



Attorney General
& Justice

Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900

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1. EXECUTIVE SUMMARY

The *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* amended the *Crimes Act 1900* (the **Act**) to create a new section 61HA, introducing a statutory definition of consent for the purposes of sexual assault offences. The new section commenced on 1 January 2008, and applies to offences under sections 61I, 61J and 61JA of the Act (sexual assault, aggravated sexual assault and aggravated sexual assault in company).

The policy objective of the amendment was to give clear guidance as to what constitutes consent. It was to provide a more contemporary and appropriate definition of consent than that found in the common law. This was so particularly in the adoption of an objective fault test that requires a person to have reasonable grounds for their belief that another person consents to sexual intercourse with them. The test reflects the increased equality in today's sexual relationships, and the dialogue that should take place between individuals prior to sexual intercourse to reach a necessary mutuality of understanding in relation to consent. In this way, section 61HA represented a significant reform in the prosecution of sexual assault cases in NSW, adopting the reforming approaches in other common law jurisdictions such as the United Kingdom, Canada and New Zealand.

Schedule 11, Part 25 of the Act requires the Attorney General to review the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* as soon as possible after the period of four years from the date of commencement of the section to determine whether the policy objectives remain valid and whether the terms of the amendments remain appropriate for securing those objectives.

The majority of submissions to the Review support the consent provisions. This support is based on section 61HA providing a contemporary and appropriate definition of consent, as well as serving an educative function. For example, the NSW Police Force submitted that the provisions of section 61HA safeguard the rights of victims and are a useful and effective tool for the police, while the NSW Rape Crisis Centre submitted that the provisions create a legal framework where sexual assault matters can be more fairly heard.

However, the Review notes that the consent provisions continue to be opposed by some criminal justice stakeholders, namely the Law Society of NSW (the **Law Society**), Legal Aid NSW (**Legal Aid**) and the Public Defenders, who were also opposed to its introduction.

The provisions have now been in place for over five years and, despite the concerns raised about them by some criminal justice stakeholders both now and before their introduction, the issues identified in the review largely relate to technical concerns. It is important to note that the amendments have resulted in a very limited number of appeals to the Court of Criminal Appeal.¹

The Review concludes that the policy objectives of the consent provisions in section 61HA of the Act remain valid. The amendments have not resulted in a significant increase in sexual assault trials,² and they have not resulted in a high level of technical challenges. Importantly, they remain firmly supported by victims' representatives

The Review makes four recommendations to address the technical and operational concerns raised in submissions. They are aimed at clarifying and extending the provisions in section 61HA to ensure they remain appropriate for securing their objectives.

The first two recommendations are for legislative amendments: recommendation one responds to the decision in the case of *W O v DPP (NSW)*, and would apply the consent provisions to attempts to commit offences; recommendation two would adopt NSW Health's proposal to redefine the 'mistaken belief' provision relating to medical procedures so that it applies to all health procedures.

The remaining two recommendations call for reviews to be undertaken in response to issues raised that the Review concludes fall outside its terms of reference. The first proposed review responds to the ODPP's concerns about the offence of

¹ The five NSWCCA decisions are summarised at pages 16-18.

² The Criminal Court statistics are summarised at page 8.

indecent assault, and would seek to establish whether the consent provisions in section 61HA should apply to other sexual offences in the Act. The second review responds to the proposal of the Children's Court of NSW and NSW Ombudsman to consider adopting a 'similar age' defence in NSW.

2. RECOMMENDATIONS

1. Amend the Act to include attempts to commit the offences to which section 61HA applies.
2. Amend section 61HA(5)(c) to replace the word 'medical' with the word 'health' so that it applies to all health procedures, not just those carried out by medical practitioners.
3. That the Department of Attorney General and Justice undertake consultation to determine whether section 61HA should apply to other sexual offences in the *Crimes Act 1900* for which a lack of consent must be proved.
4. That the Department of Attorney General and Justice consult stakeholders on whether a 'similar age' defence for young people close in age (where one or both is under the age of 16 years) engaging in consensual sexual activity should be introduced in NSW.

3. INTRODUCTION

Since the introduction of a statutory definition of consent, the number of people charged and appearing before the courts for sexual assault offences has remained relatively stable. Statistical data shows that since the introduction of section 61HA, the number of persons charged and appearing before the higher courts for sexual assault and aggravated sexual assault offences stands at 479 people for 2008 and 442 for 2012 (peaking at 537 for 2011). The number of persons found guilty in finalised trial and sentence appearances in the higher courts for sexual assault charges stands at 260 people for 2008 and 223 for 2012 (peaking at 303 for 2009).³

As outlined earlier, the policy objective of the statutory definition is to give guidance as to what constitutes consent and to provide a more contemporary and appropriate definition than the common law definition. The submissions made to the Review (discussed later in chapter 6) indicate that section 61HA is meeting its stated policy objective.

