



INQUIRY INTO CONSENT FOR SEXUAL OFFENCES – DISCUSSION PAPER – NORTHERN TERRITORY LAW REFORM COMMITTEE

31 July 2023



Contributors

The document has been developed by Gen Dally (NTAHC) with contributions from James Holland (Health Equity Matters), Hannah Walter (Health Equity Matters), Liewen Hu (HALC), Aaron Cogle (NAPWHA), Phillipa Venn-Brown (NAPWHA), Mish Pony (Scarlet Alliance) and Leanne Melling (SWOP NT).

Lead Submitting organisation

NTAHC provides a broad-based community response to Blood Borne Viruses in the Northern Territory. NTAHC's programs are aimed at preventing the transmission of blood borne viruses and have been developed to provide services, support and preventative initiatives with and for our priority populations. NTAHC has offices in Darwin, Alice Springs and Palmerston (NSP only).

Supporting organisations

Health Equity Matters is the national federation for the HIV community response in Australia and is recognised globally for its expertise in HIV and health promotion. Through advocacy, policy and health promotion, Health Equity Matters champions awareness, understanding and proactivity around HIV prevention, education, support and research. Health Equity Matters provides a voice for communities affected by HIV and leads the national conversation on HIV.

The **HIV/AIDS Legal Centre** (HALC) is the only not-for-profit, full time specialist community legal centre of its kind in Australia. HALC provides free and comprehensive legal assistance to people living with HIV or hepatitis-related legal matters, within operational guidelines. HALC also undertake community legal education and law reform activities in areas relating to HIV and hepatitis.

The **National Association of People with HIV Australia** (NAPWHA) is Australia's peak non-government organisation representing community-based groups of people living with HIV (PLHIV) across Australia. NAPWHA provides advocacy, policy, health promotion, effective representation, and outreach on a national level. Its work includes a range of health and education initiatives that promote the highest quality standard of care for HIV-positive people.

Scarlet Alliance, Australian Sex Workers Association is the national peak body for sex workers and sex worker organisations in Australia. Through its objectives, policies and programs, Scarlet Alliance aims to achieve equality, social, legal, political, cultural and economic justice for past and present workers in the sex industry. Scarlet Alliance represents a membership of individual sex workers and sex worker organisations, projects and groups from around Australia, and through the work of its members has the highest level of contact with sex workers in Australia of any agency, government or non-government.

The **Sex Worker Outreach Program Northern Territory** (SWOP NT) is a program of the NTAHC and a voting member of the Scarlet Alliance. SWOP NT is a peer-based health promotion/sex worker advocacy service. The program directly engages sex workers in peer leadership and peer support and additionally provides other sex industry stakeholders in the Northern Territory (NT) with information to gain knowledge of the application of legislation/ industrial protections that applies to sex work in the Northern Territory. SWOP NT with sex workers who work in the NT, maintains positive working relationships for advocacy with government Ministers and their departments, unions and non-government organisations and allies to advance sex worker human rights through SWOP NT service provision.

Contents

Contributors	2
Lead Submitting organisation	2
Supporting organisations	2
Contents	3
Question 1A - What, if any, elements should be added to the Northern Territory definition of consent in the context of sexual assault?	4
Question 1B - Is the current definition of ‘harm’ in the Northern Territory legislation sufficient? If not, how should it be changed?	7
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?	8
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?	9
Question 3A - Is the current law in relation to self-induced intoxication adequate?.....	10
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? .	10
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?.....	10
Question 4 - Should, and if so, how should jury directions in a sexual assault matter be modified to:	12
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?	14
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?	15
Question 7 - If the law is changed to require affirmative consent, how should the change in the law be evaluated or reviewed?.....	16

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

Recommendations

- Legislation must be well defined, tightly drafted and specific with limited scope in regard to 'mistaken identity'.
- Legislation must repeal binary approaches to gender and adhere to the terms enshrined in law in the amended Anti-discrimination Act 2012 (1 July 2023).
- There should be broad provisions about deception to vitiate consent which criminalise non-disclosure of gender history or health information.
- Proportional criminalisation must be considered in regard to non-consensual condom removal or disruption.

