

Consent in relation to sexual offences

Legal Aid NSW submission to the
NSW Law Reform Commission
Draft Proposals

4 December 2019

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

A range of Legal Aid NSW specialist services provide legal assistance to people who may be affected by changes to the definition of consent in NSW.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Division and private practitioners. The Criminal Law Division services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

The Legal Aid NSW Domestic Violence Unit (DVU) is a specialist unit helping clients who have experienced domestic and family violence with both their legal and non-legal needs. The DVU is made up of specialist lawyers and social workers who connect with clients at crisis point. The DVU provides legal advice and representation in a range of areas including: apprehended domestic violence orders, family law, care and protection, housing, social security, credit/ debt problems, victims' support, financial assistance matters and criminal law.

The Children's Legal Service (CLS) advises and represents children and young people involved in criminal cases in the Children's Court. CLS lawyers also visit juvenile detention centres and give free advice and assistance to young people in custody.

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Introduction

Legal Aid NSW welcomes the opportunity to provide a submission in response to the NSW Law Reform Commission's *Draft Proposals: Consent in relation to sexual offences (Draft Proposals)*.

Legal Aid NSW acknowledges the context in which these reforms are being proposed—that of continued, and significant underreporting of sexual assault. We recognise that the reforms present an opportunity to play an educative role, to address issues such as the low rates of reporting of sexual assault, as well as judicial and wider community attitudes about the nature of sexual assault.

However, improving the legal response to sexual assault should also be balanced with the right of the accused to a fair trial. The consent provisions require multiple layers of prescriptive legal tests to consider in a sexual assault trial. It is not clear from the Draft Proposals how these provisions interact with each other. We suggest that consideration be given as to whether all of the proposed aspects of these reforms are necessary to achieve the desired outcome of the Inquiry. There is a risk that, taken as a whole, the changes will create greater complexity and increase the risk of juror confusion, lead to complex directions and legal argument, and have the potential to increase the number of appeals.

The changes may also not achieve the desired outcomes for victims. For example, we note that recommendations of law reform bodies internationally have led to significant changes to the content and structure of sexual offence legislation.¹ However, evidence internationally and in Australia suggests that such reforms have been, at best, only moderately successful.² We reiterate our recommendation that the NSW Government consider other measures to achieve the objectives of this Inquiry, including broader community education.

We respond to the Draft Proposals in greater detail below.

New interpretive principles

The Draft Proposals include the following legislated interpretive principles, which are intended to govern the interpretation and application of the new subdivision on consent:

- (a) *Every person has a fundamental right to choose whether or not to participate in a sexual activity,*

¹ Rumney, P, *The Review of Sex Offences and Rape Law Reform: Another False Dawn?* *The Modern Law Review*. Vol 64 (November 2001) 904; Willis, J and Barnes, J., *Guiding Principles All At Sea*, *Law Institute Journal*. 8\Vol 82/8 (August 2008) 58-61. See also Powell, A. et. al. 'Meanings of 'Sex' and 'Consent' *The Persistence of Rape Myth in Victorian Rape Law*', (2013) *Griffith Law Review*; 456-480. This research into the impact of changes to the definition of consent introduced in Victoria in 2006 and 2007 found that (1) the changes did not reduce rape case attrition or increase conviction, and (2) rape myths persisted.

² Rumney, P, *The Review of Sex Offences and Rape Law Reform: Another False Dawn?* *The Modern Law Review*. Vol 64 (November 2001) 904; Willis, J and Barnes, J., *Guiding Principles All At Sea*, *Law Institute Journal*. 8\Vol 82/8 (August 2008), 904 and Powell, A. et al. 'Meanings of 'Sex' and 'Consent' *The Persistence of Tape Myths in Victorian Rape Law*, *Griffith Law Review* (2013) Vol 22 No 2 476-477.

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- (b) A person's consent to a sexual activity should not be presumed,
(c) Sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.³

Legal Aid NSW is not opposed to the content of the proposed interpretive principles, which are drafted broadly. We acknowledge that interpretive principles can be helpful to express fundamental principles for educative purposes. However, legislation may not be the best vehicle for such purposes.⁴

It is unclear how the interpretive principles are to be applied to and interpreted alongside other provisions in the subdivision, especially where provisions use different language. For example, we query how they would be interpreted alongside clause 61HJ, in determining whether the victim has said or done anything to communicate consent. If the interpretive principles are included in the legislation, there is a risk that they will be misinterpreted, incorrectly applied, result in greater cross examination, longer trials, result in additional jury directions, and increase the risk of error and the possibility of appeals. We consider that including interpretive principles in the legislation adds an unnecessary layer of complexity to the process of explaining and applying the law on consent.