3.1 Background to the introduction of a statutory definition

The introduction of section 61HA followed an extensive review of sexual assault offences in NSW in the report of the Criminal Justice Sexual Offences Taskforce (the **Taskforce Report**),⁴ released in April 2006. This was followed by the release of a discussion paper, *The Law of Consent and Sexual Assault* (the **Discussion Paper**), by the then Attorney General's Department's Criminal Law Review Division in May 2007.⁵

In seeking to propose a definition of consent to reflect contemporary societal expectations surrounding sexual relationships in NSW, the Taskforce Report recommended:

³ Tables 3.4 and 3.7, NSW Bureau of Crimes Statistics and Research, Criminal Courts Statistics Reports

⁴ *Responding to sexual assault: the way forward:*

http://www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld_publications/lpcld_reports.html#criminal

⁵ http://www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld_publications/lpcld_reports.html#criminal

- NSW should include a statutory definition of consent in the *Crimes Act 1900*, partially based on the definition in the Sexual Offences Act 2003 (UK)
- an expansion of the circumstances that vitiate consent
- further consideration of the adoption of an objective fault element.

These recommendations were not supported by all members of the Taskforce. The NSW Bar Association, Law Society, Public Defenders and Legal Aid opposed introducing a statutory definition of consent, raising concerns that statutory definitions adopted in other jurisdictions were at odds with how the common law definition of consent had evolved in NSW, and that it should be for the courts to develop the law in this area.

There was opposition to the adoption of an objective fault test, on the basis that it would be difficult to formulate an objective standard of reasonableness for juries to apply to an accused's conduct. Additionally, it was argued that a person should not be punished because their belief about consent did not accord to a standard of reasonableness determined by the community, in circumstances where they did not believe that what they were doing was wrong. The Law Society, the Public Defenders and Legal Aid argued that the subjective test should be retained.

Concerns were also raised about an accused who holds an honest belief about consent, but had failed to take reasonable steps to ascertain whether the other person was consenting. It was submitted that such an accused has less moral culpability than an accused who has sexual intercourse without consent, knowing the other person is not consenting, and that a lesser offence should be created to criminalise this type of conduct.

The Taskforce Report recommendation to introduce a statutory definition of consent was, however, supported by the majority of members, including the Director of Public Prosecutions (the **DPP**), Violence Against Women Specialist Unit, Office for Women (now Women NSW), Women's Legal Services NSW, Victims Services, NSW Rape Crisis Centre and the NSW Police Force. Those supporting the introduction of a statutory definition submitted that it would:

- make it clearer for the community to understand what does and does not amount to consent
- serve an educative function
- ensure that standard directions are given at trial.

Arguments discussed in favour of adopting of an objective fault test included:

- such a test would refocus the minds of the jury on the standards that the community expects
- as a matter of policy, a reasonable standard of care should be taken to ascertain whether a person consents before embarking on what could be potentially damaging behaviour
- an objective test overcomes an accused simply asserting that they held an honest belief in consent, however unreasonable that belief is.

The Discussion Paper sought to address the Taskforce Report's recommendations through consultation with key stakeholders and the general public. It resulted in 20 submissions from individual judicial officers, victims of sexual assault, community legal centres, the Human Rights and Equal Opportunity Commission, Law Society, NSW Bar Association, the Public Defenders and the Office of the Director of Public Prosecutions (**ODPP**). Issues raised in submissions discussed whether:

- there should be a statutory definition of consent
- consent should be vitiated by unlawful detention, unconsciousness or sleep, intoxication through drugs or alcohol, extortion, harassment or threats, or through an abuse of a position of authority or trust
- there should be a non-exhaustive list of factors that may vitiate consent
- recklessness should be codified
- an objective test should be adopted
- the defendant should be required to point to evidence of reasonable steps taken to ascertain consent
- the creation of a lesser offence of negligent sexual assault is required.

During the consultation process, a study released by the Australian Institute of Criminology on jurors' perceptions of sexual assault victims (the **AIC study**)⁶ involved a number of mock trials where jurors heard the same evidence of sexual assault where the only issue in dispute was consent. The study found that many jurors had difficulty understanding judicial directions on consent based on the then common law principles.

The AIC study also found that jurors were often influenced in their verdicts by their attitudes, beliefs and biases about sexual assault, rather than an assessment of the objective evidence placed before them.

The consultation process resulted in the passing of the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* and the creation of section 61HA in the *Crimes Act 1900*.

In his speech, the then Attorney General stated that the new statutory definition of consent would serve two purposes. First, it would clearly articulate what amounts to consent, which would have an educative effect for jurors and ensure standard directions are given to juries. Second, it would enact a more contemporary and appropriate definition than was available under the common law. This was aimed at bringing about a cultural shift in the response to victims of sexual assault by the community and key participants within the criminal justice system, in particular jurors.⁷

⁶ Trends and issues in crime and criminal justice series, Number 344, *Juror attitudes and biases in sexual assault cases* (August 2007).

⁷ Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007, Second Reading, The Hon John Hatzistergos, 7 November 2007.

3.2 Conduct of the Review

3.2.1 Terms of reference

The Review was conducted on the Attorney General's behalf by Justice Policy, Department of Attorney General and Justice. Consultation was conducted in relation to the 2008 amendment to the Act on whether the policy objective remains valid, and whether the terms of the amendment remain appropriate for securing that objective.

3.2.2 Consultation

Letters were forwarded to stakeholders inviting submissions to the Review (Annexure A), and an advertisement was placed in the Sydney Morning Herald, the Daily Telegraph, and on Justice Policy's website. Submissions were received from the agencies and individuals listed in Annexure B.

4. SUMMARY OF SECTION 61HA

Section 61HA adopted the Criminal Law Review Division recommendation in the Taskforce Report to provide a statutory definition of consent in relation to the offences of sexual assault, aggravated sexual assault and aggravated sexual assault in company.⁸ It replaces the common law definition for those offences, which uses the phrase ‘conscious and voluntary agreement’ in relation to a person’s consent to sexual intercourse, contains a subjective fault element, and sets out a number of circumstances where consent is negated (for example, where the complainant was under certain mistaken beliefs or subjected to threats or terror).

