

# No to Violence Submission

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*Current and proposed sexual consent laws in  
Australia*



Contact NTV:

Please forward inquiries about this paper to No to Violence:

Email: [policyandresearch@ntv.org.au](mailto:policyandresearch@ntv.org.au)

Phone: 03 9487 4500

Men's Referral Service – for men concerned about their behaviour

**1300 766 491**

## Acknowledgment of Country

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No to Violence acknowledges First Nations Peoples across these lands; the Traditional Custodians of the lands and waters. We pay respect to all Elders, past, present, and emerging. We acknowledge a deep connection with country which has existed over 60,000 years. We acknowledge that sovereignty was never ceded, and this was and always will be First Nation's land.



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## About No to Violence

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No to Violence (NTV) is Australia's largest national peak body representing organisations and individuals working with men to end family violence. We are guided by the values of accountability, gender equity, leadership, and change.

NTV provides support and advocacy for the work of specialist men's family violence interventions carried out by organisations and individuals. The work undertaken by specialist men's family violence services is diverse and includes but is not limited to Men's Behaviour Change Programs (MBCP), case management, individual counselling, policy development and advocacy, research and evaluation, training, workforce development and capability building.

NTV also provides a range of training for the specialist men's family violence workforce including a Graduate Certificate in partnership with Swinburne University, as well as professional development for all workforces who come into contact, directly and indirectly, with men using family violence. NTV is a leading national voice and plays a central role in the development of evidence, policy, and advocacy to support the work of specialist men's family violence nationally.

### About Our Members

We represent 185 members Australia-wide. Our membership structure is inclusive of individuals and organisations ranging from specialist services to individuals and others who have an interest in preventing and responding to men's family violence.

## Recommendations for consideration

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No to Violence (NTV) recommends the following points of consideration to the Senate and Legal Constitutional Affairs Committee.

1. No To Violence suggests the following recommendations if there were to be harmonisation of consent laws across Australia:
  - (a) Consult closely with criminal law experts on sexual assault and domestic and family violence who work with victim-survivors, to ensure that there is no 'levelling-down' of jurisdictions with affirmative consent reforms, through consensus based on the lowest common standard or denominator, and which becomes a retrograde step for victim-survivors.
  - (b) Harmonisation approach to aim at affirmative consent standard.
  - (c) Engage criminal law experts on sexual assault, intimate partner violence and those who work with victim-survivors, to identify the differences between common law and code-based criminal law jurisdictions; assess features of the different legislation, definitions and common law tests in sexual assault cases, and advise on which could offer the most effective and practicable application with the best impact for victim-survivors.
  - (d) Incorporate the work of the Commonwealth Attorney-General's Department on the National Principles to Address Coercive Control in Family and Domestic Violence and reflect the policy intent of the National Plan to End Violence Against Women and Children 2022-23.
2. National consent laws to recognise 'stealthing' as a sexual assault offence.
3. For the offence of non-fatal strangulation in any national harmonisation of sexual consent laws, standards of affirmative and enthusiastic consent should be established rather than evidence of physical force or resistance.
4. The circumstances of non-consent under any national sexual consent law reforms to include intimate partner violence and domestic and family violence, in order to recognise the intersectionality of sexual assault and domestic and family violence.
5. Under any national approach to consent laws and affirmative consent, where domestic and family violence is present, the threatening, intimidating or coercive conduct does not need to happen at the same time the sexual assault offence took place.
6. No To Violence suggests that best practice on affirmative and communicative consent standards would aim to:
  - (a) ensure fairer and more effective prosecutions of sexual offences,
  - (b) address misconceptions about consent in trial proceedings,

- (c) improve victim-survivor experience of the justice system, and
  - (d) enhance juror or fact finder understanding of the complexities and intersectionality of sexual offending and intimate partner violence, and the importance of not relying on rape myths and stereotypes in their decision-making.
7. Consider developing national guiding principles for jury directions to reduce prejudices that may impact trial outcomes. This could include:
- (a) Requiring trial judges to give jury directions on consent and reasonable belief of consent (or what are not grounds for reasonable belief), including that when making findings about the mental element (intent or reasonable belief), the fact finder (juror) must not consider any opinions, attitudes or values held by the accused person that do not meet community standards.
  - (b) Ensuring that jury directions addressing misconceptions about sexual assault are provided at the earliest opportunity in the trial (and repeated at any time in the trial where the trial judge deems appropriate).
  - (c) Direction on responses to giving evidence that *‘trauma affects people differently’*.
  - (d) Direction on family violence more clearly stating a threat of harm need not be immediate and refers to the prevalence of sexual violence within a domestic violence context.
  - (e) Incorporating relevant aspects of the National Principles to Address Coercive Control in Family and Domestic Violence Direction in a direction on coercive control during sexual assault trials where there are circumstances of domestic violence or intimate partner violence, to explain about the impact of coercive control.
  - (f) Any national guidance principles for jury directions must be developed with the close input of sexual and domestic violence experts and criminal law specialists working with victim-survivors, and such jury directions should be tested with research assessing their effectiveness and be regularly monitored and reviewed.
8. Conduct ongoing consultation with Aboriginal organisations and victim-survivors when amendments to sexual assault legislation are being proposed, and continue to reform police practices and culture, with a greater commitment to the development of collaborative projects (such as justice reform initiatives).
9. Provide increased funding to support Aboriginal Community Controlled Organisations (ACCOs) and Aboriginal specialist legal services to deliver community education and to meet the increased demand for support services when there are changes to sexual consent laws.
10. Provide comprehensive training for the justice and health sectors on identifying and responding to all forms of sexual assault, with ongoing mandatory training for Police, legal practitioners, judicial officers, interpreters, healthcare professionals, GPs, support services and court staff: in the understanding of complex trauma; the dynamics and impacts of sexual violence within the context of domestic violence; cultural competency; LGBTQ+ awareness;

and disability awareness. The specialist training needs to be complemented with perpetrator interventions to end their use of domestic and family violence inclusive of sexual assault.