We raise concerns in relation to the current and proposed provisions that 'consent does not occur when a person is mistaken about the sexual nature of the act, or a person is mistaken about the identity of any other person involved in the act.'

These must be clarified to ensure that they cannot be interpreted in a way that requires people to disclose that they are trans or gender diverse before sex. Trans and gender diverse people experience high levels of sexual coercion and violence. Historically, representations or non-disclosure of trans identity has been incorrectly and inappropriately framed as 'deception' as part of the 'homosexual advance defence' and 'trans panic defence'. This framing of deception and misrepresentation is a harmful cultural narrative about trans and gender diverse people that has enabled transphobic violence. It remains a risk that these provisions can be misused by police or transphobic former sexual partners¹.

There should also be clear definition on what constitutes "mistaken about the identity of any other person involved in the act" so that it does not capture frivolous or immaterial aspects, such as age and ethnicity.

Historically, these provisions have not been interpreted to criminalise non-disclosure of gender history or health information including a person's HIV status in Australia. Arguably, it might be hard to interpret these provisions to criminalise non-disclosure of a person's health information, including their HIV status. However, noting that there have been some concerning legislative changes in other States and Territories and internationally², we submit that there should be no broad provisions about deception to vitiate consent which criminalise non-disclosure of gender history or health information.

We note that broadly drafted legislation will leave decisions on who to police, to charge and who to convict to the police and the courts. Historically broadly drafted legislation has exposed marginalised groups to systemic injustice

¹<https://www.humanrightspulse.com/mastercontentblog/active-deception-or-failure-to-disclose-how-uk-law-relating-to-sexual-consent-discriminates-against-transgender-and-gender-non-conforming-defendants>

² <https://www.tandfonline.com/doi/full/10.1080/26410397.2023.2194188>

at the hands of the coercive agencies of the state. **NTAHC strongly recommends well defined, tightly drafted and specific legislation of limited scope in this case.**

There is consensus in Australia's National strategies for bloodborne viruses (BBV) and sexually transmissible infections (STI), and the public health policy space, that HIV and all other STI must be treated as a health issue, not a criminal issue. People must not be legally required to disclose HIV, nor to answer truthfully if asked about HIV. Further, people must not be required to disclose any other STI status before sex at law. This is because such requirements in fact discourage disclosure thereby making further transmissions more likely, not less and because of the serious consequences of criminalisation, stigma, discrimination and violence upon disclosure. In particular, when a person has an undetectable viral load, HIV is not transmissible. It is imperative that these provisions are not introduced to criminalise trans and gender diverse people, sex workers, or people living with STI inclusive of people living with HIV.

We note however that the Northern Territory has not regressed to criminalise people for BBV/STI status and in fact the Northern territory has advanced in protecting marginalised communities that includes enshrining protections against discrimination in law as protected attributes for sex workers and their work, people living with HIV and Hepatitis and for people who are LGBTI+. We applaud the Northern Territory Government for this work.

We also raise other specific concerns that for sex workers, a key component of consent is payment and that in the current legislation and proposed bill it is not clear that “false representation as to the nature or purpose of the act” would cover non-payment of services. We submit that non-payment should be given as an example that falls user “false representation as to the nature or purpose of the act”. This is integral to ensure these protections extend to sex workers as we note that the NT Sex Industry Act 2019 does not cover adequately “false representation – nonpayment.”

“In sex work, a key aspect of consent for sexual services is payment for the services negotiated. If payment is not made or withdrawn, whether or not the sex worker is yet aware, consent is also withdrawn”³

We also note that the Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023 (NT) (the Bill) proposes to criminalise non-consensual condom removal. We agree that this should be included in legislation, and that it should be explicitly restricted to the non-consensual removal of condoms only.

There is a difference in seriousness between:

- aggravated (violent) sexual assault or rape by force or threat of force and;
- sexual assault by vitiated consent, such as in the case of non-consensual condom removal or disruption.