We note concerns have been expressed that it is unclear how the Victorian guiding principles should be applied.⁵ Also, it appears that the Victorian principles are available not only to judges, but also to jurors to interpret and apply. Such an approach is a 'major change from the traditional demarcation of the roles of judge and jury and is not likely to promote consistency in decision making'.⁶

Legal Aid NSW considers that the best way of addressing these risks is to include the interpretive principles in the Bench Book, rather than in the legislation. Clear statements of policy intention and principles underpinning law reform are also commonly included in second reading speeches and explanatory memorandum.

The structure and language

Legal Aid NSW supports the overall simplification of language to the current section 61HE of the *Crimes Act 1900* (NSW) (**Crimes Act**). Simple language allows the law to be more readily understood by solicitors, the judiciary and, importantly, by the general public. Greater understanding of the law on consent is important in the context of the criminal law having both educative and regulatory functions.

³ Clause 61HF Appendix B, Consent in relation to sexual offences: Draft Proposals.

⁴ We note that in Powell, Henry, Flynn and Henderson, *Meanings of 'sex' and 'consent: the persistence of rape myths in Victorian rape law* (add proper citation), it was noted that rape myths persisted even after legislative reforms which included the insertion of guiding/interpretative principles.

⁵ Willis, J and Barnes, J., Guiding Principles All At Sea, *Law Institute Journal*. 8\Vol 82/8 (August 2008) 58-61.

⁶ Powell, A. et al. 'Meanings of 'Sex' and 'Consent' The Persistence of Tape Myths in Victorian Rape Law, *Griffith Law Review* (2013) Vol 22 No 2; 477.

The meaning of consent

Legal Aid NSW supports the retention of the current definition of consent in section 61HE of the *Crimes Act*.⁷

We prefer a standalone definition of consent as a clearer way to communicate the meaning of consent as a free and voluntary agreement to sexual activity. However, the Draft Proposals subsume the definition of consent into a long provision about how a person might withdraw consent,⁸ and what is not consent.⁹

We consider that several of the sub-sections in clause 61HI are drafted too broadly. For example clause 61HI(6) provides, *a person who consents to a sexual activity being performed in a particular manner is not...consenting to sexual activity being performed in another manner*. While the note provides the example of withdrawal of a device that prevents transmission of a sexually transmitted disease, the provision is drafted too broadly and could cover a range of matters beyond the scope of the matters envisaged.

The broad drafting in clauses 61HI(4) and (6) creates a lack of clarity about what might be the difference between a 'sexual activity' and the 'particular manner' of the sexual activity.

An affirmative consent model

The Draft Proposals move NSW to an affirmative consent model by requiring an affirmative expression of willingness from each person involved in the sexual activity.¹⁰ We reiterate our position in response to the NSW Law Reform Commission's *Consent in relation to sexual offences Consultation Paper (Consultation Paper)*, that the current law on consent adequately encompasses a communicative model of consent. As noted in the NSW LRC Consultation Paper, an affirmative consent standard is similar to the communicative consent model used in NSW, but there are key differences. Namely under the affirmative consent model, the law recognises a person's consent only where it is communicated through their words or actions.¹¹

We oppose moving to an affirmative consent model for the reasons outlined in our response to the Consultation Paper.¹² We hold concerns that an affirmative consent model risks reversing the evidentiary onus of proof and challenges the accused's right to silence, by negating consent simply by the absence of evidence that the complainant said or did anything to communicate consent.

⁷ Legal Aid NSW submission to the NSW Law Reform Commission Consultation Paper 21: *Consent in relation to sexual offences*, (February 2019) 4.

⁸ Clause 61HI (2) Appendix B, Consent in relation to sexual offences: Draft Proposals.

⁹ Clause 61HI (2)-(6) Appendix B, Consent in relation to sexual offences: Draft Proposals.

¹⁰ Clause 61HJ(1)(a), Appendix B, Consent in relation to sexual offences: Draft Proposals and NSW Law Reform Commission Consultation Paper 21: *Consent in relation to sexual offences*, (February 2019) 36.

¹¹ NSW Law Reform Commission Consultation Paper 21: *Consent in relation to sexual offences*, (February 2019) 36.

¹² Legal Aid NSW submission to the NSW Law Reform Commission Consultation Paper 21: *Consent in relation to sexual offences* (February 2019) 4-7.

Circumstances in which a person “does not consent”

We acknowledge the intention to provide more clarity on what is *not* consent. The Draft Proposals attempt to achieve this by stating a single, non-exhaustive list of circumstance in which a person “does not consent” to a sexual activity. However, in our experience, the complexity of factual scenarios that arise in sexual assault proceedings is more appropriately dealt with through retaining some discretion as to whether the circumstance always negate consent.

