting to sexual intercourse, including the extent to which the accused was affected by alcohol at the relevant time. The mistaken belief does not have to be a reasonable belief, but it must be actually held. When you are considering whether the mistaken belief was actually held, you are able to take into account whether it was a reasonable belief in the circumstances. The accused does not have to prove that he was under the mistaken belief that B was consenting to sexual intercourse. Rather, the Crown must prove beyond reasonable doubt that the accused was not under such mistaken belief.*[29]

[29] At [24].

5.6. The Committee invited responses from stakeholders to the following question:

> ***What should the law provide, if anything, about how self-induced intoxication may be taken into account when deciding whether a person acted under a mistaken belief that the other person was consenting?***

5.7. As stated in Chapter III, most of the stakeholders submitted that the law to limit the scope of the excuse of mistaken belief that the other person was consenting be reformed by introducing a requirement that such a mistaken belief be both honest (as is currently the case) and reasonable.

5.8. Section 43AU(3) of the Code provides that if "any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated."

5.9. In answering the above question, the Central Land Council submitted that s 43AU(3) would be engaged if the Committee's recommendation in relation to the excuse of mistaken belief is adopted, and the scope of the excuse is limited by introducing a requirement that a mistaken belief be reasonable. By operation of s 43AU(3), a jury would be required to assess the reasonableness of accused's belief by reference to the standard of a sober reasonable person.

5.10. In its submission, ANROWS made no specific recommendation in relation to intoxication, but drew attention to research showing that a significant segment of the Australian community considers that in sexual assault cases, intoxication reduces the culpability of male perpetrators, but increases the culpability of female victims. ANROWS cautions that the law not reinforce these "gendered victim-blaming double-standards".

5.11. NT Police, Northern Territory Women's Legal Services, the DPP and NTAHC submitted that the law should be reformed to provide that self-induced intoxication of an accused must not be taken into consideration in determining whether the person had a mistaken belief that another person was consenting to engaging in sexual conduct with the accused. As an example of such a law, stakeholders referred to s 61HK of the *Crimes Act 1900* (NSW), which provides that a trier of fact must not consider any self-induced intoxication of an accused person when considering whether a belief that the accused person had, or may have had, that the other person consented to the sexual activity was reasonable in the circumstances. Similar provisions apply in Victoria,[30] Tasmania,[31] and Queensland.[32]

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[30] *Crimes Act 1958* (Vic) s36B.
[31] *Criminal Code Act* 1924 (Tas) s 14A(1)(a).
[32] *Criminal Code Act 1899* (Qld) s348A(3).

5.12. In relation to the issues of self-induced intoxication in sexual offence cases, the DPP made the following salient observations:

> *By allowing an accused to use their state of self-induced intoxication as a reason why they mistakenly believed the complainant was consenting, the Code effectively lowers the bar for an accused who was intoxicated, but not for one who was sober. Further, when self-induced intoxication is introduced as a relevant circumstance in establishing mistaken belief, the focus invariably shifts from the culpability of the accused to the behaviour of the complainant including, for example, the complainant's lack of physical resistance, level of intoxication, dress, prior behaviour and relationship to the accused. These factors, whilst on the one hand are acknowledged to be non-indicative of consent, are paradoxically used to exculpate the accused by way of defence of mistaken belief [footnotes omitted].*

5.13. The NT Legal Aid Commission submitted, consistently with its responses to other questions in the Discussion Paper, that the current law in relation to self-induced intoxication is adequate.

The Committee's View

5.14. The Committee accepts that if, as most stakeholders have proposed, s 43AW is amended to narrow the scope of the excuse of mistaken belief by requiring it to be a reasonable belief, s 43AU(3) as currently in force will be engaged, and the finder of fact will be required to have regard to the standard of a reasonable person who is not intoxicated.

5.15. However, as stated in Chapter IV, the Committee has come to the conclusion that the excuse of mistaken belief should be made inapplicable to sexual offences that include a fault element that the accused knows about or is reckless to the lack of consent. If that recommendation is adopted, it follows that no statutory provisions would be required to regulate how self-induced intoxication is taken into account in assessing a mistaken belief.

5.16. In either case, in relation to the role of self-induced intoxication in determining whether a person's conduct is excused because of a mistaken belief that the other person was consenting, the Committee does not recommend that the law be changed.

Self-Induced Intoxication and Recklessness

5.17. In relation to the issue of recklessness, in a case where the jury finds that an accused was aware that there was a substantial risk that the other person was not consenting, it then has to decide whether it was unjustifiable for the accused to take the risk and proceed to commit the sexual act. The Criminal Code does not currently include provisions that regulate how a jury can or should have regard to self-induced intoxication when deciding whether the conduct of the accused was unjustifiable. Jurors may have different views as to whether and, if so, how the accused person's drunkenness is relevant to a determination of whether their conduct was unjustifiable.

5.18. The Committee invited responses from stakeholders to the following question:

> ***What should the law provide, if anything, about how self-induced intoxication may be taken into account when deciding whether a person was reckless as to the lack of consent of the other person?***

5.19. NT Police and the DPP submitted that the Code should provide that self-induced intoxication must not be taken into account in determining whether an accused person was reckless as to lack of consent.

5.20. The NT Legal Aid Commission made the following submission:

> *Self-induced intoxication is relevant when considering the subjective component of recklessness but not relevant when considering the objective component.*
>
> *That is, self-induced intoxication is taken into account when assessing the accused's subjective awareness of a substantial risk as to whether the other person was consenting.*
>
> *However, self-induced intoxication is not taken into account when making the objective assessment of whether it was unjustifiable in the circumstances to take the risk except to the extent that that assessment is made on the facts as known by the accused. This approach conforms with ordinary principles of criminal responsibility under the Model Criminal Code and needs no amendment.*

The Committee's View

5.21. The Committee is inclined to accept the submission by the NT Legal Aid Commission that in practice, the assessment by a Northern Territory tribunal of fact of whether conduct is unjustifiable involves the application of an objective test. The Committee

also accepts that when applying an objective test to whether advertent disregard of risk is unjustifiable, a tribunal of fact would likely approach this task by reference to the standard of a reasonable person who is not intoxicated. However, the Committee is unaware of any legislative provision or judicial authority that requires a tribunal of fact to adopt this approach.