In line with the principle of proportional criminalisation, **the law should approach these two situations differently and with appropriate proportionality respective to each case.**

³ https://respectqld.org.au/wp-content/uploads/Documents/sub_120121.pdf

Lifted with consent from Respect Inc. submission

“Respect Inc notes that the taskforce correctly identified that stealthing should cover the non-consensual sabotage or removal of a condom. The proposed approach does not include sabotage or tampering with the condom and instead only refers to sexual activity without a condom: A person who consents to a particular sexual activity is not, by reason only of the fact, to be taken to consent to any other sexual activity.

Example - A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.

Some stealthing practices include damaging the condom in such a way that it appears to still be worn by the user but does not have the effect of being a barrier because it has been sabotaged or tampered with, or used in such a way that it is likely to fail.

We note that recent stealthing laws in Victoria make reference to both removal of, or tampering with, the condom.

Respect Inc. recommends the amendment be reworded to include both removal and sabotage of the condom.

A person who consents to a particular sexual activity is not, by reason only of the fact, to be taken to consent to any other sexual activity. Example - A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity whether the condom was removed, tampered with or not used.”

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

Recommendations

- The definition of 'harm of any type' should also 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.
- Transmission of HIV should be not included in the definition of 'serious harm.'

The current definition of 'harm' is set out by s 1A of the Criminal Code Act 1983 (NT) (the Code): 'physical harm or harm to a person's mental health, whether temporary or permanent.'

In current legislation, s 192(2)(a) of the Code provides that there is no consent when 'the person submits because of force, fear of force, or fear of harm of any type, to himself or herself or another person'. If this provision stays after the Bill passes the Parliament, we submit that in this specific section, 'harm of any type' should also 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**.

However, we notice that in the Bill, the reference to 'fear of harm of any type' has been removed. If the Bill passes the Parliament, the reference to 'harm' related to sexual offences will only be relevant to circumstances of aggravation for a sexual offence. The new section 208P(1)(d) will provide that circumstances of aggravation for sexual offences include when 'the offence was committed in circumstances that involved the victim being caused serious harm or being threatened with serious harm or death'.

The current s 1 defines 'serious harm' as 'any harm (including the cumulative effect of more than one harm): (a) that endangers, or is likely to endanger, a person's life; or (b) that is or is likely to be significant and longstanding.' Considering that the definition of 'harm' is relevant to plenty of other offences such as recklessly endangering serious harm provided by the current s 174D, that the principle of proportionality requires that criminal punishment should be proportional to the objective seriousness of an offence and that 'serious harm' is given almost the same weight as death regarding imposing increased penalty, we submit that the current definition of 'harm' is sufficient.

We submit that transmission of HIV should be not included in the definition of 'serious harm'. The modern experience of HIV is of a chronic, manageable condition similar to diabetes in nature. Modern, universally available, treatments suppress HIV in the body which preserves health in the long term. People with HIV (PWHIV) now live lives of equivalent length to their HIV negative counterparts. They cannot pass on HIV if they are on effective treatment with an undetectable viral load, even in the absence of a condom. PWHIV are no longer prevented from having children and Australia has eliminated mother to child transmission. Further, PWHIV are no longer prevented from various professions such as surgeons who perform exposure prone procedures. **We submit therefore that traditional associations of HIV with 'harm' are scientifically out of date and should be reassessed.**

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?

Recommendations

- The law must consider the many mechanisms for giving and withdrawing consent. This must include verbal and nonverbal cues, use of body language and other augmentative and alternative communication tools. The law must not support biases or undermine variants of diverse sexual expression.
- The law must be framed in such a way as to validate all forms of consensual sexual expression and to criminalise only non-consensual sexual intercourse.

Bill s 208HE(b): the trier of fact must have regard to all the circumstances of the case including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, engaging in the conduct, the performance of the act, the touching or the act.

Yes, the law should provide that a person is reckless as to whether the other person consents if they do not take steps to ascertain consent. **This is trauma informed legislation and must consider diverse responses to traumatic experiences that may include 'freeze' or 'fawn'**. It also recognises that the absence of explicit consent is by default non consent (in the circumstances where a complaint of sexual assault has been made).