11. Work with No To Violence to inform and tailor the design or development of specific workforce training packages, including the priority workforce training of Police, on the perpetration of domestic and family violence inclusive of sexual violence and coercive control.
12. Expand the healthcare, support services and legal services for victim-survivors of sexual assault regardless of whether they choose to pursue legal action, with the provision of sustained investments to frontline sexual assault services, culturally specific services, healthcare services and perpetrator interventions to meet current and future demand; along with appropriate resourcing of the family violence sector (primary prevention, early intervention, response, recovery, monitoring and evaluation).
13. Support legislative change with well-resourced public awareness and education campaigns, ensuring campaigns about legislative changes are accessible for a diverse audience.
14. Introduce a national sex education and healthy relationships curriculum in schools to embed concepts of a communicative and affirmative consent along with respect as part of healthy relationships education.
15. Provide culturally appropriate and accessible information that would enable victim-survivors and perpetrators to seek help and support, including niche public awareness campaigns in sport clubs and arenas, pubs, on transport, in GP clinics, hospitals, cinemas, TV series and films, popular culture, highly gendered workplaces or industry sectors, social media, dating apps/online dating, universities and campus colleges/student accommodations.



## Executive summary

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No to Violence (NTV) welcomes the opportunity to inform this Inquiry into current and proposed sexual consent laws in Australia. As the national peak body for organisations and individuals working with men to end their use of family violence, we look forward to legal reforms that could improve the criminal justice response for victim-survivors and ultimately lead to enhanced perpetrator accountability and interventions.

Throughout 2022 when we made submissions on criminal law and sexual offences, we consulted with our members and allied organisations on non-fatal strangulation, sexual consent laws, coercive control, as well as with expert stakeholders including academics and organisations working with victim-survivors. The discussions in 2022 have informed this submission with recommendations that reflected or are aligned with the appropriate aspects of previously made submissions.

We recommend that any reforms arising from this Inquiry are developed and enacted in close consultation and collaboration with the perpetrator intervention sector to ensure their efficacy and responsiveness.

NTV consistently provides trusted advice to Federal, State and Territory Governments on legislative reform. We have most recently provided advice on sexual consent law reform to the Tasmanian and New South Wales governments.<sup>1</sup> We also have a strong background working closely with the criminal justice system including Courts and Police Forces to support their awareness of the gendered nature of family violence, including sexual violence.

We support reforms such as affirmative consent laws but recognise that they have to be complemented by a victim-survivor centred response within education, healthcare, support services and the justice sector including specialist training for Police, legal practitioners and the judiciary, healthcare professionals and GPs, along with perpetrator interventions to end their use of domestic violence inclusive of sexual violence.

The overarching policy intent of the National Plan to End Violence Against Women and Children 2022-23 and the current work of the Commonwealth Attorney-General's Department on the National Principles to Address Coercive Control in Family and Domestic Violence would need to be considered in any national approach to the harmonisation of sexual consent laws.

Our submission supports affirmative consent, and outlines the barriers to successful prosecution, the disproportionate impact of disconnects between law and practice including on First Nations communities, the need to improve victim-survivors' experiences of courts and Police Services, with suggestions on changing the culture of sexual consent.

We look forward to the recommendations and outcomes that arise from this Inquiry. We are prepared to work with Government to inform law reform in this area relating to men's use of domestic and family violence (DFV) inclusive of sexual assault; perpetrator interventions; and the specialised workforce providing services to work with men to end the use of DFV inclusive of coercive control and sexual violence.

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<sup>1</sup> No to Violence, 2022c; No to Violence, 2022e

## Harmonisation of consent laws

In Australia, the laws that describe how sexual consent is defined for sexual assault and rape offences differ across the States and Territories. This could cause inconsistencies and confusion, as well as complexities in any uniformed national approach to sexual consent education.

The varying definitions would mean victim-survivors are protected differently depending on what jurisdiction they live in. This makes it challenging to send clear and unambiguous messages about what the law requires.

Consent law has been under the spotlight following recent legislative changes in New South Wales, the Australian Capital Territory, Victoria and Queensland. Tasmania was the first state to move towards affirmative consent in 2004. Each of these jurisdictions has adopted an affirmative consent standard, which means consent is understood as an ongoing communication. Such reforms make it clear that consent to sexual activity must be communicated by words or actions, and that there is a responsibility on the accused person to take steps to find out whether the person is consenting.