5.22. The Committee considers that, at least in relation to sexual offences containing an element that the other person was not consenting, the Criminal Code should be amended to provide that when determining whether, for the purpose of s 43AK of the Criminal Code, it was unjustifiable for a person to take a risk, the tribunal of fact must have regard to the standard of a reasonable person who is not intoxicated.

RECOMMENDATION 4

The Committee recommends that the Criminal Code be amended to provide that when determining whether a person charged with a sexual offence was reckless as to the lack of consent of the other person, regard must be had to the standard of a reasonable person who is not intoxicated.

Chapter VI: Jury Directions

6.1. One of the objectives of affirmative consent laws is to further a trauma-informed understanding of sexual assault, and in particular that 'freezing' rather than actively objecting to unwanted sexual activity is a common human behaviour.

6.2. Given this, affirmative consent laws interstate have incorporated directions to the jury to complement and clarify the intent of the offence provisions.

6.3. The Northern Territory Criminal Code provides that in a relevant case the judge shall direct the jury that a person is not to be regarded as having consented to an act of sexual intercourse or to an act of gross indecency only because the person:

- did not protest or physically resist;
- did not sustain physical injury; or
- had, on that or an earlier occasion, consented to sexual intercourse or an act of gross indecency whether or not of the same type, with the accused.[33]

6.4. On the date of commencement of the *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* (NT) ("the Amending Act") the direction on consent will be amended to read: [34]

> (1) *In a proceeding for an offence against this Part, the judge must, in an appropriate case, direct the jury that a person must not be regarded as having consented to a particular sexual act merely because:*
> (a) *the person did not say or do anything to indicate that the person did not consent;*
> (b) *the person did not protest or physically resist;*
> (c) *the person did not sustain physical injury; or*
> (d) *during the period, or on the occasion when the sexual act occurred, or an earlier occasion, the person consented to engage in a sexual act (whether or not of the same type), with the person charged with the offence or another person.*[35]

[33] *Criminal Code 1983* (NT), s 192A.
[34] The Amending Act was assented to on 17 August 2023. It is to commence on a day fixed by the Administrator by *Gazette* notice.
[35] Section 13 *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* [new s 208PB of the Criminal Code].

6.5. In New South Wales, the law provides that, if there is a good reason to do so, judges shall give the following jury directions:[36]

- there is no typical or normal response to non-consensual sexual activity;
- people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything;
- the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity;
- people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence;
- the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence;
- trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not;
- the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence;
- it should not be assumed that a person consented to a sexual activity because the person –
    (a) wore particular clothing or had a particular appearance, or
    (b) consumed alcohol or another drug, or
    (c) was present in a particular location.

6.6. The *Northern Territory Law Reform Committee Inquiry into Consent for Sexual Offences Discussion Paper*, posed the following question for discussion:

> ***Should, and if so, how should jury directions in a sexual assault matter be modified to:***
>
> - ***promote a trauma-informed approach by the jury;***
> - ***steer the jury away from reliance on myths and stereotypes about sexual assault; and***
> - ***ensure the accused receives a fair trial?***

[36] Provisions providing for particular directions to be given during certain sexual assault trials, were inserted in ss 292 to 292E of the *Criminal Procedure Act* 1986 by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021. The Attorney General said the purpose of these provisions was to "address common misconceptions about consent and to ensure a complainant's evidence is assessed fairly and impartially by the tribunal of fact": Second Reading Speech, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, NSW, Legislative Assembly, *Debates*, 19 November 2021, p 58.

Responses Received to the Discussion Question

6.7. A range of responses were received.

(a) Central Land Council submitted that jury directions should be broadened to reflect interstate practice.

(b) Australia's National Research Organisation for Women's Safety ('ANROWS') said they support the Committee's proposal in relation to jury directions. (The Discussion Paper did not contain a proposal. This may have been intended to refer to the New South Wales provisions which were included in the Discussion Paper.)

(c) Northern Territory Council of Social Services ('NTCOSS') submitted that jury directions should be aimed at refuting common rape myths.

(d) Northern Territory Police submitted that current jury directions are 'extremely inadequate', and that the NT should adopt the same directions given in NSW.

(e) Women's Legal Services Australia ('WLSA') provided the Committee with a copy of the submission provided to the Senate Inquiry into consent laws. That submission did not specifically address the NT's current jury directions, but they recommend that jury directions should address misconceptions about consent, trauma, sexual violence and family and domestic violence.

(f) NT Women's Legal Service ('NTWLS') submitted that jury directions should address common rape myths and they endorsed the NSW approach.

(g) Northern Territory Legal Aid Commission ('NTLAC') supports the NSW approach to jury directions.

(h) North Australian Aboriginal Family Legal Service and Central Australian Aboriginal Family Legal Unit provided a joint submission, but did not address the issue of jury directions.

(i) NT Aids and Hepatitis Council ('NTAHC') supports amendments to jury directions as mentioned in the Discussion Paper (presumably the New South Wales provisions).

(j) Criminal Lawyers Association NT ('CLANT') expressed the view that jury directions should not be prescribed as in Victoria, but should be given at the discretion of the presiding judge.

(k) NT Director of Public Prosecutions ('DPP') supports an expansion of jury directions and suggests that a resource like the NSW Criminal Trial Courts Bench Book be developed for the Northern Territory.

The DPP also recommends that additional jury directions be developed in order to combat common rape myths, in particular, that a similar approach as exists in Victoria, be adopted in the NT. In Victoria, jury directions are given on the following issues:

(i) differences in a complainant's account;
(ii) evidence of a post-offence relationship;
(iii) effect of delayed complaint on credit;
(iv) early directions on jury assessment of evidence about consent and reasonable belief in consent; and
(v) child witnesses.