However, we have concerns that the way the proposed law could criminalise people engaging in a range of diverse sexual practices. For example, many people in Australia regularly engage in sexual intercourse with anonymous partners, in situations where the sexual partner cannot be seen, nor identified and in locations where non-verbal communication is strictly enforced, regardless of if there is consent before entering the venue and consent can be withdrawn. There are a range of sexual practices for example consensual BDSM including being tied up, restrained and/or submitting to devices or items of apparel which prevent verbalisation, such as gas masks and ball-gags. These kinds of sexual practices that may or may not involve sexual intercourse, like all variants of human sexuality, are normal and consent are often non-verbal and at times augmented. We wish to emphasise that the law must not inadvertently discriminate against the sexual practices of individuals.

Further, **we strongly recommend that the law be drafted in such a way that it can respond positively and adaptably to the full range of human sexual expression and that anodyne, heteronormative stereotypes of sex are not held to be universally applicable.**

The law must be framed in such a way as to validate all forms of consensual sexual expression and to criminalise only non-consensual sexual intercourse.

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?

Recommendations

- There must be a complete carve out for HIV status and gender/diverse, intersex or non-binary identity, or individuality, or personal identity.
- This must be reinforced as part of jury directions.

We are concerned that mistaken belief can be used to take into account extraneous evidence unrelated to the incident, and consider it a reason for the accused being misled about consent. Amendments should be seeking to remove from potential evidence factors such as: how a person looks, what their job is, gender, ethnicity, age, previous sexual activity, whether they were able to defend themselves, their intoxication level, mental incapacity, their work as a sex worker, sexuality, gender identity, HIV/STI status and language barriers. None of these factors are excuse or justification for rape or sexual assault. The mistake of fact defence must not be informed by societal attitudes to who is and who is not able to be a legitimate victim of sexual assault. A person's gender, appearance or work as a sex worker should not be able to be used as a reason a defendant was 'confused' about consent. A defence of mistaken belief must both be honest, but also reasonable.

There is a significant risk in relation to the forced disclosure of a person's BBV or STI status. We recommend that there must be a complete carve out for HIV status and gender/diverse, intersex or non-binary identity, or individuality, or personal identity.

Additionally, we also recommend that this carve out be reinforced under the directions to jury.

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?

Recommendations

- The jury should be directed to the circumstances where a person is incapable of freely agreeing and the situations which involve inebriation but are nevertheless consensual.
- Evidence of intoxication such as documented Blood Alcohol Level (BAL) or toxicology, CCTV footage and independent witness statements should be presented to the jury.
- The jury should not be directed to consider how affected by alcohol the accused was at the time they held the mistaken belief that the victim/survivor was consenting to the sexual act.
- Amending the current law so that the jury does not consider self-induced intoxication when deciding if the accused genuinely held the mistaken belief will further focus efforts by the defence to demonstrate that the accused proactively and explicitly sought consent from the victim-survivor.

The current law describes circumstances when there is no consent [CCA s.192(2)], including where: the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing. While this adequately describes circumstances of no consent the evidence that would support the victim-survivors testimony such as a documented excessive blood alcohol level (BAL), positive toxicology results, CCTV footage of the assault or witness statements from bystanders are often unavailable to the jury.

Case studies involving 'opportunistic' sexual assaults that occur in the context of the victim-survivor having fallen asleep or 'passed out' due to intoxication resulting in the person to become separated from their family or friends' group, are common in the Northern Territory. Frontline health and emergency services personnel are often the first point of contact when a person has woken to someone sexually assaulting them or waking alone knowing that a sexual assault has occurred. Often this understanding is due to the presence of semen or injuries resulting from the assault. The assault and the level of intoxication of the victim-survivor may have been captured by CCTV footage or recorded as a BAL at the emergency department or observed by a witness. This evidence needs to be paramount and explicit when presented to the Jury. In preparing this submission, NTAHC consulted with a variety

of front-line services and anecdotally it is understood that currently at least one person a night in the Darwin urban region is experiencing a sexual assault under these circumstances.

However, the law must not confuse situations in which a person is so affected by alcohol or another drug as to be incapable of freely consenting (so, unconscious) with common situations in which people voluntarily imbibe excessive amounts of alcohol and other drugs for the express purpose of having sex. Many people commonly and regularly use copious amounts of alcohol and other drugs to heighten the experience of sexual intercourse, to overcome barriers to sexual intercourse, and to engage in sex for longer. We submit that the law must have the ability to distinguish between voluntary alcohol and drug use for the purposes of consensual sex and circumstances where the person is so intoxicated that they are unable to consent.