The current Inquiry to examine whether there should be harmonisation of sexual consent laws is timely. It could support educational efforts around sexual consent and reduce confusion around the law regardless of which jurisdiction a person resides in. It also has the potential to clarify the standard of ongoing communication expected before and during sex – a key component of affirmative consent.

No To Violence (NTV) urges the Inquiry to closely consult with criminal law experts on sexual assault and domestic and family violence and with victim-survivors, to ensure that there is no ‘levelling-down’ of jurisdictions that have adopted reforms that assist victim-survivors, in order to achieve harmonisation but run the risk of reaching the lowest common standard or denominator, which would be a retrograde step for victim-survivors.

If there were to be harmonisation of the consent laws, harmonisation needs to aim at some form of affirmative consent standard. Criminal law experts on sexual assault and victim-survivors would need to be consulted closely on which of the jurisdictions’ legislation, definitions and common law tests applied for reasonable belief would offer the most effective and practicable application with the best impact for victim-survivors. The jurisdictions with affirmative consent laws differ in their details such as different tests for whether a defendant (the accused person) has a reasonable but mistaken belief in consent, that provides an excuse for the sexual assault offences.

There are also differences between common law and code-based criminal law jurisdictions. These differences would need to be overcome if there were to be a harmonised model, which again, requires the advice of criminal law specialists on sexual assault and domestic violence offences who represent victim-survivors.

NTV suggests that any national approach on the harmonisation of sexual consent laws could incorporate the current work of the Commonwealth Attorney-General’s Department on the National Principles to Address Coercive Control in Family and Domestic Violence and to consider the overarching policy intent of the National Plan to End Violence Against Women and Children 2022-23.

### Recommendations for consideration:

1. No To Violence suggests the following recommendations if there were to be harmonisation of consent laws across Australia:

(a) Consult closely with criminal law experts on sexual assault and domestic and family violence who work with victim-survivors, to ensure that there is no 'levelling-down' of jurisdictions with affirmative consent reforms, through consensus based on the lowest common standard or denominator, and which becomes a retrograde step for victim-survivors.

(b) Harmonisation approach to aim at affirmative consent standard.

(c) Engage criminal law experts on sexual assault, intimate partner violence and those who work with victim-survivors, to identify the differences between common law and code-based criminal law jurisdictions; assess features of the different legislation, definitions and common law tests in sexual assault cases, and advise on which could offer the most effective and practicable application with the best impact for victim-survivors.

(d) Incorporate the work of the Commonwealth Attorney-General's Department on the National Principles to Address Coercive Control in Family and Domestic Violence and reflect the policy intent of the National Plan to End Violence Against Women and Children 2022-23.

## Best practice sexual consent laws

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### Affirmative consent

No to Violence is in favour of affirmative consent standards.

Affirmative consent involves a key change with the inclusion of communicative and affirmative consent language. Such reforms make it clear that consent to sexual activity must be communicated by words or actions, and that there is a responsibility to take steps to find out whether the person is consenting. This is achieved by changes to the rules on proof of non-consent and proof of knowledge of non-consent – the key components of the criminal offence of sexual assault, and other sexual offences.

Affirmative consent reforms aim to better deliver justice to sexual assault victim-survivors. It is estimated that as many as 87 per cent of women who have experienced sexual assault do not report to Police, and even fewer go to court.<sup>2</sup> The justice system seems to largely fail victim-survivors.

It has been common in sexual assault trials for the defence (representing the accused person) to challenge the Crown's (prosecution) ability to prove non-consent by citing evidence that the complainant (victim-survivor) did nothing to show non-consent, such as her silence or lack of resistance. Under reforms on affirmative consent, evidence that a person or complainant (victim-survivor) did not say or do anything to communicate consent will be evidence of non-consent – which becomes a prosecution strength.

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<sup>2</sup> Carter and McNamara, 2022

Under an affirmative consent standard, silence or lack of resistance cannot be interpreted as consent. This is intended to recognise how some victim-survivors may respond to non-consensual sexual activity by freezing and being unable to say or do anything due to fear or trauma. The affirmative consent reforms empower judges to give the jury an educative direction on this and other 'rape myth' or stereotypes.

In the NSW reforms on affirmative consent, an accused person can no longer assert that their belief that the other person was consenting was reasonable unless there is evidence that the accused person took steps (by words and/or actions) – to find out if the person was consenting.

NTV supports affirmative consent standards that include clearer recognition that sexual consent involves ongoing and mutual communication, that a person has the right to withdraw consent at any time, and that if someone gives consent to one sexual act, this does not mean that the person consented to other sexual acts.

Consent laws also need to recognise 'stealthing' as sexual assault or rape (eg it is illegal in NSW, Victoria, the ACT, South Australia, Tasmania and Queensland).

Stealthing is when a person removes a condom during sex, without the other person's consent or knowledge.

For the offence of non-fatal strangulation in any national harmonisation of sexual consent laws, standards of affirmative and enthusiastic consent should be established rather than evidence of physical force or resistance. This is consistent with our position in previous submissions made in 2022 to the Victorian Government on their then proposed non-fatal strangulation offences, and to the Tasmanian Government's Criminal Code Amendment Bill 2022.