In addition to adopting the above, the DPP recommends that consideration be given to including the following directions:

- *the meaning and circumstances of consent* – including myths discussed in the Discussion Paper, namely that consent to one act does not mean consent to all acts, consent to sexual activity on a prior occasion does not mean consent to sexual activity on all occasions and that consent can be withdrawn at any time;
- *the circumstances in which a person does not consent or may not consent to sexual intercourse* – including for example, as outlined at 4.4 of the Discussion Paper, when the person did not say or do anything to indicate that the person did not consent;
- *non-consensual sexual acts occurring between different of people* – noting that sexual acts can occur without consent between different people including people who are known to each other such as people who are married to each other, people who are in an established relationship, people of the same or different sexual orientation or gender identity or between people who provide a commercial sexual service and their client;[37]
- *other sexual activity* – noting that a complainant does not consent to a sexual act with a particular person because they have engaged in consensual sexual activity with that person on a prior occasion. The DPP recommends directing the jury in an appropriate case that if a complainant has consented to a particular type of sexual activity, and the type of activity changes, an accused is required to obtain affirmative consent to the further type of activity;
- *behaviour and appearance of the complainant* – noting that a complainant does not consent to sexual activity merely because they were in a particular

37 *Jury Directions Act* (2015) (Vic) s 47H.

location such as the accused's home, drank alcohol or took any other drug, wore certain clothing or behaved in a particular way for example flirting with the accused or another person;

- *the "freeze response"* – noting that there is no 'normal' response to sexual assault; that the complainant's lack of verbal or physical resistance does not indicate the presence of consent; and that such a response cannot be relied upon by an accused as a factor demonstrating consent or their belief of such consent; noting also that it is not uncommon for a person the subject of a sexual assault to not 'cry out' during an alleged attack, and an allegation should not be assumed to be less likely to be truthful merely because a person has not 'cried out' during an attack;
- *domestic and family violence* – noting that a person may participate in sexual activity because of force, harm, fear of force or harm, blackmail, coercion or intimidation in the context of domestic and family violence;
- *presence or absence of emotion or distress* – noting that some people may show visible signs of emotional distress when giving evidence, others may not, and that experience shows that neither should be considered more typical of an honest witness.

The DPP recommends further that when the alleged offending relates specifically to child victims, the following directions also be adopted:

- *"brazen offending"* – noting that it is not uncommon for sexual offending to occur in brazen circumstances, and that a complaint should not automatically be considered less likely to be truthful as a result of it being alleged to occur in these circumstances;[38]
- *"piecemeal disclosure"* – noting that it is not uncommon for children to disclose sexual abuse in a piecemeal fashion.

The DPP also supports framing the jury directions in positive language, so as not to re-state misconceptions.

The DPP submits that it is important that directions are flexible and can be given and repeated at different times and that jury directions will not achieve their desired purpose if given in a vacuum or in a single address such as the summing up where they may be overwhelmed. For this reason, the DPP submits that it is important for judges to be able to tailor the jury directions to the case, although it is also important to ensure consistency in jury directions across all sexual assault trials. To this end, while the DPP does not support mandating all jury directions, the DPP does support introducing a provision similar to that of Victoria whereby

[38] See *Foster v The Queen* [2021] NTCCA 8 at [9] – it is now well-recognized, if not notorious, that it is common for child sexual assaults to occur in the family home and/or in brazen circumstances" (at [9]).

the prosecution or defence counsel may request the trial judge to issue a direction the form of which has been prescribed.[39]

The Committee's View

6.8. In summary, there appears to be general support among those organisations that responded to the invitation in the Discussion Paper to make submissions on this issue for directions to be given to juries that address "common rape myths" or "misconceptions about consent, trauma, sexual violence and family and domestic violence". There also appears to be a general view that the New South Wales directions set out at [6.5] above would be appropriate for that purpose, although the DPP has adopted a somewhat different approach, favouring aspects of the Victorian model.

6.9. Consideration also needs to be given to the question to what extent any legislative amendment dealing with jury directions should mandate specific directions or provide that certain generally described types of direction may be given, or should in appropriate cases, be given.

6.10. Leaving aside remarks on the issues, evidence and submissions (which take longer), the directions in the summing up of a fairly straight forward sexual offence trial in the Northern Territory will take a minimum of half an hour and up to an hour or more, depending on the judge and the number of special directions it is necessary to include. (This applies also to trials for other offences.)

6.11. In addition, the jury is given a written aide memoire which sets out the elements of the offences charged and definitions of sexual intercourse, consent and recklessness (and where necessary indecency and gross indecency). The definition of consent given will contain the portions of s 192(2) which are relevant to the circumstances of the case. That definition is as follows:

> Circumstances in which a person does not consent to sexual intercourse or an act of gross indecency include circumstances where:
>
> (a) the person submits because of force, fear of force, or fear of harm of any type, to himself or herself or another person;
>
> (b) the person submits because he or she is unlawfully detained;
>
> (c) the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing;
>
> (d) the person is incapable of understanding the sexual nature of the act;

[39] *Jury Directions Act (2015)* (Vic) ss 46-47

(e) the person is mistaken about the sexual nature of the act or the identity of the other person;

(f) the person mistakenly believes that the act is for medical or hygienic purposes; or

(g) the person submits because of a false representation as to the nature or purpose of the act.

6.12. The trial judge goes through the aide memoire orally with the jury in detail and the judge tells the jury about the factual and legal issues in the trial and summarises the relevant evidence and counsels' submissions. As can be appreciated, this is a lengthy process.

6.13. Recent research into how humans take in and retain information suggests that the average person's ability to absorb and remember things told to them orally is quite limited. Certainly the existing jury directions in sexual offence trials in the Northern Territory will severely test, and very probably exceed those limits. That is one consideration which militates against adding further mandatory jury directions, particularly lengthy ones.