The current law provides that evidence of intoxication cannot be considered when determining whether the person intended to commit the sexual act. Although, the jury can consider how affected the accused was by alcohol at the time they held the mistaken belief that the victim-survivor was consenting to the sexual act. The mistaken belief does not have to be reasonable but has to be genuinely held.

The ability for the accused to cite self-induced intoxication as a defence is in opposition to the intention of affirmative consent laws that are underpinned by shared responsibility for ensuring that both parties are consenting to the sexual act. Self-induced intoxication is a common feature of sexual offences in the Northern Territory.

In 2013, the NT Law Reform Committee tabled a report on the laws on self-induced intoxication. The report noted that there were widely held views regarding self-induced intoxication and that there is a public policy benefit in holding persons criminally responsible for their actions whilst intoxicated, irrespective of whether they acted voluntarily or intentionally. There seems no doubt that the community considers it a benefit if self-induced intoxication, leading to activities against the law, and committed with the relevant intent should be subject to criminal sanctions.

Amending the current law so that the jury does not consider self-induced intoxication when deciding if the accused genuinely held the mistaken belief will further focus efforts by the defence to demonstrate that the accused proactively and explicitly sought consent from the victim-survivor.

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

Jury directions should be modified to:

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

Of all the proposed amendments to the current law modifying jury directions is one of the most crucial reforms required to ensure a trauma informed approach is applied to the court process, clear and informative directions will also ensure a fair trial for the accused.

Promoting a trauma-informed approach by the jury:

- Educate the jury on the impact of trauma on memory and why some details may be unclear or inconsistent.
- Educate the jury on barriers faced by LGBTQIA+ people, sex workers, people with HIV and Aboriginal and Torres Strait Islander to report or disclose incidences of sexual assault to healthcare workers or police due to fear of discrimination and potential prejudice.
- Encourage the jury to approach the survivor's testimony with empathy and sensitivity, understanding that their emotional responses may vary.

Steer the jury away from reliance on myths and stereotypes about sexual assault:

- Instruct the jury about the common reactions and behaviours of sexual assault victim- survivors, emphasising that there is no "right" way to respond to trauma, including current research that explores 'freezing and fawning' as common trauma responses.
- Advise the jury to consider the context of the assault, recognising the power dynamics and fear that victim-survivors may have experienced during the incident while taking great care not to impose heteronormative stereotypes on people of differing sexualities.
- Educate the jury on what constitutes 'slut shaming' and advise that the court has specific guidelines that prohibit many areas including allowing 'slut shaming' as a strategy to undermine the fair and just process.
- Provide clear guidance on the changes to the legislation and the meaning of affirmative consent. Instruct the jury that consent cannot be implied by a lack of physical resistance or that a lack of injury does not negate the possibility of sexual assault.

Ensuring the accused receives a fair trial:

- Remind the jury of the presumption of innocence, emphasising that it is the prosecution's burden to prove the accused's guilt beyond a reasonable doubt.
- Instruct the jury to focus solely on the evidence presented in court and to set aside any personal biases or assumptions.
- Clarify the elements of the alleged offence and the specific legal requirements for conviction, ensuring that the jury fully comprehends the necessary elements for a guilty verdict.

It is essential to continually review and update jury directions to reflect best practices and current understanding in sexual assault cases. In circumstances where specialist knowledge is required to understand the context of the assault it is important that the court appoint a credible professional to provide the jury with accurate information.

An example of this may be the concept of U=U (undetectable viral load = untransmissible HIV)⁴ in cases where one of the parties is a person with HIV. Directions to the jury must be presented in plain language and where appropriate a verbal or Auslan interpreter must be utilised, and directions must be provided in preferred language or communication other than English. In addition, the jury must be directed to consider other intersecting Northern Territory legislation such as the Anti-Discrimination Act 1992, the Sex Industry Act 2019, the Public and Environmental Health Act 2011

Legal professionals, judges, victim-survivors advocates, and experts in trauma should collaborate to develop comprehensive and effective jury instructions that promote fairness, understanding, and empathy while safeguarding the rights of both the accused and the victim-survivor.