The statutory definition in section 61HA uses the updated phrase ‘freely and voluntarily’ in relation to a person’s consent to sexual intercourse. It reflects the common law definition to the extent that it retains recklessness as a subjective fault element, as recommended in the Taskforce Report. However, it expands the common law definition in adopting an additional, objective, fault element, which states that a person knows another person does not consent to sexual intercourse if the person has no reasonable grounds for believing that the other person consents.⁹

The objective fault element was included in section 61HA in response to stakeholder support in the Discussion Paper that followed the Taskforce Report (which itself recommended that there should be consideration of whether the common law definition should be modified to adopt an objective fault element). This marks an important point of distinction between the statutory and common law definitions. With the inclusion of this reasonableness test in the statutory definition, a person can no longer rely on a mistaken belief in consent, however honest that belief may have been. Under the statutory definition, a person must have reasonable grounds for that belief.

In making a finding about consent, the jury must have regard to all the circumstances of the case, including any steps taken by a person to ascertain whether the other

⁸*Crimes Act 1900*, sections 61I, 61J.

⁹*Ibid*, section 61HA(3)(c).

person consented to the sexual intercourse.¹⁰ Self-induced intoxication on the part of the accused is specifically excluded as a circumstance to consider.¹¹

Section 61HA also expands the common law definition in terms of the circumstances where consent may be negated. A person does not consent to sexual intercourse if:

- the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity
- the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep
- the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person)
- the person consents to the sexual intercourse because the person is unlawfully detained.¹²

Additionally, the section sets out three situations where a person who consents to sexual intercourse has not consented if they were under a mistaken belief:

- as to the identity of the other person
- that the other person is married to the person
- that the sexual intercourse is for medical or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means).¹³

An accused will be deemed to know that the other person did not consent if the accused knew that consent was given under one of the mistaken beliefs.

Additionally, the section sets out an inclusive list of grounds on which it may be established that a person does not consent to sexual intercourse.¹⁴ The grounds include when the person has sexual intercourse:

- while substantially intoxicated by alcohol or any drug

¹⁰ *Ibid*, section 61HA(3)(d).

¹¹ *Ibid*, section 61HA(3)(e).

¹² *Ibid*, section 61HA(4).

¹³ *Ibid*, section 61HA(5).

¹⁴ *Ibid*, section 61HA(6).

- because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force
- because of the abuse of a position of authority or trust.

Section 61HA(7) states that a person who does not offer actual physical resistance to sexual intercourse is not, by this fact alone, to be regarded as giving consent.

The section concludes by stating that it does not limit the grounds on which it may be established that a person does not consent to sexual intercourse.

5. APPLICATION OF SECTION 61HA

5.1 Commencement

Section 61HA applies to the offences of sexual assault, aggravated sexual assault and aggravated sexual assault in company committed after the section's commencement on 1 January 2008. Statistics from the NSW Bureau of Crime Statistics and Research confirm that from 2008 to 2012, 2,527 people appeared before NSW's higher courts charged with sexual assault and aggravated sexual assault offences.

5.2 Use as an educational tool

The definition has been used to inform the public in fact sheets available on the NSW Rape Crisis Centre's website. Copies of its *Myths and Facts* and *Sexual Assault: The Law and Statistics* fact sheets are available on its website. They give advice about issues surrounding consent and the law. For example, the *Sexual Assault: The Law and Statistics* fact sheet explains that a defendant will be, 'asked to show what steps were taken to ensure consent was given'. The *Myths and Facts* fact sheet, 'When negotiating a sexual encounter both parties have a responsibility to ensure the other is consenting'.

The definition is also discussed on Victims Services' website, which gives help for victims of sexual assault and explains the statutory definition of consent in its 'Commonly use legal terms' section. The explanation includes a list of circumstances from section 61HA that negate consent.

5.3 Case law

Since the introduction of section 61HA, the Review has identified a limited number of appeals to the NSW Criminal Court of Appeal (the **CCA**) that have raised issues in relation to the statutory definition of consent in sexual assault cases. They are summarised in the cases that follow.

W O v DPP (NSW) [2009] NSWCCA 275

The CCA held that the statutory definition of consent did not apply to an offence of attempting to commit an offence of sexual assault: it only applies to the substantive offences referred to in section 61HA(1).

BP v R [2010] NSWCCA 159

The CCA held that the trier of fact must not have regard to any self-induced intoxication of the accused person for the purpose of determining whether that person had knowledge of the complainant's lack of consent, in accordance with section 61HA(3)(e). However, the intoxication of an offender may be relevant on sentence, depending upon the circumstances of the case and the impact of intoxication upon the offender's degree of deliberation, and whether it contributes to an offender acting out of character.¹⁵

AM v R [2011] NSWCCA 237

The CCA affirmed that the prosecution is entitled to rely on recklessness when establishing the accused had knowledge that the victim did not consent.