6.14. The Committee notes the submission by the DPP that it is important that directions are flexible and can be given and repeated at different times and that jury directions will not achieve their desired purpose if given in a vacuum or in a single address such as the summing up where they may be overwhelmed. The Committee endorses those remarks but considers that it is important for trial judges to be able to tailor the jury directions to the case (as the DPP acknowledges). For this reason the Committee does not favour adopting a model such as the Victorian one which prescribes the times at which various directions should be given. This is best left to the trial judge.

6.15. Weighing in favour of additional jury directions is the fact that, as demonstrated by the submissions made in response to the Discussion Paper, there is a general perception that juries are still susceptible to being influenced by myths about rape and rape victims, and how they might be expected to behave, and that these perceptions and attitudes need to be overcome, or at least ameliorated, by appropriate jury directions, given with the authority of the trial judge.

6.16. A mandatory provision that a judge must give particular directions in certain nominated circumstances is generally undesirable as it would lead to inflexibility and unduly hamstring the trial judge's discretion. On the other hand, legislative provisions which state that a judge "may" give nominated directions suffers from the defect that it gives

the erroneous impression that a judge may only give directions nominated in the legislation.

6.17. The present Northern Territory provision in s 192A of the Criminal Code, specifying directions to be given as set out in [6.3] above, says that "[i]n a relevant case the judge shall give" the specified direction. By simply stating that the direction shall be given "in a relevant case", that provision would seem to adequately preserve the trial judge's discretion without resorting to the use of "may" and its erroneous connotations. Similarly, the new s 208PB provides that "the judge must, in an appropriate case", give the specified directions to the jury, which is to the same effect.

6.18. The New South Wales legislation provides that:

> *"[i]n a trial to which this Subdivision applies, the judge must give any one or more of the directions set out in sections 292A-292E (called a "consent direction"):*[40]
>
> (a) *if there is a good reason to give the consent direction, or*
> (b) *if requested to give the consent direction by a party to the proceedings, unless there is a good reason not to give the direction.*
>
> *A judge is not required to use a particular form of words in giving a* consent direction.[41]
>
> *A judge may, as the judge sees fit give a consent direction at any time during a trial, and give the same consent direction on more than one occasion during a trial.*[42]

6.19. Like the existing Northern Territory s 92A, the New South Wales provision would seem to adequately preserve the trial judge's discretion while specifying the kind of direction it is intended to be given when appropriate. In the Committee's view, however, the wording in s 92A (and s 208PB) is preferable, having the virtue of simplicity and of avoiding the use of the word "may".

6.20. The DPP has recommended the adoption of at least some aspects of the Victorian legislation, in particular the process by which counsel can request the trial judge to give a direction the form of which has been prescribed.[43] In the Committee's view, the

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[40] *Criminal Procedure Act 1986* NSW s 292(2); The sub-division applies to proceedings in respect of offences listed in s 292(1).
[41] *Criminal Procedure Act 1986* NSW s 292(3).
[42] *Criminal Procedure Act 1986* NSW s 292(4). The use of "may" here suffers from the defect referred to in [17]. A trial judge may do the things set out in s 292(4) without the permission of the legislature.
[43] Section 12 of the *Jury Directions Act (2015) (Vic)* provides that after the matters in issue have been identified in accordance with section 11, (which prescribes matters counsel must tell the trial judge) the prosecution and defence counsel must each request that the trial judge give, or not give, particular directions to the jury. Section 14 provides that the trial judge must give the jury a requested direction unless there are good reasons for not doing so, and s 14(2) sets out specific matters to be taken into account by the trial judge in determining whether there are good reasons for not giving a requested direction. Section 15 provides that, subject to s 16, the trial judge must not give the jury a direction that has not been requested under s 12. Section 16(1) provides that the trial judge must give the jury a direction which has not been requested if the trial judge considers that there are

Victorian legislation is unduly prescriptive. It sets out the wording of the directions to be given in great detail, prescribes the procedure for directions to be requested and given and even goes so far as to prescribe the time at which various directions are to be given.

6.21. While the directions prescribed in the Victorian legislation,[44] or variations on those directions, may well be desirable in appropriate cases, this Committee does not consider it would be desirable to prescribe in such detail what directions should be given in what circumstances. That is best left to the discretion of the trial judge assisted by submissions from counsel. Nor do we consider it desirable to closely prescribe the information and submissions which must be made by counsel as the Victorian legislation does. This is best left to counsel.

6.22. The Committee favours adopting the approach in the New South Wales legislation which sets out matters which may be the subject of jury directions in order to attempt to overcome any preconceptions which members of the jury may entertain based on myths and stereotypes, but which leaves ample room for the exercise of appropriate discretion by the trial judge. However, in any legislative amendment we consider that the form of wording should reflect that in s 192A of the Northern Territory Criminal Code ("in a relevant case the judge shall give" the specified direction) or s 208PB ("the judge must, in an appropriate case"), rather than the more complicated provisions in the New South Wales legislation.

6.23. The Committee further note the DPP's proposal that resources be allocated to develop and maintain a Criminal Trials Bench Book specifically for the NT. Currently, practitioners rely on a combination of their own research, prior matters including *Aide Memoirs* utilised in previous cases, and interstate Bench Books. Guidance from interstate Bench Books often needs to be amended to be applicable to the NT. The creation and maintenance of an NT specific Bench Book would have significant benefit to the current practice of Criminal Law in the NT. It would simplify and improve the quality of argument that precedes the settling and issuing of directions to the jury. The process of formulating relevant directions for the jury, by providing guidance to trial Counsel and the Judiciary, would also be simplified. Lastly, it would incorporate directions which have their genesis in the NT, such as the 'Mildren direction' on Aboriginal witnesses.

substantial and compelling reasons for doing so and s 16(2) goes on to specify things the trial judge must do before giving a direction pursuant to s 16(1).

[44] These are summarised in para [7](j) above.