⁴ <https://napwha.org.au/pass-it-on/>

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?

We suggest that the Northern Territory should implement a broad range of guiding principles to assist the Judiciary to interpret the legislation. A selection of guiding principles is included below.

Guiding Principles or Objectives to be inserted into the Territory Legislation in relation to sexual assault

- Both parties to sexual intercourse share an equal responsibility for the prevention of HIV and other BBVs and STIs. This responsibility cannot be discharged by asking sexual partners about their HIV/BBV/STI status. Each partner has agency and therefore a responsibility to implement the sexual health interventions that are suitable for them such as PrEP, U=U, condoms or other prevention mechanisms.
- Sexual consent laws and sexual offences should utilise modern, degendered language that is clear and inclusive and reflect intersecting legislation such as the *Anti-Discrimination Act 1992*.
- Sexual consent laws should aim to reflect the requirement of affirmative consent, but are not prescriptive in how consent is obtained
- Legislative change towards the affirmative consent model should be supported by community education, targeted education for young people and vulnerable people who are disproportionately impacted by the changes.
- Legislative change towards better realising the affirmative consent model should be supported but there must be ample lead in time to support the education for police, lawyers, judges and other court officials.
- Directions should aim to influence the frequency with which arguments based on misconceptions about consensual and non-consensual activity are used in sexual offence trials.
- Directions should aim to reduce the over-emphasis in trials on whether the complainant resisted or otherwise demonstrated a lack of consent.

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?

Should the law be changed to require affirmative consent, a communication strategy should be developed to educate the community and support awareness and cultural change.

The communication strategy should be aimed at improving the understanding of affirmative consent within the broader population but should also include specific education modules for:

- police
- healthcare workers, including primary care
- sexual assault service personnel
- family and domestic violence service personnel
- personnel working in refugee support and CALD community services
- sex workers and peer organisations
- Aboriginal and Torres Strait Islander Community Provided Health and Medical Service personnel and peer workers.

Public education through advertising campaigns should clearly explain the meaning of affirmative consent and its relationship to shared responsibility within the sexual act.

Consideration should also 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.

Information should be made available in community languages in both hard and soft copy.

The implementation of the communication strategy must be adequately resourced and prioritise the role of people with lived experience and peers to deliver resources and education modules.

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

If the law in the NT is changed to require affirmative consent the introduction of this change to the law should be evaluated and reviewed, consistent with best practice and where possible consistent with legislation across other jurisdictions. Evaluation and review can be undertaken by the implementation of the following actions.

- Review of the number of complaints made under the changed law annually for three years, then at five year intervals.
- Review the number of complaints brought before the courts for litigation annually for three years and then at five year intervals.
- Review of the number of actions successfully prosecuted under changes to the act annually for three years and then at five year intervals.
- Review demographic information about the people charged under such laws including: the numbers of Aboriginal and Torres Strait Islander people, LGBTIQ+ people, HIV positive people etc. to be published annually.

Intersectional recommendations

1. Sharing of intimate images without consent

Sharing of Images and sounds - inclusive of video, pictures and or any other recording, including sound recording without consent.

Retaining intimate images for personal use without consent

Recommendation must include consent between all parties for the retaining of images and or audio for personal use who consent to sexual activity regardless of if; “-sexually explicit images, videos, audio recording, cartoons, drawings, photographs or ‘jokes’ are retained without sharing, or are shared or used to threaten to share an intimate image or video or audio recording without consent”

Current laws in in the Northern Territory,

Currently the laws in the Northern Territory do not protect individuals who have consented to sexual activity from having their sexually explicit images and or audio from being retained without permission.

If consensual sexual activity is undertaken and a person who has consented to the sexual activity retains images and audio for their own purpose and does not intend to share the private images or audio, then this is permissible without consent.

Offences are deemed as an offence only if the images or audio is shared.

This must be amended to reflect consent with all parties regardless of if the images or audio is for private use of one party and not shared.