R v XHR [2012] NSWCCA 247

This case was an appeal by the DPP against a directed verdict of acquittal. The CCA held that the three grounds of appeal that related to consent were made out, namely that:

- The Crown does not have to show the complainant communicated his or her lack of consent in order to prove that the accused knew that the complainant did not consent.
- The trial judge failed to have regard to section 61HA(3)(d) in directing a verdict of acquittal. That is, the judge erred in failing to consider what steps the accused took to ascertain whether the complainant consented to sexual intercourse.
- Sections 61HA(4)(c) (consent gained by threats or terror) and 61HA(6)(b) (consent gained by intimidatory or coercive conduct, or other threat, that does not involve a threat of force) are only relevant where there is apparent consent to

¹⁵ Johnson J at 55.

sexual intercourse, but the consent is negated because it was induced by force or intimidatory conduct.

***Dean v Phung*[2012] NSWCCA 223**

The CCA affirmed that a mistaken belief that the accused is married to the victim negates consent to sexual intercourse.

***The Queen v Getachew* (2012) 86 ALJR 397**

Although a decision of the High Court of Australia (the **HCA**) considering an appeal decision of the Victorian Court of Appeal, it nevertheless impacted on sexual assault trials in NSW. The HCA examined the requirement under section 37AA of Victoria's *Crimes Act 1968* for the judge in a sexual assault case to give certain directions about the accused's awareness on the issue of consent. It includes a requirement to direct the jury to consider any evidence of the accused's belief that the complainant was consenting to the sexual act. The HCA held that such a direction must be given where evidence is led or an assertion is made that the accused believed that the complainant was consenting. In response to the HCA's decision, the Judicial Commission of NSW amended its Criminal Trial Courts Bench Book (where it gives guidance on jury directions in relation to the accused's knowledge at [5-1550] and [5-1566]) to read: 'On the other hand, you may decide on the basis of the evidence led in the trial [or if applicable and relied on by the accused] that [he/she] might have believed...'

Taking into account that over 2,500 people have been charged and appeared before the higher courts for sexual assault and aggravated sexual assault offences in the years 2008 to 2012, the limited number of appeals identified leads the Review to conclude that the statutory definition is understood and is working in NSW's courts.

In particular, the Review notes that none of the cases identified involve a successful appeal by an accused on the basis of an erroneous jury direction on the statutory definition of consent. This is significant in the context of the AIC study discussed above, which found that jurors struggled to understand judicial directions on consent based on common law principles, and suggests that the statutory definition is meeting its objective in providing clear guidance.

6. DISCUSSION OF SUBMISSIONS

6.1 Summary

Consultation letters were sent to the stakeholders listed at Annexure A in August 2012, inviting written submissions on whether the policy objectives behind the introduction of section 61HA remain valid, and whether the section remains appropriate for securing those objectives. Submissions were received from the agencies and individuals listed at Annexure B.

The majority of stakeholders who responded to the invitation confirmed their support for the statutory definition of consent in section 61HA of the Act. Support focussed on section 61HA (and in particular, its objective fault element) being consistent with community standards and expectations as to the conduct of sexual relations. Many stakeholders were reaffirming views put forward to the Sexual Offences Taskforce.

The Law Society confirmed, however, that it continues to oppose the statutory definition of consent. Its submission was supported by Public Defenders and Legal Aid. These submissions did not address the practical operation of the provision and did not cite any case examples. As discussed earlier in the Review, these stakeholders expressed their opposition to reform in the Taskforce Report, and in particular the adoption of an objective fault element. Their concerns focussed on the criminalisation of previously acceptable behaviour under the common law definition.

Submissions to the Review supporting section 61HA were received from:

- Children's Court of NSW
- ODPP
- Department of Family & Community Services NSW (**FACS**)
- Ministry for Police and Emergency Services (**MPES**) on behalf of the NSW Police Force's Sex Crimes Squad (the **Sex Crimes Squad**) and Police Prosecutions
- NSW Ministry of Health (**NSW Health**)
- Women's Legal Services NSW
- NSW Rape Crisis Centre
- WirringaBaiya Aboriginal Women's Legal Centre Inc (**WirringaBaiya**)

FACS confirmed its support for the objective fault test, stating that section 61HA protects the autonomy of people to participate in sexual activity, and that the new test better reflects community standards and expectations than the former subjective test.

NSW Health submitted that section 61HA serves an educative function by clarifying for the community what does and does not amount to consent.

Women's Legal Services NSW submitted that the introduction of a statutory definition of consent was an important part of modernising sexual assault laws in NSW, with the objective fault test being a welcome change. As well as providing clarity, it is seen as an important educative tool. Through their work, they have not become aware of any problems in the operation of the statutory definition.

Warringa Baiya indicated that they are primarily concerned with the legislation's educative function in shaping the responses of the police, magistrates, jurors and the wider community when responding to, and supporting, Aboriginal women who have been the victims of sexual assault within a domestic violence relationship. Additionally, Warringa Baiya submitted that there should be broad community education around the law of consent in order to reduce the stigma and damaging myths around consent and sexual assault within intimate partner relationships.

The NSW Rape Crisis Centre submitted that the objective fault test was, and continues to be, a progressive law reform toward creating a legal framework where sexual assault matters can be more fairly heard. In its opinion, the former subjective fault test was, and continues to be, outside current community views of acceptable behaviour. Additionally, the NSW Rape Crisis Centre submitted that the grounds by which it can be established that a person does not consent to sexual intercourse, as set out in section 61HA(6), was a positive move in providing protection for those who are sexually assaulted when intoxicated: it also serves as a community educative message in confirming that the exploitation of a person in a vulnerable state is unacceptable.