### *Intersectionality with domestic and family violence*

Affirmative consent standards should be introduced alongside recognition that intimate partner sexual violence is commonly used by perpetrators of domestic and family violence (DFV). In cases in which a perpetrator is subjecting a victim to ongoing DFV, explicit and implicit behaviours of coercion and control become normative. In such circumstances, the relationship has come to be characterised by control of one party over another, and perpetrators' attempts to seek and receive consent cannot be separated from the abusive nature of the relationship. Affirmative consent principles, requiring the unequivocal agreement to engage in a particular act, become essential for assessing whether consent has been given in these circumstances of DFV.<sup>3</sup>

Under the NSW sexual consent reforms, the list of circumstances of non-consent has been expanded to include:

- Fear of serious harm to person, property or animal;
- Coercion, blackmail or intimidation;
- Fraudulent inducement such as trickery.

NTV suggests intimate partner violence (IPV) and DFV could be considered for inclusion as circumstances of non-consent under any national approach to affirmative consent laws, given the intersectionality of sexual assault and DFV.

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<sup>3</sup> Goldsworthy, 2018

NTV is concerned that in circumstances where DFV is present, that it is harder to demonstrate that a person has not consented. Consideration could be given to include DFV as a circumstance of non-consent, rather than as a factor to negate consent (which presumes consent as the starting default position). While intimidation, coercion or other threat does not require a threat of force, but they do not provide for situations where the threat is not immediate and yet forms part of an ongoing abusive pattern over time, which is most common in intimate partnerships affected by DFV.

It would better protect victim-survivor of sexual assault in the context of DFV or IPV by including that where DFV is present, the threatening, intimidating or coercive conduct does not need to happen at the same time the sexual assault offence took place.

While reforms such as affirmative consent laws are commendable, they have to be complemented and supported by a victim-survivor centred response within education, healthcare and justice sectors including specialist training for Police, legal practitioners and the judiciary, along with perpetrator interventions to end their use of DVF inclusive of sexual violence.

### Recommendations for consideration:

2. National consent laws to recognise 'stealthing' as a sexual assault offence.
3. For the offence of non-fatal strangulation in any national harmonisation of sexual consent laws, standards of affirmative and enthusiastic consent should be established rather than evidence of physical force or resistance.
4. The circumstances of non-consent under any national sexual consent law reforms to include intimate partner violence and domestic and family violence, in order to recognise the intersectionality of sexual assault and domestic and family violence.
5. Under any national approach to consent laws and affirmative consent, where domestic and family violence is present, the threatening, intimidating or coercive conduct does not need to happen at the same time the sexual assault offence took place.
6. No To Violence suggests that best practice on affirmative and communicative consent standards would aim to:
  - (a) ensure fairer and more effective prosecutions of sexual offences,
  - (b) address misconceptions about consent in trial proceedings,
  - (c) improve victim-survivor experience of the justice system, and
  - (d) enhance juror or fact finder understanding of the complexities and intersectionality of sexual offending and intimate partner violence, and the importance of not relying on rape myths and stereotypes in their decision-making.

# Disconnects between the law and its practical operation

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## Barriers to successful prosecution

Some legal experts have argued that the low successful prosecution rate of sexual offences has given rise to a perception that sexual assault is normalised and not unlawful.<sup>4</sup> This perception dissuades victim-survivors from pursuing justice through the criminal justice system along with the trauma of being cross-examined in court by the defence team (accused person).

One of the other significant barriers in addressing sexual assault relates to issues with reporting sexual assault. The issue lies in the difficulty in reporting of sexual assault and the level of evidence required, which leads to a low conviction rate.

Victim-survivors do not report to Police for a range of reasons, including: the stigma around sexual assault, shame, self-blame, humiliation, embarrassment, fear of not being believed, unsympathetic response, lack of evidence, distrust in the justice system, lack of support from Police, re-traumatisation with re-telling their story, the length of time sexual assault matters take to be finalised in court, fear of the impact on their visa/residency status, fear of reprisal from the perpetrator and fear on how it may impact on any Family Law Court proceedings.

The likelihood that complainants will be further traumatised through legal proceedings, coupled with low rates of successful prosecutions of rape and sexual assault in Australia, dissuade victim-survivors from reporting sexual assault and pursuing criminal charges.<sup>5 6 7</sup>

One of the common examples of disconnects between the law and its practical operation involves the legal burden on the prosecution (victim-survivors-complainants) to refute the defence team (the accused) has 'a reasonable belief in consent' and prove that the accused person had the 'intent to commit sexual assault'.<sup>8 9</sup>

### *Reasonable belief in consent*

Legal defences positing that a defendant reasonably believed that the complainant (victim-survivor) had consented can make it hard for the prosecution.<sup>10</sup> A reasonable belief in consent can be informed by common rape myths – misconceptions about the nature of sexual violence, who perpetrates it, and why victim-survivors might seek criminal justice responses.<sup>11</sup> Reliance on rape myths in sexual assault cases hinder successful prosecutions and can stoke community mistrust in the effectiveness of criminal justice system responses.<sup>12</sup> The law also needs to adapt, legislatively and in practice, to the reality of sexual violence as part of DFV.