RECOMMENDATION 5

The Committee recommends that the Criminal Code be amended to insert a provision along the lines of ss 292 to 292E of the *Criminal Procedure Act 1986* (NSW) in order to address common misconceptions about consent and to ensure a complainant's evidence is assessed fairly and impartially by the tribunal of fact.

RECOMMENDATION 6

The Committee recommends that resources be allocated to develop and maintain a Criminal Trials Bench Book specifically for the Northern Territory.

Chapter VII: Implementation and Cost Implications

7.1. The inquiry's terms of reference require discussion of the cost implications of reforming the law. The Committee has identified three possible cost implications that flow from implementation of an affirmative consent law, namely:

- delivering education, communication, and compliance support;
- evaluation that collects adequate data, including remote data; and
- possible increased demands on the resources of the criminal justice system.

Relationship Between Law, Education and Social Attitudes

7.2. While ignorance of the law is no excuse, for affirmative consent laws to reduce sexual assault, it is important that laws are promulgated and understood. It is particularly important when the law is a serious offence punishable by a substantial term of imprisonment. Promulgation upholds the rule of law.

7.3. Australian attitudes and laws have been progressively shifting in relation to non-consensual sex, with the National Community Attitudes towards Violence against Women Survey (NCAS) documenting that acceptance of non-consensual sex and violence against women has been decreasing. When the attitudes and beliefs of the majority shift, the law often follows, and then it may be the case that a proportion of the community holds views that are out of step with the law.

7.4. Recent research found that seven out of ten Australian adults believe the way people broadly think and talk about sexual consent is different now compared to a few years ago.[45] Almost half of Australians experience low confidence in their ability to define consent and are conflicted in their understanding of the problem of consent and potential solutions, while over three quarters consider sexual consent is a topic that is really important to them personally. This makes education around the change in the law essential.

The education and communication needed is continuing education, not a one-off campaign to highlight this particular change in the law.

7.5. Principles of responsive regulation recognise that an effective compliance and enforcement strategy uses a range of complementary tools. Enforcement of criminal offences by its nature tends to only target a small number of persons and involve substantial resources, so the role of criminalisation in an enforcement strategy is as a

[45] *Reducing Sexual Violence: Full Report* by Kantar Public, February 2022.

deterrent (by creating a small risk of serious consequences), and symbolic (to express and communicate community moral standards). However, criminalisation cannot change the behaviour of a broader population unless it is accompanied by education, persuasion, and compliance support. Conversely, the relevance and effectiveness of education, persuasion, and compliance support is enhanced by the existence of a criminal offence.

7.6. Without adequate education and communication about sex and consent, Territorians are at a greater risk of experiencing sexual violence, and some Territorians are at greater risk of committing and being incarcerated for a serious offence because they did not appreciate the significance of their actions. The education and communication needed is continuing education, not a one-off campaign to highlight a particular change in the law.

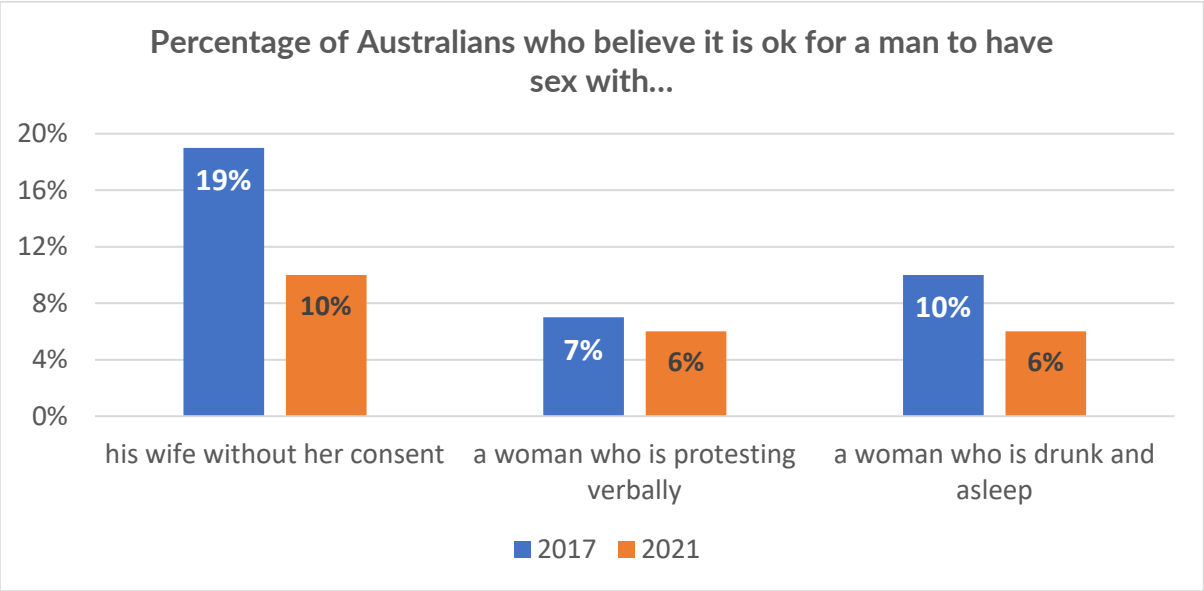
7.7. Compliance support is also critical. This includes services which assist to reduce risk factors which contribute to offending, and services to support potential victims to stay safe and strong.

7.8. Research into Australian attitudes towards and understanding of sexual assault indicates that the majority of persons have a good understanding of consent, but that a significant minority do not recognise non-consensual sex as unlawful in certain situations.

Without substantial, effective education, the adoption of affirmative consent laws are unlikely to protect Territorians from sexual assault.

7.9. It is important to recognise that these beliefs or attitudes are already out of step with the current law. That is to say, there is a small but significant population that need consent education in order to understand when sex acts are legal, whether or not affirmative consent laws are adopted. This highlights that without substantial, effective education, the adoption of affirmative consent laws are unlikely to protect Territorians from sexual assault.