The Sex Crimes Squad submitted that the rationale surrounding the introduction of section 61HA remains relevant. Police Prosecutions advised that it is unaware of any issues arising from the consent provisions that have compromised the effective investigation or prosecution of relevant offences, and that the provisions continue to be an effective and useful tool.

The Law Society's submission (supported by Public Defenders and Legal Aid) confirmed its strong opposition to the introduction of section 61HA. It stated that under the statutory definition of consent in section 61HA, a person who honestly believed that consent was present, where it was not, would be guilty of an offence, whereas this would not have been the case under the common law definition. Additionally, the Law Society indicated its preference for the common law definition of consent, as set out in the Judicial Commission's Criminal Trial Courts Bench Book (the **Bench Book**), used for offences alleged to have been committed prior to the introduction of section 61HA in 2008.

The Judicial Commission raised an issue concerning attempts to commit sexual assault offences, and the NSW Ombudsman raised an issue about a 'similar age' defence. Both are discussed in more detail below.

6.2 Other considerations of the definition of consent

The Australian Law Reform Commission's Report 114, *Family Violence – A National Legal Response* (November 2010) (the **ALRC Report**) made three recommendations in relation to consent and sexual assault offences, follows:

- 25-4 Federal, state and territory sexual offence provisions should include a statutory definition of consent based on the concept of free and voluntary agreement.
- 25-5 Federal, state and territory sexual offence provisions should set out a non-exhaustive list of circumstances that may vitiate consent.

25-6 Federal, state and territory sexual assault provisions should provide that it is a defence to the charge of 'rape' that the accused held an honest and reasonable belief that the complainant was consenting.

Section 61HA already includes the provisions set out in recommendations 25-4 and 25-5.

The ALRC Report consultation paper proposed that all Australian jurisdictions should adopt legislation based on the NSW approach to the fault element. However, recommendation 25-6 combines a subjective test of 'honest belief' with an objective requirement that the honest belief also be reasonable. This differs from the definition in section 61HA, in that section 61HA does not require the prosecution to prove that an accused did not hold an honest belief: all that is required is for the prosecution to prove that an accused had no reasonable grounds for his or her belief in consent.

The ALRC Report states that in reaching its view on recommendation 25-6, it sought to, 'promote the communicative model of consent and reconcile it with the general proposition of law that the onus of proof in criminal trials lies with the prosecution'.

The Review is of the opinion that NSW's statutory definition of consent is better suited to promoting a 'communicative model of consent'. Both its requirement that a person have reasonable grounds for believing that another person consents to sexual intercourse with him or her, and the requirement for the trier of fact to 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) sends a clear message that a person must be certain of consent. This is a step that necessarily involves communication with the other person.

6.3 Particular issues raised in submissions

6.3.1 Domestic violence relationships

Warringa Baiya submitted that sexual assault in domestic violence relationships constitute a unique set of circumstances in that:

- the issue of consent within intimate partner relationships is complex
- sexually abusive behaviour by a partner is likely to be violent and repeated
- such abuse forms part of a controlling pattern of behaviour, designed to dominate, humiliate and denigrate.

Their submission highlighted the myths that still surround domestic violence, quoting research published in 2009 that found jurors still believe stereotypes about sexual and domestic violence victim behaviour, which frequently conflicts with what is expected of ‘real’ victims.¹⁶ The submission also highlighted Warringa Baiya’s experience of low rates of disclosure of sexual assault in domestic violence relationships, submitting that for rates to increase legislation should specifically reflect the seriousness and unique circumstances of sexual assault in such relationships through recommendations to:

- prescribe family violence as a circumstance where there is no consent, or
- recognise family violence as an environment characterised by threats of force or terror and prescribe that there is no consent where it is obtained by such threats.

The Review is of the opinion that section 61HA, as currently drafted, accommodates the circumstances that may arise in family violence described in the suggested recommendations. For example, section 61HA(4)(c) and (d) confirm that consent is negated when it is given in response to threats of force or terror (whether to that or any other person), or if the person is unlawfully detained. Additionally, the Review notes that the ALRC Report, in its recommendation for a non-exhaustive list of circumstances that may vitiate consent (recommendation 25-5), did not include specific family violence circumstances. Those circumstances included in recommendation 25-5 are already included in section 61HA.

Domestic and family violence (**DFV**) has recently been the subject of public consultation, with the release of *It Stops Here: Standing together to end domestic and family violence in NSW* in June 2013. This discussion paper outlines potential reforms to the NSW whole of Government response to DFV. The Review notes the

¹⁶ *Intimate Partner Sexual Violence; Sexual Assault in the Context of Domestic Violence*, Washington Coalition of Sexual Assault Programs.

discussion paper's commitment to developing a sexual assault strategy that will be broader than DFV.

6.3.2 Attempts to commit offences

The Judicial Commission's submission highlighted the 2009 Court of Criminal Appeal case of *W O v DPP (NSW)*,¹⁷ which held that section 61HA did not apply to an attempt to commit an offence of sexual assault. This case had also been brought to the Department's attention by the ODPP. The appeal was brought under section 5F of the *Criminal Appeal Act 1912* against an order made during the District Court trial. That order was that the consent provisions in section 61HA applied to an attempt to commit a sexual assault, charged under section 61P of the Act, which sets out a number of sexual offences in the Act for which it is an offence to attempt to commit.

