

NORTHERN TERRITORY LAW REFORM COMMITTEE SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE CURRENT AND PROPOSED SEXUAL CONSENT LAWS IN AUSTRALIA

The Northern Territory Law Reform Committee (**the NTLRC**) is a non-statutory committee established to advise the Northern Territory Attorney-General and Minister for Justice (**the Attorney-General**) on the reform of law in the Northern Territory. The Legal Policy Division of the Department of the Attorney-General and Justice provides executive and administrative support to the Committee, but the Committee operates on a voluntary basis and has no staff.

On 2 December 2022, the Attorney-General asked the NTLRC to “investigate, examine and report on possible law reform in relation to consent in sexual offences in the Northern Territory”, and to provide a report by 31 October 2023. The Attorney-General requested the NTLRC to consider 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
4. Whether any other amendments would improve the operation of consent in sexual offences in the Northern Territory.

The NTLRC has accepted the Attorney-General’s reference and commenced an inquiry. The NTLRC inquiry is currently examining the operation of consent laws in each Australian jurisdiction, and will presently consult with relevant professionals and stakeholders in both the Territory and in other jurisdictions.

The NTLRC is mindful of the desirability of harmonisation of criminal laws across different jurisdictions. However, the NTLRC notes that there are currently substantial differences between consent laws across Australia, and that accordingly, whichever model the Northern Territory adopts will be inconsistent with at least some other jurisdictions. Moreover, in compliance with the Attorney-General’s request, the NTLRC intends to have regard to the unique Territory context in making its recommendations.

The Northern Territory is the only State or Territory jurisdiction that has committed to generally adopting the Commonwealth *Model Criminal Code* (2009) (**the MCC**). That commitment was made in support of the aspiration by the drafters of the MCC to harmonise criminal laws across Australia. Whilst the prospect of nationally consistent criminal laws has, if anything receded, successive Northern Territory governments have maintained the commitment to using the MCC model of criminal responsibility when formulating new offences and reformulating existing offences. The MCC model is codified in the Northern Territory in Part IIAA of the *Criminal Code 1983* (NT) (**the NT Code**).

Part VI Division 5 of the NT Code includes offence provisions for a range of sex offences, including sexual intercourse without consent, which is established by s 192 of the NT Code. The provisions of s 192 and s 192A (“Direction to jury in certain sexual offence trials”) are

modelled on the terms of Chapter 5 Part 5.2 (“Sexual offences”) of the MCC. In contrast to other State and Territory jurisdictions, an element of the Northern Territory offences of sexual intercourse without consent and gross indecency without consent is that the accused knew about or was reckless as to the lack of consent. The fault elements of knowledge and recklessness are set out in Part IIAA of the NT Code, which is drawn directly from the MCC.

However, by operation of s 192(4) of the NT Code, the fault element of recklessness is modified in relation to these two offences, as follows: “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”.

The Northern Territory Department of the Attorney-General and Justice has recently published an exposure draft of a Bill to reform sexual offence law. The draft Bill can be accessed at <https://justice.nt.gov.au/law-reform-reviews/open-law-reform-consultations/exposure-draft-criminal-justice-legislation-amendment-sexual-offences-bill-2023>. In particular, the draft Bill proposes two substantive amendments to the elements of offences involving non-consensual sexual conduct:

1. A requirement that “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”; and
2. The expansion of the non-exhaustive list of circumstances in which a person does not consent to a sexual act to include “stealthing” by adding: “the person participates in the act because of an intentional misrepresentation by another person about the use of a condom”.

In summary:

1. The current nature and scope of “consent” in the Northern Territory’s sexual offence laws is, broadly speaking, consistent with most Australian jurisdictions.
2. It is anticipated that amendments will be made in the near future that will partially reform these Northern Territory laws.
3. An inquiry is now underway in the Northern Territory into whether, and if so, how, to further reform the law in relation to consent for sexual offences, including consideration of an affirmative consent model.

Russell Goldflam

Deputy President

Northern Territory Law Reform Committee

8 March 2023