

NORTHERN TERRITORY LAW REFORM COMMITTEE

**INQUIRY INTO CONSENT FOR SEXUAL
OFFENCES**

DISCUSSION PAPER

Discussion Paper
May 2023

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1. INTRODUCTION

1.1. Sexual assault is one of the most serious health and welfare problems in Australia. It is estimated that 2,000,000 adult Australians, 80% 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: only about 1% of sexual assaults committed in Australia leads 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. For its part, the Northern Territory Government proposes to reform sexual offence law in two stages. Firstly, in January 2023 it invited the community to respond to an Exposure Draft of the *Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023*.³ The *Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023 (the Bill)* was subsequently introduced in the Legislative Assembly on 18 May 2023, however, at the date of this Discussion Paper has not yet passed into law.⁴ In preparation for the second stage of these reforms, Attorney-General and Minister for Justice the Hon. Chansey Paech MLA has 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:

1. whether the Northern Territory should adopt 'affirmative consent' to apply in relation to Criminal Code sexual offences;
2. if the answer to the first question is yes, what form this should take;
3. 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

¹ Australian Institute for Health and Welfare, *Sexual Assault in Australia* (August 2020), 1 and 3.

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

³ Available at <https://justice.nt.gov.au/law-reform-reviews/open-law-reform-consultations/exposure-draft-criminal-justice-legislation-amendment-sexual-offences-bill-2023>

⁴ Available at <https://legislation.nt.gov.au/en/LegislationPortal/Bills/~link.aspx?id=9FF8C5FBC42F4780B1048717B8023DA8&z=z>.

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

1.3. The Committee has brought together a group of Northern Territory legal experts to conduct the inquiry. As part of its inquiry, the Committee now seeks the views of service providers and other key stakeholders. This Discussion Paper summarises some of the key issues that arise and sets out a series of questions for recipients to answer.

2. PRIVACY AND CONFIDENTIALITY OF SUBMISSIONS

2.1. Submissions provided to the Committee will be held by the Legal Policy Division of the Department of the Attorney-General and Justice. This means they are potentially subject to freedom of information requests and confidentiality cannot be guaranteed. Additionally, the Committee is seeking case studies and personal stories that can be included in its final report, so that the public is able to understand the basis for its recommendations. The Committee therefore requests submissions contain only de-identified case studies and personal stories, or examples where the details provided are already in the public domain. If personal information is submitted that is not in the public domain, the Committee will de-identify this information before using it in its published reports. The names and contact details of organisational representatives who author submissions will not be treated as confidential information unless this is specifically requested in the submission.

3. HOW TO MAKE A WRITTEN SUBMISSION

3.1. Anyone can make a written submission. The Committee will accept all forms of submission, be they short and informal such as a letter or email, or a more substantial document. Submissions in electronic form are preferred. While we encourage those making a submission to address the questions set out in this Consultation Paper, there is no need address all the questions posed. Further, the submission need not be confined to the issues addressed in this Discussion Paper. Finally, for ease of reference, all of the questions for stakeholder comment set out in this Consultation Paper have been set out in Appendix 1.

Submissions should be sent to:

Executive Officer

Northern Territory Law Reform Committee

E: Lawreformcommittee.DOJ@nt.gov.au

Alternatively, a hardcopy of the submission can be mailed to:

GPO Box 1535

DARWIN NT 0801

The closing date for submissions is **Friday 30 June 2023**.

In the absence of a clear intention that a submission should be treated as confidential, the Committee will treat all submissions received as non-confidential.

The purpose of a submission is to assist the Committee in its formulation of recommendations, and the contents of a submission may be quoted or referred to in the Committee's final report. Submissions also may be made publicly available.

4. CONSENT

4.1. Section 192 of the Criminal Code (NT) (**the 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.

4.2. Under current Northern Territory law, 'harm' is defined 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.

4.3. The Bill proposes to also criminalise conduct colloquially known as “stealthing” (the secret removal or sabotaging of a condom without the consent of the other person to participating in sexual activity without a condom) by adding the following item to the above list:

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.⁵

4.4. The 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;
- the person did not sustain physical injury; or
- the person had, on that or an earlier occasion, consented to a sexual act whether or not of the same type, with the accused.

The Bill proposes the following additions to the above list:

- the person did not say or do anything to indicate that the person did not consent; and
- during the period or on the occasion when the sexual act occurred, or on an earlier occasion, the person consented to engage in a sexual act (whether or not of the same type) with the accused *or with another person* (emphasis added).⁶

4.5. Affirmative consent laws have been adopted in four other jurisdictions,⁷ and a fifth jurisdiction has committed to the introduction of an affirmative consent model.⁸ 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 —

⁵ Section 208GA(2)(h) of the *Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023*.