The appellant argued that the ruling in the District Court was wrong on the basis that section 61HA had no application to section 61P, as section 61HA specifically refers to offences under sections 61I, 61J and 61JA of the Act. The DPP argued that section 61P does not create an offence, but merely states the penalty for an attempt to commit one of the offences prescribed (being the same as for a commission of the substantive offence). Additionally, the DPP argued that in seeking to establish the offence of attempting to commit a sexual assault, the Crown would be required to establish the elements of the offence under section 61I, including the question of consent and the accused's knowledge of it.

In his judgment allowing the appeal, Basten JA held that, although the DPP's arguments were by no means irrational or implausible, they did not reach the level of clarity required to overcome the express language and textual support in order to apply section 61HA to attempts to commit the offences set out in sub section 1. Basten JA pointed out that it would have been a simple matter of drafting to include a reference to section 61P in section 61HA(1).

¹⁷[2009] NSWCCA 275.

The ODPP identified the issue of section 61HA not applying to attempts in the context of such offences appearing on the same indictment as substantive offences. This scenario requires the judge to give the jury two different definitions of consent: the statutory definition in relation to substantive sexual assault offences to which section 61HA applies, and the common law definition in relation to attempts to commit those offences.

The Review concludes that the Act should be amended to provide for the statutory definition of consent in section 61HA to apply to attempts to commit the offences referred to in the section. This is because, as argued by the DPP, the Crown is required to establish a lack of consent when prosecuting an attempt to commit a sexual assault offence: a complainant in such circumstances should be allowed the same protections as the section affords complainants in prosecutions for the substantive offences to which it applies. It would also simplify the directions a judge is required to give to a jury in the circumstances highlighted in the ODPP's submission, which is discussed in greater detail below about whether section 61HA should apply to other sexual offences in the Act.

Recommendation 1

Amend the Act to include attempts to commit the offences to which section 61HA applies.

6.3.3 Medical or hygienic purposes

NSW Health raised a concern about the specific wording of section 61HA(5)(c) that states a person does not consent to sexual intercourse if he or she is under a mistaken belief that it is for medical or hygienic purposes. Their submission proposes replacing the word 'medical' with the word 'health', so that it applies to all health procedures, not just those carried out by medical practitioners. Although the Review is unaware of any issues arising at trial in relation to the use of the word 'medical', nevertheless the proposed change is supported as it meets the aim of section 61HA's provisions to give clear guidance as to what constitutes consent, by setting clear parameters in its statutory definition.

Recommendation 2

Amend section 61HA(5)(c) to replace the word 'medical' with the word 'health' so that it applies to all health procedures, not just those carried out by medical practitioners.

6.3.4 Applying section 61HA to other sexual offences

The ODPP highlighted in its submission the problems that can arise when an indictment contains a range of sexual offences to which either the statutory or the common law definition of consent will apply. The ODPP gave the example of a case involving an accused charged with sexual assault and indecent assault against the same victim. In such a case the judge would be required to give the jury different directions at trial in relation to consent, as the common law definition of consent applies to the indecent assault offence, and the statutory definition in section 61HA applies to the sexual assault offence.

This is a common scenario, with indictments in trials for sexual assault offences also including charges for indecent assault. This is particularly so in relation to trials involving child sexual abuse that has occurred over a number of years. In such trials, there is often an escalation in the seriousness of offending, from indecent assault through touching to sexual intercourse resulting in sexual assault charges under section 61J of the Act (aggravated sexual assault, with the circumstance of aggravation being an alleged victim under the age of 16 years). Even in sexual assault trials that result from a single incident (for example, a 'date rape' case), it is common for an indecent assault charge to be included in the indictment to reflect an allegation of touching additional to the allegation of sexual intercourse.

Another common scenario in sexual assault trials is the inclusion of assault charges such as common assault and assault occasioning actual bodily harm in an indictment. This, too, raises the issue of differing directions to the jury, as the common law definition of consent applies to assault offences under the Act.

Sexual offences in the Act

In trials involving counts of sexual assault and other offences to which the common law definition of consent applies the jury is required to consider differing terms, for example, 'freely and voluntarily' in relation to the sexual assault charge, and 'conscious and voluntary permission' in relation to the indecent assault charge.

Perhaps more confusing for the jury is the requirement to consider directions in relation to the differing objective and subjective tests from the statutory and common law definitions. The ODPP submitted that different directions can lead to confusion for the jury and error on the part of the judicial officer giving the directions. This raises concerns, especially in light of the recently tabled Law Reform Commission report examining jury directions.¹⁸ The report highlighted statistics showing that the most common type of jury misdirection resulting in an appeal is in relation to instructions about the elements of an offence.¹⁹

Applying section 61HA to indecent assault

If the statutory definition of assault is applied to the offence of indecent assault (and its aggravated form), the issues surrounding different jury directions are not necessarily cured.

The Bench Book sets out the four elements that must be proved for a successful indecent assault conviction:²⁰

- the accused assaulted the complainant
- the assault was indecent
- the assault was committed without the consent of the complainant
- the accused knew that the complainant was not consenting.

The Bench Book explains that the prosecution must prove that the accused committed an act of indecency either at the time of the assault, or immediately

¹⁸NSW Law Reform Commission Report 136, *Jury directions* (November 2012).

¹⁹*Ibid*, at page 21.