We see merit in a single knowledge test expressed as a 'no reasonable belief' test to be applied, with the reasonable belief test incorporating actual knowledge, recklessness and an objective standard

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<sup>4</sup> Heath, 2007

<sup>5</sup> Orchowski et al., 2022

<sup>6</sup> Australian Institute of Health and Welfare, 2020

<sup>7</sup> Townsend et al., 2022

<sup>8</sup> Larcombe et al., 2016

<sup>9</sup> Chesser et al., 2021

<sup>10</sup> Larcombe et al., 2016

<sup>11</sup> Larcombe et al., 2016

<sup>12</sup> Larcombe et al., 2016

based on reasonableness, under an affirmative consent standard. The juror or fact finder (judge in a non-jury trial) would then need to consider any verbal or physical steps taken by the accused person (defendant) to establish whether the other person (complainant-victim-survivor) consented to the sexual act. This approach could shift the focus off the complainant (victim-survivor) and onto the accused behaviour to ensure verbal and physical steps were taken to support active communication about consent.

The proposed approach to the test for knowledge of consent could consider the reformulation of the 'reasonable belief' test, to make it clear that the test is satisfied if 'any belief' of the accused person that is not reasonable (rather than requiring the prosecution to show that the accused person had no reasonable grounds for believing the complainant consented).

In any harmonisation attempt, one of the questions would be whether a defence of reasonable belief should be drafted in the negative or as a positive formulation.

One option, for instance, could be that reasonable grounds are not made out if the accused's belief in consent was based on the complainant's:

- (i) style of dress;
- (ii) prior sexual conduct with the accused or another person;
- (iii) consumption of alcohol;
- (iv) consumption of drugs;
- (v) silence; or
- (vi) lack of physical resistance.<sup>13</sup>

Jury directions regarding the complainant's (victim-survivor's) dress, intoxication and previous consensual sexual activity would not be necessary if these factors were unable to be used as the grounds on which an accused person formed his belief as to consent.<sup>14</sup> Although, they could remain necessary if these factors had not been legislatively excluded from the reasonable grounds (or reasonable belief) inquiry.

### *Improving jury directions*

Approximately 85% of sexual assaults never come to the attention of the Australian criminal justice system, with a smaller number of cases proceeding to a trial.<sup>15</sup> Out of the few cases that came before the courts, an even smaller proportion resulted in a successful conviction.<sup>16</sup> Overwhelming, this low rate of convictions reflects:

- a belief in sexual assault myths and stereotypes (e.g. that "true" rape is always violent)
- an innate mistrust of victim-survivor testimonies
- difficulties in providing sufficient evidence due to the nature of sexual assault and rape, and how it differs from other forms of (physical) violent crime.

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<sup>13</sup> Cossins, 2019

<sup>14</sup> Cossins, 2019

<sup>15</sup> Christian, 2021

<sup>16</sup> Christian, 2021

One important way to address these barriers to justice is by improving jury directions with developing a national approach that addresses common misconceptions about sexual assault.

To ensure greater consistency and fairness between the conduct of sexual assault trials across the nation, a harmonised approach to legislate jury directions or to develop guidance principles could be examined.

Jury directions are particularly important because there remains high community adherence to rape myths.<sup>17</sup> A 2016 study conducted with professionals working in the sexual assault sector found that jurors' misconceptions represented a key barrier to successful sexual assault prosecutions.<sup>18</sup>

Harmonisation on mandatory directions about assumptions about consent could be explored. However, flexibility is also needed so judges could tailor directions to the facts of the trial.

Research has also indicated that directions given earlier in a trial could have more impact than those given at the end of the trial, and repeating jury directions may assist jurors to understand the directions.<sup>19</sup>

We also do not believe sexual assaults within DFV have been adequately recognised in the law. Any national proposals should give better recognition of sexual violence in a DFV context both in reference to a list of non-exhaustive circumstances of non-consent (as discussed above) as well as jury directions.

Sexual consent laws could look at improving jury directions in sexual assault trials regarding issues about rape myths, the commonality of the freeze response (involuntary, reflexive component of extreme fear) in victim-survivors, and the effects of trauma on the ability of a person to give best evidence and the likely triggers within the criminal trial process that can re-trigger a person's response to trauma.<sup>20</sup>

Harmonisation of legislative guidance could inform fact-finders about what will not constitute reasonable grounds or a reasonable belief but we recognise that law reform could only go so far in achieving cultural change.

### Recommendations for consideration:

7. Consider developing national guiding principles for jury directions to reduce prejudices that may impact trial outcomes. This could include:
  - (a) Requiring trial judges to give jury directions on consent and reasonable belief of consent (or what are not grounds for reasonable belief), including that when making findings about the mental element (intent or reasonable belief), the fact finder (juror) must not consider any opinions, attitudes or values held by the accused person that do not meet community standards.
  - (b) Ensuring that jury directions addressing misconceptions about sexual assault are provided at the earliest opportunity in the trial (and repeated at any time in the trial where the trial judge deems appropriate).
  - (c) Direction on responses to giving evidence that *'trauma affects people differently'*.

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<sup>17</sup> Webster et al., 2018

<sup>18</sup> Larcombe et al., 2016

<sup>19</sup> Women's Legal Service NSW, 2019

<sup>20</sup> Cossins, 2019



- (d) Direction on family violence more clearly stating a threat of harm need not be immediate and refers to the prevalence of sexual violence within a domestic violence context.
- (e) Incorporating relevant aspects of the National Principles to Address Coercive Control in Family and Domestic Violence Direction in a direction on coercive control during sexual assault trials where there are circumstances of domestic violence or intimate partner violence, to explain about the impact of coercive control.
- (f) Any national guidance principles for jury directions must be developed with the close input of sexual and domestic violence experts and criminal law specialists working with victim-survivors, and such jury directions should be tested with research assessing their effectiveness and be regularly monitored and reviewed.