⁶ Section 208PB of the *Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023*.

⁷ New South Wales, Australian Capital Territory and Victoria introduced affirmative consent models in 2022, and Tasmania introduced an affirmative consent model in 2004.

⁸ In 2022, Queensland committed to the introduction of an affirmative consent model.

- 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
- 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 a sexual activity.

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?

5. STATE OF MIND OF THE ACCUSED

5.1. Northern Territory law provides that a person commits an offence of sexual intercourse or an act of gross indecency without consent if they engage in sexual intercourse or gross indecency with another person without the other person’s consent *while knowing about or being reckless* as to the other person’s lack of consent.

5.2. The Code states that for the purpose of this type of offending a person is reckless if:

- (a) they are aware of a substantial risk that the other person is not consenting;
and
- (b) having regard to the circumstances known to the person, it is unjustifiable to take risk.

5.3. The Code also provides that being reckless as to a lack of consent to sexual intercourse or an act of gross indecency includes not giving any thought to whether or not the other person is consenting to the sexual intercourse or act of gross indecency.

5.4. The Bill proposes to amend the law to require that when considering whether or not a person was reckless as to the lack of consent by the other person to engaging in a sexual act, a jury must have regard to all the circumstances of the case including any steps taken by the person to ascertain whether the other person was consenting to engage in the sexual act.⁹ These provisions are modelled on a similar, repealed, provision from New South Wales.¹⁰ The provision was repealed with the introduction of affirmative consent within that jurisdiction, which requires a person to take steps, rather than just requiring consideration of steps taken.¹¹

5.5. While it is not yet known how the courts will approach this amendment, if introduced, it is anticipated that a jury will be directed in a similar way as under the current law, namely, that they should consider the evidence to determine whether an accused gave any thought to the issue of consent. In any given case, whether such a direction is favourable to an accused will depend on the factual scenario and evidence adduced. Under the proposed amendments, it is expected¹² that a jury would be told as part of their consideration of whether the accused gave any thought to the issue of consent, that they must also have regard to any steps taken by an accused to ascertain consent. This does not mean that if no steps were taken an accused will be found to have the relevant mental state, but rather it directs that it is one factor that the jury must consider.

⁹ Section 208HE of the *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023*.

¹⁰ Section 61HE of the *Crimes Act 1900* (NSW)

¹¹ That provision has been within the NSW *Crimes Act* since 2018 and was repealed with the introduction of affirmative consent in New South Wales. Some argue that this amendment is a step towards affirmative consent, although it is important to note that this provision is a historical provision in New South Wales and is not found in these terms within affirmative consent models in other jurisdictions.

¹² Based on the similar provision that was in force in New South Wales.

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?

6. INTOXICATION

6.1. The 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. A person is not criminally responsible for conduct the result of non-self-induced intoxication, for example as a result of drink spiking. By far the most common type of intoxication featuring in Northern Territory sexual offending is self-induced intoxication.

6.2. If a person commits a sexual act while in a state of self-induced intoxication, the Code provides that evidence of their intoxication cannot be considered when determining whether the person intended to commit the sexual act. It can be taken into account, however, when looking at the mental state of an accused.

6.3. As an illustration of how this law applies in practice, here is the direction given by a Northern Territory judge to a jury in one such case:

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.¹³

6.4. 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 Code does not include provisions that regulate how a jury can or should have regard

¹³ *R v Willcocks (No 2)*[2018] NTSC 38, [24]

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 intoxication is relevant to a determination of whether their conduct was unjustifiable. The Committee will consider whether Northern Territory law should be reformed by specifying the way in which juries can and should have regard to self-induced intoxication.

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?

7. JURY DIRECTIONS

- 7.1. 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.
- 7.2. Given this, affirmative consent laws interstate have incorporated directions to the jury to complement and clarify the intent of the offence provisions. The current Northern Territory jury directions and those proposed in the Bill are summarised at paragraph 4.4 above.
- 7.3. In New South Wales, the law provides that judges may also give the following jury directions:
- 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.

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?***

8. AWARENESS AND COMMUNICATION

8.1. In some jurisdictions, sexual offence laws have been amended to include a statement of guiding principles or objectives, such as:

- consent is integral to a person's autonomy and wellbeing;
- understanding and expectations of consent affects everyone who engages in sexual activity;
- consent is not to be assumed but must be proactively obtained at the time of engaging in sexual activity;
- subject to specific exceptions regarding children and other persons who are especially vulnerable, every person is free to consent to sexual activity of their choice; and
- consent can be withdrawn at any time.

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?

APPENDIX 1 – 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?