²⁰At [5-600].

before or after. However, it is not necessary to establish two separate acts, as the same act can amount to both the assault and the act of indecency (for example, where the indecent assault involves an allegation that the accused touched the complainant's genitals or breasts). Although an allegation can involve two separate acts, matters involving the same act are the most common type of indecent assault prosecutions. The Bench Book describes the word 'indecent' as contrary to the ordinary standards of respectable people in the community. The common law definition of consent applies to both the assault and the act of indecency.

The Bench Book sets out the common law definition of consent, which is defined as involving the 'conscious and voluntary permission by the complainant to the accused to touch the complainant's body in the manner that he or she did'. The Bench Book continues by explaining the subjective test to be applied from the common law definition, namely that the jury are concerned with the accused's actual state of mind, rather than what a member of the jury or a reasonable person would have realised, thought or believed. The suggested jury direction requires the jury to look at what was going on in the mind of the accused, and for it to be made clear to the jury that an accused who honestly, but wrongly, believed the complainant was consenting to the act amounting to the assault is not guilty.

The difficulty in applying section 61HA to the offence of indecent assault arises when the assault and the act of indecency are separate acts. In principle, the jury would then be required to apply the statutory definition of consent to the sexual element of the offence (that is, the act of indecency) and the common law definition of consent to the physical assault on the complainant.

One solution may be to redefine the offence of indecent assault, so that the act of assault and the sexual element of the offence constitute the same act. By way of example, the equivalent offence in England and Wales is sexual assault.²¹ It involves the sexual touching of another person, whereby the physical act of assault and the sexual element of the offence always constitute the same act.

²¹Section 3 of the Sexual Offences Act 2003 (UK).

Assault offences

Even if the offence of indecent assault were redefined so that just the statutory definition of consent could apply to it, this does not solve the issue of different jury directions when non-sexual assault offences (such as common assault and assault occasioning actual bodily harm) are included in the same indictment as a sexual assault charge.

One solution may be to consider a statutory definition of consent for the offences against the person offences in Part 3 of the Act that reflects the definition in section 61HA, to overcome the issue of different jury directions. However, this raises issues about important distinctions that can currently be drawn between the common law and section 61HA definitions of consent. For example, as discussed above, the common law definition involves the ‘conscious and voluntary permission’ of a person to engage in certain acts, whereas section 61HA requires that a person ‘freely and voluntarily agrees to the sexual intercourse’ for there to be consent.

The difference in terminology in the two definitions in this regard is deliberate. It was the subject of discussion in the Taskforce Report, which accepted submissions in its recommendation that the words ‘freely and voluntarily’ should be used.²² The Taskforce Report was of the opinion that such are words are ‘compelling because of the use of the word “agree” which suggests some degree of mutuality and consideration of the sexual activity that will take place’.²³ It noted in its discussion, the view that the common law notion of consent presupposes ‘the subordinate position of the victim’ and that ‘in this context consent is not understood in terms of mutuality, but rather a set of arrangements initiated by the defendant with a passive recipient’.²⁴

In this context, there may be concerns that adopting a definition of consent for offences against the person that reflects a position of mutuality between a complainant and accused is not appropriate.

²²Recommendation 10.

²³At page 35.

²⁴At page 35.

Overall, the Review concludes that consideration of applying section 61HA to other sexual offences and non-sexual assault offences is beyond its terms of reference. In particular, it is noted that the issues surrounding the redefinition of consent for offences against the person raises particular complexities, and the Review makes no recommendation in relation to those offences. However, the Review recommends that consultation be undertaken in this regard in relation to sexual offences in the Act. This would allow other stakeholders who may have an interest in this issue the opportunity to contribute.

Recommendation 3

That the Department of Attorney General and Justice undertake consultation to determine whether section 61HA should apply to other sexual offences in the Act for which a lack of consent must be proved.

6.3.5 'Similar age' defence

Consent is not a defence to a charge of sexual assault involving a child under the age of 16 years. This means that ostensibly consensual sexual activity between two young people close in age, where one or both is under 16, could result one or both being charged with offences under the *Crimes Act*. The only exception is for the offence of procuring or grooming a child under 16 for unlawful sexual activity in section 66EB, where the definition of adult person effectively provides a defence of similar age for young people aged 16 and 17 years.

The NSW Ombudsman raised in its submission the absence in NSW of a 'similar age' defence for adolescents engaging in consensual sexual activity. The Children's Court of NSW also raised this issue. Both submissions referred to the defence available in Victoria in section 45 of the *Crimes Act 1958 (Vic)*, which sets out the offence of sexual penetration of a child under the age of 16. The section allows consent as a defence in circumstances where the victim was aged 12 or older, and the accused was not more than two years older than the victim. The age of consent in Victoria is 16.

Similar defences are available in some other Australian jurisdictions for consensual sexual activity involving young people. In Tasmania, where the age of consent is 17 years, it is a defence to have sexual intercourse with a person aged under 17 when that person is aged 15 years or over and the accused is no more than five years older, or the person is aged 12 years or over and the accused is no more than three years older.²⁵ In the Australian Capital Territory, where the age of consent is 16 years, it is a defence to have sexual intercourse with a person aged 10 years or over and the accused is no more than two years older.²⁶ Finally, in Western Australia, where the age of consent is 16 years, it is a defence to have sexual intercourse with a person aged under 16 years when the accused believed on reasonable grounds that person was aged 16 years or over and the accused is no more than three years older.²⁷

A defence of similar age was recommended by the Model Criminal Code Officers Committee (**MCCOC**). MCCOC recommended that the appropriate age differential be 2 years, such that the defence would be available if the child was over the “no defence age” and the offender was not more than 2 years older or younger than the child.²⁸

The policy of the NSW Police Force’s Child Abuse Squad is to investigate all allegations of unlawful sexual activity involving children, which includes activity between two children under the age of 16 years (the age of consent in NSW), even where the parties have consented to such activity. During an investigation, the following factors are taken into account when considering whether criminal charges should be brought:

- the age of the children involved, and their level of maturity and ability to make informed choices about sexual activity
- any imbalance in the age or relative power of the children involved
- whether consent was obtained by bribery, coercion or threatening behaviour

²⁵ Section 124 of the *Criminal Code Act 1924* (Tas).