## Disproportionate impact on First Nations people

There is limited data on the rates of sexual assaults experienced by First Nations women, however there is consensus that First Nations women experience higher rates of DFV and sexual violence than non-Indigenous Australians.<sup>21</sup> Data is limited in part as recorded rates of sexual assaults rely on Police data and First Nations peoples regularly report a fear and distrust of Police that extends to the broader criminal justice system.<sup>22 23</sup>

First Nations people are significantly over-represented within custodial settings.<sup>24</sup> Aboriginal men have historically received harsher punishment for sexual offences than do non-Indigenous men and remain under closer surveillance by State and Federal bodies due to misrepresentations of sexual violence within Aboriginal communities.<sup>25</sup> We are also aware from our own consultations with First Nations victim-survivors that there is a reluctance to pursue legal redress for family violence and sexual offences, due to the damaging effect of over-incarceration, over-policing, and overt/covert racism in law enforcement and judicial systems on First Nations communities, whether perpetrators are First Nations or not. This points to a need to provide more culturally appropriate criminal justice responses; reduce the over-representation of First Nations peoples in the carceral system; and repair the damage that over policing and over incarceration has done to First Nations communities. NTV hopes to see some steps towards addressing these systemic issues in the development of the Aboriginal and Torres Strait Islander Action Plan, under the National Plan to End Violence Against Women and Children.

There is the need to mitigate the adverse consequences of over-criminalisation for Aboriginal and other marginalised communities, and the simultaneous need for clear and enforceable legislation that protects the safety of victim-survivors. Any amendment to sexual assault legislation is an opportune moment to conduct significant, ongoing consultation with Aboriginal organisations, victim-survivors, and other stakeholders to ensure that reforms are both culturally appropriate and responsive. As part of this process, increased funding should be provided to support Aboriginal Community Controlled Organisations (ACCOs) and Aboriginal specialist legal services so that legislative reforms are introduced alongside culturally specific and appropriate community education and support services.

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<sup>21</sup> Australian Institute of Health and Welfare, 2020

<sup>22</sup> Wahlquist, 2022

<sup>23</sup> Queensland Centre for Domestic and Family Violence Research, 2019

<sup>24</sup> Australian Law Reform Commission, 2018

<sup>25</sup> A specific example of this is the Howard Government's Northern Territory Intervention. This intervention aimed to address problems of child sex abuse in remote and regional Aboriginal communities but was implemented without any sustained consultations with Aboriginal organisations or people living within the affected areas.

These steps will help to build trust in criminal justice responses by showing respect to First Nations communities as the experts in their own experiences.

#### Recommendations for consideration:

8. Conduct ongoing consultation with Aboriginal organisations and victim-survivors when amendments to sexual assault legislation are being proposed, and continue to reform police practices and culture, with a greater commitment to the development of collaborative projects (such as justice reform initiatives).
9. Provide increased funding to support Aboriginal Community Controlled Organisations (ACCOs) and Aboriginal specialist legal services to deliver community education and to meet the increased demand for support services when there are changes to sexual consent laws.

### Training for key workforces

Specialist training for key members of the criminal justice system and healthcare sector would support better responses to victim-survivors and perpetrators of sexual assault. Training should be required for healthcare professionals, Police, court staff, legal professionals, and other members of the criminal justice system. Training has to be ongoing and focus on the gendered nature of sexual violence; correcting common misconceptions about sexual assault and demonstrating the impact of these myths on access to justice; the role of sexual violence within DFV; the cumulative impact of all forms of domestic, family and sexual violence; and systems abuse tactics commonly employed by perpetrators. Such training should take an intersectional and pro-feminist approach, specifically identifying the ways in which gender, race, visa status/residency, employment, and geographic location influence a person's experience of sexual assault and of the criminal justice system.

#### *Improving policing responses*

Evidence shows that far too many women who report family and sexual violence are not believed by Police.<sup>26</sup> If the criminal justice sector is to effectively respond to sexual assault and DFV, it must have the education and training to appropriately respond to all domestic, family, and sexual violence incidents.

NTV continually advocates for specialised training for Police Forces. For instance, in our submission to the Independent Commission of Inquiry into Queensland Police Service (QPS) responses to domestic and family violence, we identified the need to enact cultural change in QPS to better respond to family violence, including sexual assault, and pointed to the immediate need for transparent processes to hold members of QPS who are identified as perpetrators accountable.<sup>27</sup>

NTV has provided valued policy advice and training for various Police Services.<sup>28 29 30</sup> In our submission to the Victorian Police Code of Practice, we noted that it is important that Police Services acknowledge that fear of Police is a significant factor in the under-reporting of domestic, family and sexual violence, and that significant work must be undertaken to increase community trust.<sup>31</sup> For

<sup>26</sup> See for example the NT Coroners reports into the deaths of Roberta Judy Curry (2022); Fionica Yarranganlagi James, Keturah Cheralyn Mamarika and Layla Leering (2020); Sasha Loreen Napaljarri Green (2018); and Wendy Murphy and Natalie McCormack (2016).

