



RULE OF LAW

INSTITUTE OF AUSTRALIA

**NSW Law Reform Commission Review of Consent in relation to
Sexual Assault Offences under
s 61HA of the *Crimes Act 1900* (NSW)
Submission from the Rule of Law Institute**

The New South Wales Law Reform Commission has sought submissions on consent in relation to sexual assault offences under section 61HA of the *Crimes Act 1900* (NSW) (“**s 61HA**”).

The review of the meaning of consent brings in to play questions of autonomy of the individual and the capacity of adults to make their own rational choices. It also raises, however, concerns regarding protection of individuals, when the actions of others impacting on them do not meet societal norms,¹ or when the rights of those individuals are not clearly identified in legislation.

For the above reasons, the Rule of Law Institute proposes two changes to s 61HA. One, to suggest that a positive test of communication of consent should now be pre-eminent and two for the purpose of clarity of the law as it stands regarding such positive consent. Both are articulated with the same proposed change in the wording of the section. Finally the issue of intoxication is raised, as a matter for which no clear change is currently

¹ Tasmanian Law Reform Commission, *Consensual Assault*, Final Report No. 25 (May 2018) 7 - 8.

proposed, but which is identified for consideration by the Commission, due to issues surrounding lack of capacity.

1. Positive Statement of the Legal Position regarding Consent

A crime is usually committed through a voluntary or positive act or omission.² Proven sexual assault cases in New South Wales demonstrate that there is a requirement for a voluntary physical act by one party, as well as an omission from that party regarding consent.

The test regarding consent presumptively focuses on the guilty state of mind of the alleged offender.³ They must firstly answer an allegation that they had no reasonable grounds for belief (as to lack of consent) and secondly that the other party was not in fact consenting;⁴ effectively having to prove a double negative.

For the alleged offender, the facts of the case may show that their knowledge of consent was unwittingly false or deliberately so. It may also be a case where they cannot answer the allegations of a victim as to a lack of consent, which may be factually equivocal.

The rights and responsibilities of both parties are clearer if the alleged offender is required to obtain positive communication of consent from the other party, rather than potentially have to ground their defence in what may be a more subtle and inferred denial or absence of consent. In circumstances where a victim may not be in a physical or psychological position to provide a clear and unambiguous denial of consent, both parties may be at risk of having to revisit the issue in

² Halsbury's Laws of Australia at <https://advance.lexis.com/documentprint/documentprintclick/?pdmfid=1201008&crd=3956df3a-1b60-4465-bd13-d752b13d466d&ecomp=55n5k&prid=ee65ac1d-b79c-4867-bb14-39e9e3a32551>.

³ *Crimes Act 1900* (NSW) s 61HA(3).

⁴ *Crimes Act 1900* (NSW) s 61HA(3)(c).

criminal proceedings. The requirement for a positive affirmation of consent in every relevant case, may reduce that risk.

2. Clear Expression of Positive Consent in Legislation

The Magna Carta notes, in its second last paragraph:

“..neither we nor our heirs will seek anything by which the liberties contained in this charter might be infringed or damaged, and should anything be obtained from anyone against this it is to count for nothing and to be held as nothing”. (Magna Carta 1297)

Drawing out the above clause, the rights provided by the rule of law ought to be clear and easily found.

Guidance as to what consent in New South Wales means has been provided in the *NSW Judicial Commission Criminal Trial Bench Book - Offences (Sexual Intercourse without Consent)*. That text contains a suggested direction in regard to communication of consent in s 61HA(2), to the effect that *‘consent involves a conscious and voluntary agreement on the part of [the complainant] to engage in sexual intercourse with [the accused]. It can be given verbally or expressed by actions’* (emphasis added).

Such reference in a suggested direction is not a clear public statement of our laws regarding consent, but is nonetheless a demonstration of what may be legally required for consent to be positively given (as compared to an absence of consent).

This reference also demonstrates that the courts in NSW have moved towards the consideration of consent as a required positive action and not just as a denial. This legal position should be included in s 61HA, as a clear statement of the law, so that it is evident and easily found.

The change proposed to the definition of consent in s 61HA(2) in accordance with points 1. and 2. above is thus that there be a clear statement in the legislation regarding positive communication of consent, for every relevant sexual assault matter, as suggested by the additional wording underlined below.

*A person **consents** to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse and communicates that agreement by their words or actions.*

In addition and to support clarity in the requirement for positive communication of consent, s 61HA(3)(d) should be amended to read:

(d) including any steps taken by the person to ascertain ~~whether~~ that the other person consents to the sexual intercourse,

3. Intoxication

Reference to intoxication is included under s 61HA(6)(a) as follows:

The grounds on which it may be established that a person does not consent to sexual intercourse include:

(a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or

This section indicates that a person *may* not consent to sexual intercourse, if they are substantially intoxicated. The key consideration is capacity to consent and whether there is sufficient identification in this section, of when a lack of capacity arises in cases involving intoxication.⁵

⁵ We note that s 61HA(4) *Crimes Act 1900* (NSW) deals with negation of consent in other circumstances, due to lack of capacity. There is no submission that this section be changed.

The Australian legal system and the rule of law that is embedded within it, require that each person shall be equal before the law.⁶ There is therefore some difficulty in proposing a change to the law on intoxication and consent, despite the above concerns, when it may significantly burden one party more than another.

Whilst issues remain regarding capacity to consent and significant intoxication, the change proposed above to s 61HA(2), whereby consent ought to be positively demonstrated, may limit these concerns.

⁶ *Magna Carta* 1297, clause 29.