²⁶ Section 55 of the *Crimes Act 1900* (ACT).

²⁷ Section 321 of the *Criminal Code Act Compilation Act 1913* (WA).

²⁸ Model Criminal Code, *Chapter 5, Sexual Offences against the Person*, at 5.2.17 p 149.

- whether any substance misuse was involved that might impact on the ability to make an informed choice.

Cases of concern are referred to the Joint Investigative Response Team (**JIRT**), made up of representatives from agencies such as the NSW Police Force, Department of Community Services, and NSW Health. JIRT conducts a risk assessment, and determines the need for criminal charges or the involvement of the Children’s Court.

Issues about the lack of a ‘similar age’ defence in NSW were discussed in the NSW Ombudsman report: *Responding to Child Sexual Assault in Aboriginal Communities*. The report recommends that the Attorney General should conduct a separate review of consent provisions, with the introduction of a ‘similar age’ defence in mind, should it not take place within this Review.²⁹

The Review notes the comments of the Legislative Council’s Standing Committee on Law and Justice (the **Committee**) 2010 Report *Spent convictions for juvenile offenders*. The Committee recognised the ‘substantial long-term consequences for juveniles convicted of consensual sexual intercourse with a person under 16 ... The offender will live with the stigma of a conviction for a sexual offence, although this stigma may not be warranted by the circumstances of the offence’.

The Review considers that the Department of Attorney General and Justice should conduct consultation on whether a similar age defence should be introduced into the *Crimes Act 1900*. A defence would apply to “young love” cases (that is consensual relationships involving two young people close in age, where one or both persons is under 16 years). It is important to note that while defendants in “young love” cases may receive a non-custodial penalty, they may nonetheless be a registrable person under the *Child Protection (Offenders Registration) Act 2000*.³⁰

²⁹Recommendation 59(b), *Responding to Child Sexual Assault in Aboriginal Communities*, December 2012.

³⁰ If the defendant is a child (defined as under 18 under the *Child Protection (Offenders Registration) Act 2000*), they may not be registrable in certain circumstances: section 3A(2)(c).

Like the issue of the wider application of section 61HA raised in stakeholder submissions, the introduction of a 'similar age' defence is beyond the terms of reference for this Review. Whilst the issue was raised by the NSW Ombudsman and the Children's Court of NSW, it was not an issue on which submissions were sought. Accordingly, a number of stakeholders with an interest in this issue did not express views on it. This is particularly so as many children and youth groups may not have responded to this Review as consent is not necessarily an issue in the prosecution of young offenders, and the statutory definition does not apply to the child-specific sexual assault offences.

Therefore, the Review recommends consultation be undertaken on whether a similar age defence should be introduced in NSW.

Recommendation 4

That the Department of Attorney General and Justice consult stakeholders on whether a 'similar age' defence for young people close in age (where one or both is under the age of 16 years) engaging in consensual sexual activity should be introduced in NSW.

ANNEXURE A

LIST OF AGENCIES INVITED BY LETTER TO PROVIDE A WRITTEN SUBMISSION

- Children's Court of NSW
- District Court of NSW
- Supreme Court of NSW
- The Chief Magistrate of the Local Court
- The Public Defenders
- Crown Advocate
- Director of Public Prosecutions (NSW)
- Victims Services, Department of Attorney General and Justice
- Judicial Commission of NSW
- The Law Society of NSW
- Department of Family & Community Services NSW
- NSW Police Force
- Legal Aid NSW
- Bar Association of NSW
- Women NSW, Department of Family and Community Services NSW
- NSW Ministry of Health
- Ms Annie Cossins, Associate Professor, Faculty of Law, University of NSW
- Ms Julie Stubbs, Professor, Faculty of Law, University of NSW
- Women's Legal Services NSW
- NSW Rape Crisis Centre
- Assert NSW
- Avant Mutual Group Limited
- Community Legal Centres NSW
- Australian Human Rights Commission
- Shoalcoast Community Legal Centre
- Victims Advisory Board, Department of Attorney General and Justice

ANNEXURE B

LIST OF AGENCIES WHO PROVIDED A WRITTEN SUBMISSION

- Children's Court of New South Wales
- The Chief Magistrate of the Local Court
- The Public Defenders
- Director of Public Prosecutions (NSW)
- Judicial Commission of NSW
- The Law Society of NSW
- Department of Family & Community Services NSW (on behalf of Family and Community Services and Women NSW)
- Ministry for Police & Emergency Services (on behalf of the NSW Police Force)
- Legal Aid NSW
- NSW Ministry of Health
- Women's Legal Services NSW
- NSW Rape Crisis Centre
- WarringaBaiya Aboriginal Women's Legal Centre
- NSW Ombudsman