7.10. Some key illustrative findings from the 2017 and 2021 National Community Attitudes towards Violence Against Women Survey (NCAS) identified the following beliefs:



7.11. These behaviours are already criminalised by the existing Territory law. Related beliefs that the NCAS identified that are likely to be contributing to risks and harm of sexual assault, and to challenges holding offenders to account include:

Do you agree...?	2017	2021
Women often say 'no' when they mean 'yes'	12%	10%
When a man is very sexually aroused, he may not even realise that the woman doesn't want to have sex	28%	25%
Since some women are so sexual in public, it's not surprising that some men think they can touch women without permission	21%	10%
A lot of times, women who say they were raped had led the man on and then had regrets	31%	24%
If a woman reports abuse by her partner to outsiders it is shameful for her family / domestic violence should be handled in the family	13%	12%
A man is less responsible for rape if he is drunk or affected by drugs at the time	8%	5%
If a woman is raped while she is drunk or affected by drugs she is at least partly responsible	13%	10%

7.12. These community beliefs contribute to challenges reporting sexual assault, in obtaining community and family support during and after the investigation and prosecution, and in obtaining a conviction (which requires at least a majority of ten jurors to agree that the accused was reckless as to whether the other person was consenting, and that the other person did not consent). The submission by Australia's National Research Organisation for Women's Safety (ANROWS) to this inquiry noted:

> *If an affirmative consent model was used to understand these situations, the actions of perpetrator and their failure to take steps to confirm consent would be the focus rather than the victim's and survivor's behaviour. Challenging victim-blaming narratives is critical as they have a significant impact on victims and survivors. Fear of not being believed is a key factor in whether women disclose sexual assault to their informal networks and through formal pathways such as police or authorities. … Victim-blaming attitudes can also influence how victims and survivors are treated when they* do *report sexual violence. Myths and misunderstandings about sexual consent and sexual violence can undermine police and legal perceptions about the credibility of sexual violence allegations.*

7.13. It is notable that the NCAS results indicate that community attitudes are shifting towards greater regard for free and voluntary consent, indicating that education, law reform, and community attitudes are having an impact on beliefs regarding non-consensual sex.

7.14. A recent Senate inquiry by the Australian Parliament into *Current and Proposed Sexual Consent Laws in Australia* (2023) considered education in schools in relation to sexual assault, and quoted Dr Rachael Burgin, Chief Executive Officer of Rape and Sexual Assault Research and Advocacy, who emphasised the limitations of implementing affirmative consent through law alone:

> *The criminal law is the lowest common denominator. We're dealing with people who have sexually assaulted another person. We need to look at something more rigorous. We need to look at a comprehensive relationships and sexuality program that doesn't just take into consideration what is a legal definition of consent and make sure you align with that but what a good, healthy, mutual sex life looks like for young people. How can we make sure that everybody is not only there and participating but is there and enjoying themselves and wants to be there? They are not coerced. There is no social pressure. They are not forced. They don't feel scared to say no. They are not worried that if they say no they will get called a prude and if they say yes, they are a slut. Those attitudes are really fundamental. The law doesn't do that. I'm not sure that it's capable of it.*

Consent education is not just about sex, but more broadly about respectful relationships and recognition of each participant's personal autonomy and human rights.

7.15. The NCAS demonstrates that attitudes towards gender equality correlate closely with attitudes and beliefs towards violence against women, including sexual violence.[46] It further identifies that the two most influential factors influencing support for gender equality are whether the person supports other forms of prejudice, and whether the person endorses violence generally. This highlights that consent education is not just about sex, but more broadly about respectful relationships and recognition of each participant's personal autonomy and human rights.

One size does not fit all

7.16. Education, communication, and compliance support needs to recognise that different approaches may be more or less effective for different sub-populations of Territorians. Further, there needs to be an intersectional approach taken, where it is recognised that persons may be part of multiple sub-populations and have unique needs and perspectives as a result.

Men, women, gender-diverse, LGBTQIA+ Territorians and sex workers

7.17. In the Territory in 2022, 90 per cent of victims of sexual assault were female.[47] Of the persons proceeded against by NT Police for sexual assault in 2021-22, 97.5 per cent were male.[48]

7.18. The gendered dynamic of sexual offending and the connection to beliefs about gender roles and behaviours needs to be recognised in developing effective tools and services. Understandings of sex and consensual sex are also affected by understandings of gender and heteronormativity.

7.19. This includes awareness of:

(i) promoting healthy, respectful relationships for persons of all sexualities and genders;
(ii) recognising the prevalence of gendered sexual violence and addressing factors underlying this dynamic such as the objectification of women;
(iii) the impact of pregnancy and gendered parental roles on coercive control dynamics on the risk of sexual assault;
(iv) addressing myths about sexual assault as it relates to persons of various sexualities and genders; and

[46] Page 126. Available at: NCAS 21 Main Report ANROWS.5.pdf (cdn-website.com)
[47] ABS Recorded Crime – Victim.
[48] ABS Recorded Crime – Offenders.

(v) the need for consent to be understood in the context of diverse sexual practices, including sex work and kink.

7.20. The submission of the Northern Territory Aids and Hepatitis Council (a joint submission involving contributors from NTAHC, Scarlet Alliance, Sex Worker Outreach Program, Health Equity Matters, and the HIV/AIDS Legal Centre) of the Northern Territory suggested:

> *Consideration should be given to extending the advertising campaign to include the information on prominent dating sites and apps. This should apply to dating sites frequented by LGBTQIA+ communities, as well as those accessed by cis-gender people.*

7.21. The NTAHC submission also suggested that communication should prioritise the role of people with lived experience and peers to deliver resources and education modules. NTCOSS similarly emphasised use of persons with lived experience.

<u>Aboriginal Territorians</u>

7.22. It is critical that targeted education, communication, and compliance support is developed in collaboration with Aboriginal communities, as per the principle 'nothing about us without us'.