<sup>27</sup> No to Violence, 2022d

<sup>28</sup> No to Violence, 2022b

<sup>29</sup> No to Violence, 2022c

<sup>30</sup> No to Violence, 2021

<sup>31</sup> No to Violence, 2021

these reasons, the Police are a priority workforce for specialist training to ensure they can consistently and appropriately respond to sexual violence.

It is just as important that the criminal justice system and members of the judiciary have access to, and make use of the expert advice from the DFV sector.

NTV can offer our expertise to inform and tailor the design or development of training packages. We are experienced in training various workforces on general and specific issues related to the perpetration of domestic, family and sexual violence. We have provided training to Victoria and Tasmania Police Services on identifying and responding to perpetrators of family violence, including identifying and responding to coercive control.

#### Recommendations for consideration:

10. Provide comprehensive training for the justice and health sectors on identifying and responding to all forms of sexual assault, with ongoing mandatory training for Police, legal practitioners, judicial officers, interpreters, healthcare professionals, GPs, support services and court staff: in the understanding of complex trauma; the dynamics and impacts of sexual violence within the context of domestic violence; cultural competency; LGBTQ+ awareness; and disability awareness. The specialist training needs to be complemented with perpetrator interventions to end their use of domestic and family violence inclusive of sexual assault.
11. Work with No To Violence to inform and tailor the design or development of specific workforce training packages, including the priority workforce training of Police, on the perpetration of domestic and family violence inclusive of sexual violence and coercive control.

## Victim-survivors' experience of the criminal justice system

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While reforms on affirmative consent are a major improvement, they must be complemented by a survivor-centred response within education, healthcare and justice sectors including training for Police, legal practitioners and judiciary.

The criminal justice system is too often adversarial for victim-survivors. Criminal justice reform is required to ensure consistent and appropriate responses to family violence, including holding perpetrators accountable for their choice to use violence—and to make the criminal justice system safe for victim-survivors.<sup>32</sup> No to Violence (NTV) has continually advocated for better training for all members of the criminal justice system.

Victim-survivors are often unaware of what to do in the aftermath of a sexual assault. Increasing awareness about available services and process of reporting sexual violence while improving reporting mechanisms and court processes would simultaneously increase victim-survivors awareness of reporting and willingness to report. Legal and social supports for victim-survivors should be expanded, to enable them to pursue legal action, should they choose to do so. Substantive investment in court services is required to ensure that victim-survivors have access to information

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<sup>32</sup> Women's Legal Service Victoria, 2015

prior to attending court regarding what to expect, and legal supports available for counselling and debriefing on the day and in the weeks following their hearing. Furthermore, strategies could be implemented to prevent perpetrators in custodial settings from continuing to use tactics of coercive control towards victim-survivors.

Social supports such as counselling and case management and non-criminal justice measures could be expanded to support victim-survivors who do not want to engage in legal action.

Outside the criminal justice system, media reporting of sexual violence and DFV cases could be improved to reduce the trauma for victim-survivors. Our Watch, the national primary prevention organisation for violence against women and children, has developed best practice guides for media reporting on domestic, family and sexual violence cases and recommends that journalists avoid identifying victim-survivors.<sup>33</sup> Recent reforms in Victoria retained laws that prevent victim-survivors from being named in media unless they have chosen to share their experiences.<sup>34</sup>

### Recommendations for consideration:

12. Expand the healthcare, support services and legal services for victim-survivors of sexual assault regardless of whether they choose to pursue legal action, with the provision of sustained investments to frontline sexual assault services, culturally specific services, healthcare services and perpetrator interventions to meet current and future demand; along with appropriate resourcing of the family violence sector (primary prevention, early intervention, response, recovery, monitoring and evaluation).

## How can sexual consent culture be changed?

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Sexual violence continues to be a taboo topic. Research shows that women who report family violence are unlikely to report sexual violence or coercion, and that seeking help for sexual violence, harm, and abuse in the context of an IPV relationship is a significant challenge for victim survivors.<sup>35</sup> Changing the conversation around sexual violence, harm and abuse will enable better primary prevention: if adults and young people alike understand healthy sex and sexual relationships, they will be better able to identify and call out harmful or unhealthy behaviours.

Legislative reform, in isolation, will be ineffective to reform attitudes and responses to sexual assault and the Government could consider:

- designing and implementing a comprehensive community education program including specialist education programs for those working in the justice system that promote trauma-informed practice
- funding support for improving court and social support services.

There needs to be the development and implementation of an extensive evidence-based education campaign about the drivers of gender-based violence, respectful relationships and ethical sexual practice, to be developed by experts, that challenges rape myths, victim blaming attitudes and male entitlement. A comprehensive primary prevention strategy is required, including preschools, schools, tertiary institutions, workplaces, sporting clubs, media and entertainment. This involves significant and ongoing investment.

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<sup>33</sup> Our Watch, 2023

<sup>34</sup> Department of Justice and Community Safety, 2022

<sup>35</sup> Orchowski et al., 2022

A specific strategy is required to educate the Police, judiciary and legal professionals about safe and respectful relationships and ethical sexual conduct, and to help address misogynist, sexist, racist, ableist and homophobic views that underpin a culture of sexual violence.