There has been reporting to police by private sex workers and sex service operators of Brothels, Agencies and Parlors as well as SWOP NT, of clients who have been suspected to be taking recordings via mobile phone video. As there was no ability to trace the video being shared, police were unable under the current laws to legally obtain a warrant to search the clients premises, as the activity was consensual under NT laws and no proof of sharing was visible.

Detective Danny Bearman - NT Police - Palmerston Police Station - PROMIS Number - (AK) 9782557 - Client suspected of taking video footage of a full service 1 hour booking with a sex worker.

2. Supreme Court Code of Practice - Guidelines

Recommend: Re-enforcing Supreme Court Code of Practice - Guidelines for Defence Council, Crown and Judges to abide by

Slut Shaming in Supreme Court⁵

“The previous licencing framework in the Northern Territory provided perpetrators of sexual assault a space to target sex workers who they thought would not report crimes to police, due to the criminalised environments that sex workers were forced to work within. SWOP NT have evidenced that incidences of stealthing (which is the non-consensual removal of condoms) during sexual services and violence were significantly higher under the previous Prostitution Regulation Act 1992. Since the implementation of decriminalisation through the Sex Industry Act 2019, the ability of sex workers to report sexual assault to police has improved. This reporting has often been with the support of SWOP NT, and/or the Sexual Assault and Referral Centre (SARC). Sex workers report that decriminalisation has assisted in raising their confidence that crimes against sex workers will be taken seriously. The decriminalisation of sex work in the Northern Territory has put in place a barrier of safety that has minimised areas where these perpetrators can commit crimes as easily or with an expectation of impunity. These critical improvements under decriminalisation are undermined by the public reporting and experiences of sex workers in court.

The following example highlights the ‘slut shaming’ of survivors of sexual violence by the courts during rape cases and the continuation of the vilification in reporting by media and quotes by defence counsel. This was evidenced in the Supreme Court case of *Queen v Wilcocks* 2018 (19)⁶.

⁵ Scarlet Alliance, SWOP NT & SWRG submission to NT ADA Exposure Draft 2022, pages 25-26
<https://scarletalliance.org.au/library/submission-to-the-northern-territory-exposure-draft-anti-discrimination-amendment-bill-2022/>

⁶ 19 *The Queen v Wilcocks* [2018] NTSC 21, CITATION: *The Queen v Wilcocks* [2018] NTSC 21 PARTIES

A SWOP NT worker reports the following on the rape trial:

“SWOP NT staff and SWRG members together with other workers who work as strippers set up a roster to record the trial. The words describing the anatomical parts of the woman's body and how large parts of her body were and what sort of objects could go where, were abhorrent. Transcripts are accessible as evidence. This case was one of the worst that SWOP staff have experienced in the way a person who had been raped was being described in a court of law. Unfortunately the type of vilification that occurred in 19 The Queen v Willcocks [2018] NTSC (21 22) commonly occurs and is not just directed towards sex workers but women (inclusive of trans women) seeking justice for sex crimes.”

Examples of blatant vilification and offensive conduct by the defence lawyer were reported in the media⁷, continuing the experience of slut shaming against the survivor of sexual assault⁸.

These reports are incredibly harmful and continue to perpetuate misinformation around sex work that compromises the dignity of the victim/survivor and of a sex worker's right to feel safe at work. The intention of the Sex Industry Act 2019 was to ensure the workplace safety of sex workers in the NT. The treatment of sex worker survivors by the courts and in the media continue to jeopardise this aim.

3. Recommend: Legislation must repeal binary approaches to gender and adhere to the terms enshrined in law in the amended Anti-discrimination Act 1992 (1 July 2023)

Modernising all NT legislation to align with the new NT Anti-Discrimination Act 2022 - implemented 1st July 2023

From the very first discussion paper in 2017 calling for submissions to modernise the NT Anti-Discrimination Act and during the submission process for the development of the Sex Industry Act in 2019 inclusive language has been advocated for by our communities. We look forward to the application of the new Anti-Discrimination inclusive language amendments

“Recommendation 18: “The Northern Territory Government should open an Inquiry to remove provisions from any legislation which discriminates or may lead to discrimination, against any person as provided in the new NT Anti-