7.23. Aboriginal Territorians are overrepresented in all aspects of the criminal justice system, including in relation to sexual assault. 2022 ABS data indicates Aboriginal Territorians were victims of 47.3 per cent of sexual assault recorded. Of the persons proceeded against by NT Police for sexual assault in 2021-22, 67.8 per cent were Aboriginal.[49]

7.24. Aboriginal Territorians are more likely to experience additional complexities in relation to sexual violence, such as:

- higher rates of overcrowding, housing insecurity, and homelessness, creating increased opportunities for sexual assault and increased risk of child removal if a mother reports sexual assault;
- difficulties accessing professional and institutional support on Country, in a manner consistent with cultural obligations, and without disrupting social support systems;
- fear and mistrust of the criminal justice system;
- experiences of systemic racism when accessing services and support; and
- different manifestations of coercive control, reflecting broader community and extended family dynamics, rather than the hegemonic understanding of coercive control as just reflecting the dynamics of a relationship with a close partner or family member.

[49] ABS Recorded Crime – Offenders.

7.25. The joint submission from the North Australian Aboriginal Family Legal Service and the Central Australian Aboriginal Family Legal Unit endorsed comments from the Lowitja Institute from 2019:

> *Fear, shame and stigma prevents women from disclosing experiences of family violence or intimate partner violence and accessing support. This can be compounded for First Nations women due to systemic racism and traumatising experiences with police, legal and health services.*

7.26. Similarly, the submission from WLSA stated:

> *Sexual violence is particularly underreported in First Nations communities despite its prevalence. NTWLS' clients have reported experiences of being 'cut off' when reporting, often being turned away, a lack of interpreters and very few available female officers.*

7.27. The submission from Northern Territory Council of Social Service (NTCOSS) stated:

> *It is also important to understand the perpetration of family violence within Aboriginal and Torres Strait Islander communities within the context of colonisation. Research has highlighted the continued social and personal impacts on Aboriginal and Torres Strait Islander people of practices such as displacement from traditional lands, forced removal of children, the loss of Indigenous language, dispossession of culture, normalisation of violence, inequality and inequitable access to services, and the resulting break down of enduring social bonds. The impact of these historical and ongoing systems has been emphasised as a primary contributor to male perpetrated family violence. Noting these important nuances, and the commitment to self-determination under Closing the Gap, communications strategies directed to Aboriginal and Torres Strait Islander communities must be led by the communities themselves and provided sufficient and long-term resourcing.*

7.28. The extent to which a tailored education and communication approach is necessary is identified in the joint NAAFLS and CAAFLU submission, which quotes Professor Victoria Hovane:

> *Conceptualisations of domestic and family violence in Aboriginal and Torres Strait Islander families and communities are different to prevailing dominant Western theories of domestic and family violence. It has a different background, different dynamics, it looks different, it is different. It needs its own theoretical discourse and its own evaluations.*

7.29. The Territory's bipartisan Aboriginal Justice Agreement (AJA) recognises that:

> *The justice system plays a critical role in maintaining law and order and community safety. Government agencies and contracted service providers must consider change at every stage of the justice system to make services more relevant and effective for Aboriginal people. But these changes must be led from within Aboriginal communities to strengthen families, reduce the likelihood of offending and improve community safety.*

7.30. In particular, the AJA relevantly includes the following commitments:

- Improve the style, method and delivery of communications to Aboriginal Territorians by government and contracted service providers.
- Engage and support Aboriginal leadership.
- Listen to and hear the aspirations and needs of all Aboriginal people when making decisions.
- Ensure local decision-making is informed and supported by local, validated data.
- Increase Aboriginal Territorians' knowledge and use of justice and other complaint mechanisms.
- Develop and implement a specialised approach for delivering men's behaviour change, domestic and family violence programs.
- Develop culturally-appropriate, evidence-based rehabilitation programs.
- Increase opportunities for prisoners to participate in high quality programs to reduce reoffending.
- Research and develop a non-custodial facility in Central Australia with a therapeutic focus to address domestic and family violence.

7.31. Several submissions discussed the need for tailored communication. The Central Land Council recommended that the Territory engage a variety of organisations in Central Australia, in particular organisations that have offices in remote regions of Central Australia and/or provide community legal education services.

7.32. NTCOSS made a number of specific suggestions informed by the recommendations of *Changing the Picture* by Our Watch, including:

- A public education campaign about affirmative consent and challenging attitudes and behaviours that effectively condone violence against women and girls must be prioritised, adequately resourced, and developed with experts and those with lived experience.
- Public education campaigns directed at Aboriginal communities must be led by communities themselves.

- Provide funding for evidence-based campaigns to promote respectful relationships across Aboriginal and Torres Strait Islander communities, with a specific focus on children and young people.
- Support initiatives developed and led by Aboriginal and Torres Strait Islander people to challenge community norms, attitudes and practices that condone or excuse violence (including stigma, victim blaming, excusing and intimidating women seeking to report) and to promote values of respect and gender equality.

Other Cultural Groups

7.33. The submission from NT Police noted that the NT is very ethnically, culturally, and linguistically diverse, and that there may be a lack of knowledge about consent and sexual health in some communities.

7.34. The submission of the Women's Legal Services Australia (WLSA) identified that for migrant women, there may be additional complexities, including lack of connections with the wider community, financial dependence on a husband and his family, and concerns that leaving the marriage will result in loss of a visa. The WLSA also identified that perceptions that discussing sex or sexual assault within relationships may be particularly difficult for persons from culturally and linguistically diverse backgrounds, as sex is considered particularly private.

Age

7.35. The submission from NTCOSS emphasised that the prevalence of reported sexual assault among young persons was the highest of any age demographic, and recommended that education be targeted towards young people accordingly. The research by Our Watch on *Respectful Relationships Education in Schools* identifies evidence-based elements which were essential to delivering effective education on this topic for young people.

7.36. According to the Senate Inquiry, the Australian Government has agreed to provide $65.3 million over 4 years from 2022-23 to invest in respectful relationships education to help prevent gender-based violence and keep children safe.