### *Awareness raising campaigns and education programs*

While Australia does not have a rich history of successful campaigns on healthy attitudes towards sex, sexuality, and sexual relationships, there are important campaigns from the sexual and reproductive health sector that can provide guidelines.<sup>36</sup> NTV strongly calls for well-resourced public awareness and education programs that ensure a whole-of-community understanding about sexual assault laws and healthy relationship principles.

Respectful Relationships education programs are vitally important to prevent and address sexual violence, by targeting children and young people and offering them the tools that they need for a healthier approach to sex and relationships. National programs such as Love Bites and Love Bites Junior (targeted at young people aged 11-17) deliver age-appropriate and inclusive education on respectful relationships, gender, sexuality and sex.<sup>37</sup> Love Bites is a good example of a targeted educational program that strikes a careful balance between being adaptive to the local community, and the use of an evidence-based model combined with rigorous evaluation and implementation. While also providing opportunities for primary prevention, these programs are often first points of referral for children and young people seeking a service response – an important step in breaking cycles of domestic, family and sexual violence.

Awareness raising campaigns and education programs have the potential to correct societal myths about sexual assault. However, this can mean that many participants may also learn for the first time that they have experienced and/or perpetrated sexual assault and/or DFV. For these reasons, it is vital that awareness raising campaigns and education programs include referral pathways for support options, including support services for victim-survivors and perpetrator interventions for men to change their behaviour and end the use of violence.

Curriculum material for respectful relationships education should also include support for staff, in case of the likely event that participants disclose that they have either experienced or perpetrated sexual assault and/or DFV. Considerations may need to be extended to education and child protection departments to handle a potential influx in child safety notifications that may occur following the delivery of respectful relationships awareness raising campaigns.

### *Increased funding for services*

Increased awareness raising and education programs necessitate appropriate funding for the entire violence prevention and service ecosystem. Appropriate resourcing for primary prevention, early intervention, response, and recovery as well as regular monitoring and evaluation across these areas is critical. As we have recommended in another section above, more funding is required for frontline sexual assault services, culturally specific services, healthcare services and perpetrator intervention providers. Without investment in service provision, the efficacy of awareness raising campaigns and reforms to the criminal justice system may be limited.

NTV is of the view that the criminal justice system alone cannot deliver the widespread lasting cultural change necessary to end domestic, family and sexual violence. A holistic approach to ending sexual

<sup>36</sup> See for example, WA's Healthysexual campaign

<sup>37</sup> National Association for Prevention of Child abuse and Neglect, 2023

violence includes primary prevention, early intervention, response, and recovery. This includes, as reflected in an earlier recommendation above, early education and awareness raising campaigns; specialist interventions for perpetrators of sexual violence and DFV; social and legal supports for victim-survivors; and on-going support to healing and recovery programs for victim-survivors and for perpetrators.<sup>38</sup>

The family violence sector, including sexual assault services, requires new additional funding to meet current and future demand. As consent laws change and more victim-survivors feel empowered to seek support and pursue legal action, demand on frontline and specialist service providers will grow.

#### Recommendations for consideration:

13. Support legislative change with well-resourced public awareness and education campaigns, ensuring campaigns about legislative changes are accessible for a diverse audience.
14. Introduce a national sex education and healthy relationships curriculum in schools to embed concepts of a communicative and affirmative consent along with respect as part of healthy relationships education.
15. Provide culturally appropriate and accessible information that would enable victim-survivors and perpetrators to seek help and support, including niche public awareness campaigns in sport clubs and arenas, pubs, on transport, in GP clinics, hospitals, cinemas, TV series and films, popular culture, highly gendered workplaces or industry sectors, social media, dating apps/online dating, universities and campus colleges/student accommodations.

## Conclusion

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NTV welcomes the opportunity to assist in informing this Inquiry into the current and proposed sexual consent laws in Australia.

This Inquiry is an important step towards reforming our legal and justice system so that victim-survivors can access justice, perpetrators are held accountable, and ultimately male violence against women can end.

NTV cautions that legislative reform will not in and of itself bring sufficient change. We advise that any reform aiming at making the criminal justice system more responsive to victim-survivors, would require increased investment in the services that keep victim-survivors safe, in conjunction with perpetrator interventions.

Our submission supports affirmative consent, and outlines the barriers to successful prosecution, the disproportionate impact of disconnects between law and practice on First Nations peoples, the need to improve victim-survivors' experiences of courts and Police Services, with suggestions on changing the culture of sexual consent.

The best practice on affirmative consent standards would aim to:

- ensure fairer and more effective prosecutions of sexual offences,
- address misconceptions about consent in trial proceedings,

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<sup>38</sup> Day, 2019

- improve victim-survivor experience of the justice system, and
- enhance the understanding of juror (or fact finder such as a judge in a non-jury trial) of the complexities and intersectionality of sexual offending and IPV and DFV, and the importance of not relying on rape myths and stereotypes in their decision-making.

While reforms such as affirmative consent laws will be supported, they have to be complemented and supported by a victim-survivor centred response within education, healthcare and justice sectors including specialist training for Police, legal practitioners, the judiciary, healthcare professionals and GPs, along with perpetrator interventions to end their use of domestic violence inclusive of sexual violence.

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