⁷ ABC News (2019) Man accused of beer-bottle rape of buck's night performer tells Darwin court he has 'seen worse things' <<https://www.abc.net.au/news/2019-02-27/man-accused-of-beer-bottle-rape-of-bucks-performer-examined/10852584>> Accessed 22/08/2022

⁸ NT News (2020) Man convicted of raping stripper with beer bottle was a 'larrikin who made a mistake', court hears <<https://www.ntnews.com.au/truecrime/police-courts/man-convicted-of-raping-stripper-with-beer-bottle-was-a-larrikanwho-made-a-mistake-court-hears/news-story/d0e45da08b89e38590799a95978cc632>> Accessed 22/08/2022

Discrimination Act 2018. Consider Developing a Bill of Human Rights to work alongside the new Anti-Discrimination protections”⁹

“Future Legislative Reforms- Recommendations: The Northern Territory Government should open an Inquiry to remove provisions from any legislation which discriminates or may lead to discrimination, against any person as provided in the new NT Anti-Discrimination Act 2018. Consider Developing a Bill Of Human Rights to work alongside the new Anti-Discrimination protections. *page 6 of 35*

“SWOP NT and the SWRG believe that an 'Inquiry' by the Northern Territory Government to remove provisions from any other legislation' which discriminates or may lead to discrimination, against any person as provided in the new NT Anti-Discrimination Act 2018 will enable holistically best practice reforms and will strengthen the Acts of the Northern Territory as a whole. We would like the government to dually consider developing a Bill of Human Rights 'to work alongside the new Anti Discrimination Act protections” *page 29 of 35*¹⁰

4. Recommend: that SARC services be additionally resourced and funded to undertake;

The Top End Health Service Sexual Assault Referral Centre (SARC) is a 24 hour crisis response service offering counselling, medical management and forensic medical examinations for people and their families affected by sexual assault and sexual abuse. In addition to client led care SARC delivers school based healthy relationships programs and prevention programs with a focus on protective behaviours, consent and mutual respect across urban and remote communities in the Top End.

SARC receives intakes and referrals for people accessing services from a variety of sources. Individuals may self-refer or referrals may come from partners, friends, family members, clinic and hospitals or from agencies such as NT police and Territory Families. SARC operates under a trauma informed model of care, determined and led by

⁹ REFORMING REGULATION OF THE SEX INDUSTRY IN THE NORTHERN TERRITORY Sex Worker Outreach Program (SWOP NT) Sex Worker Reference Group (SWRG) Collective Submission in response to the Northern Territory Government Discussion Paper – release 29th March 2019, submitted SWOP NT & SWRG, 25 May 2019, accessed 14-7-2023, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://irp-cdn.multiscreensite.com/7a46c311/files/uploaded/final_swop_nt_swrg_submission_law_reform_nt.pdf

¹⁰ Sex Worker Outreach Program (SWOP NT) Sex Worker Reference Group (SWRG) Collective Submission in response to the Northern Territory Government Discussion Paper - release September 2017 Modernisation of the Anti-Discrimination Act, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://justice.nt.gov.au/_data/assets/pdf_file/0004/1082533/submission-162-sex-worker-outreach-program-and-sex-worker-reference-group-collective-submission.PDF

the individual and in instances where a young person accesses the service, every attempt is made to ensure they are empowered to take control of their experience

It is understood that in order to improve outcomes for victims-survivors outside of the court processes people need ongoing and continuous support. For this to be achieved the following is resourcing is required.

- Outreach services directly to remote areas and communities inclusive of
- Full forensics training to remote areas and in storage and use of PFKs
- A activity scope to identify gaps in reporting sexual assaults, in providing forensics and facilitating transport for the survivor to be able to report crime and access to clear pathways for support services inclusive of SARC services, medical services for ongoing counselling and support
- For PFKs to be disseminated across the NT, forensic fridges and storage of information are available in all local areas to minimise cost and to ensure that minimal travel and identification of survivors in remote areas are minimised and protected

Further Reading and Support for consent reforms:

Victoria:

https://scarletalliance.org.au/wp-content/uploads/FINAL-Vixen_Scarlet-Alliance_DJCS-Consent-reforms-feedback_Redacted.pdf

Queensland:

https://respectqld.org.au/wp-content/uploads/Documents/sub_310120.pdf