7.37. The submission from NT Police observed that many students in the Territory's tertiary educational institutions are from diverse cultural backgrounds, and some of these students may come from countries where sexual health education is either banned or not taught adequately. The submission suggested it may be useful to target sexual consent education at this group.

Disability and Illness

7.38. The Senate Committee Inquiry Report *Women With Disabilities Australia* ('WWDA') highlighted that the curriculum is also not addressing the specific needs of all children and young people. In particular, WDA voiced concerns about the need for:

> *… targeted education is needed for young women and girls with disability who are more likely to experience sexual and reproductive coercion than almost any other group and are significantly more likely to experience coercion in the context of decisions around reproductive health issues such as menstrual management, contraception, abortion and sterilisation.*

Justice System Professionals

7.39. Police and criminal law professionals will need specific training regarding changes to the law. The submission from NTLAC identified the importance of training for lawyers and the judiciary. The Committee identifies that training for NT Police will also be essential.

7.40. NTCOSS and WLSA recommended that education for justice system professionals involve an understanding of complex trauma, and understanding of the impact of sexual violence, and understanding of the dynamics and impacts of intimate partner sexual violence, cultural safety, and disability awareness. WLSA quoted their clients reporting the court system as 'humiliating', 'brutal, abrupt and traumatising', 'aggressive and insensitive', 'damaging and gruelling', and 'disrespectful of their dignity as human beings.'

7.41. While the Committee agrees that education of justice professionals regarding trauma and sexual assault is essential, to ensure the training is relevant and persuasive, the Committee considers it is essential that such training is developed in conjunction with experienced and respected professionals in each relevant field. This means that senior criminal lawyers need to be involved in developing and delivering training for lawyers, judicial officers need to be involved in developing and delivering training for judicial officers, police training needs to be developed in conjunction with NT Police of a significant rank (e.g., Superintendent or higher). Implementing a trauma-informed approach also needs to be supported by institutional policies and procedures.

7.42. The training needs to recognise and address concerns these professionals may have regarding how to implement a trauma-informed approach in an ethical and logistically feasible way. For example, criminal lawyers must navigate overriding legal obligations to the court, and to either the client or to prosecutorial guidelines. Training for lawyers

and the judiciary needs to grapple with implementing trauma-informed practices in complex scenarios where there is tension between these obligations and the ideal approach for a victim-survivor.

7.43. The joint submission of NAAFLS and CAAFLU recommended that in addition to covering best practice trauma-informed interview techniques, training should convey Aboriginal victim-survivors' experiences in reporting sexual violence and the barriers (both historical and ongoing) which Aboriginal people face to reporting sexual violence.

7.44. WLSA noted that access to female police officers was associated with an increase in crime reporting by female assault victims, and recommended that efforts be made to increase and target recruitment of female police officers.

7.45. The most recent data from the Australian Bureau of Statistics found that in relation to investigations of reported sexual assault in the Territory:[50]

- 50.6 per cent were finalised within 30 days, the lowest finalisation rate of any jurisdiction (other jurisdictions finalisation rates ranged from 52.7 - 86.1 per cent);
- 22.9 per cent resulted in an offender being proceeded against, the highest rate of any jurisdiction (other jurisdictions proceeded against an offender in 4.8 - 17.7 per cent of investigations).

Evaluation

7.46. In the view of the Committee, it is essential that any substantial changes to the law in relation to sexual offences be evaluated.

7.47. The Committee endorses the following statement from the Senate Report at [5.13]:

> *Given several jurisdictions have legislated different provisions seeking to implement an affirmative consent standard, the committee is of the opinion that it would be beneficial for those states and territory [sic] to monitor and evaluate the impact of the standard so that evidence can inform the process of reform across the country. In particular, the committee considers it important that the effect of an affirmative consent standard is assessed by the collection and examination of data on:*
> - *the disclosure and reporting of sexual assaults;*
> - *the number and nature of alleged sexual assaults investigated by police;*
> - *the laying of charges;*
> - *matters being brought to trial; and*
> - *conviction rates.*

[50] ABS, *Recorded Crime – Victims*, 2022.

Increased system demands

7.48. In the view of the Committee, until an evaluation is completed of any reforms implemented to the law in relation to sexual offences both in the Northern Territory and other Australian jurisdictions, commentary on increased demands on the resources of the criminal justice system would be speculative.

Appendix 1: Discussion Paper Questions for Stakeholder Comment

Question 1A - What, if any, elements should be added to the Northern Territory definition of consent in the context of sexual assault?

Question 1B - Is the current definition of 'harm' in the Northern Territory legislation sufficient? If not, how should it be changed?

Question 2A - Should the law provide that a person is reckless as to whether the other person consents to sexual activity if the person does not take any steps to ascertain whether the other person consents to engage in the sexual activity?

Question 2B - Should the law provide that for an accused person to raise a defence of mistaken belief that the other person was consenting to sexual activity, the accused person's belief must be not only honest but also reasonable?

Question 3A - Is the current law in relation to self-induced intoxication adequate?

Question 3B - What should the law provide, if anything, about how self-induced intoxication may be taken into account when deciding whether a person acted under a mistaken belief that the other person was consenting?

Question 3C - What should the law provide, if anything, about how self-induced intoxication may be taken into account when deciding whether a person was reckless as to the lack of consent of the other person?

Question 4 - Should, and if so, how should jury directions in a sexual assault matter be modified to:

a. promote a trauma-informed approach by the jury;
b. steer the jury away from reliance on myths and stereotypes about sexual assault; and
c. ensure the accused receives a fair trial?

Question 5 - Should there be any guiding principles or objectives inserted into the Territory legislation in relation to sexual offences to assist in sending a message regarding the purpose of the laws?

Question 6 - If the law is changed to require affirmative consent, what suggestions do you have for a communication strategy to support awareness and cultural change?

Question 7 - If the law is changed to require affirmative consent, how should the change in the law be evaluated or reviewed?