We consider that any expansion of the current section 61HE(5) should not prescribe mandatory categories of circumstances where consent will necessarily be negated. Judicial and prosecutorial discretion should be retained. Further, any additional circumstances where consent may be negated should be expressly linked to a person’s ability, or lack thereof, to consent to sexual activity freely and voluntarily. Finally, and in any event, any additional prescribed circumstances should be more tightly drafted to avoid unjust outcomes. For example:

- Clauses 61HJ(1)(e) and (f) are too broad. The *fear of harm or intimidation* should be to such a degree that it means that a person does not freely or voluntarily agree to sexual activity.
- The inclusion of *property* in the proposed drafting of clause 61HJ(1)(e)(i) would, in some scenarios, set the bar too low for a circumstance that must negate consent.
- Clause 61HJ(1)(f)(ii), which negates consent where the participant is mistaken about the nature of the sexual activity, is unclear and is potentially very broad. We prefer the current provision, which links the mistaken belief about the nature of the sexual activity to inducement by fraudulent means.¹³
- Similarly, we do not support the broad drafting of clause 61JH(1)(f)(iii) which negates consent where the participant is mistaken about the purpose of the sexual activity. The current law targets mistakes about sexual activity for the purposes of health and hygiene.
- Clause 61HJ(1)(g), which negates consent where the person is fraudulently induced to participate in the sexual activity, is also too broad. There is uncertainty as to what would constitute fraudulent inducement.

Time is a relevant factor in understanding consent

In our experience, people who have experienced domestic and family violence carry fear and trauma with them, from that relationship, for many years. Therefore, it is important that historical incidents of force and non-physical violence in such relationships, are given the appropriate consideration when determining if someone consented freely and voluntarily to a sexual activity.

However, we consider that the exclusion of regard to the time at which an incident or conduct occurs contained in clause 61HJ(1)(e)(i), is problematic. The point in time when an incident of force or the conduct occurs, is likely to be a highly relevant factor for the court and jury to consider as to whether the circumstance negates consent. Equally, consideration should be given to the use of the words *intimidation occurring at any time* in clause 61HJ(1)(e)(ii).

¹³ *Crimes Act 1900* (NSW) s 61HE(6)(d).

We query how the proposed provisions would interact with limitations on the admissibility of evidence in the *Evidence Act 1995* (NSW),¹⁴ and the *Criminal Procedure Act 1986* (NSW).¹⁵

Knowledge about consent

Legal Aid NSW does not oppose replacing the current “no reasonable grounds”¹⁶ test with the “it is not reasonable in all of the circumstances” test.¹⁷ A broad approach is necessary to capture relevant subjective circumstances of the accused, such as age or cognitive capacity.

Jury directions on consent and sexual offending

Jury directions should be contained in the Bench Book

Legal Aid NSW does not support legislated jury directions. In our submission to the Consultation Paper, we noted that mandatory, codified, jury directions can unsettle and complicate law which has developed over many years.¹⁸ In our experience, the codification of the sentencing laws were an example of highly prescriptive legislation providing fertile grounds for appeal. We maintain that the appropriate place for jury directions is in the Bench Book.

The Bench Book is a valuable resource for the judiciary and contains suggested directions that can be tailored to the individual case. In our experience, legislated jury directions, particularly mandatory ones, do not encourage individual tailoring of jury directions. Ritualistic jury directions are highly undesirable.¹⁹ This is particularly so in sexual assault matters, which often have a complex factual matrix. We note that mandatory jury directions in sexual assault trials in Victoria have been criticised for generating increasingly elaborate and complex directions which overwhelm, rather than assist, members of the jury.²⁰

Jury directions in the Bench Book also allows for updates in response to appellate decisions, updated evidence on sexual assault and changing attitudes and misconceptions in the community about consent.

One of the purposes of the Bench Book is to minimise the risk of appealable error. In the NSW Judicial Commission’s review of appeals in NSW, the Commission found that the trial judge gave one or more misdirections in 53% of successful conviction appeal cases.²¹ It found that by far the most common misdirection cases were sexual assault and related

¹⁴ *Evidence Act 1995* (NSW) Part 3.5 Tendency and Coincidence.

¹⁵ *Criminal Procedure Act 1986* (NSW) s 293; Admissibility of evidence of sexual experience,

¹⁶ *Crimes Act 1900* (NSW) s 61HE(3)(c).

¹⁷ Clause 61HK(1)(c) Appendix B, Consent in relation to sexual offences: Draft Proposals.

¹⁸ Legal Aid NSW submission to the NSW Law Reform Commission Consultation Paper 21. Consent in relation to sexual offences (February 2019) 13.

¹⁹ Judicial Commission of NSW, *Conviction Appeals in New South Wales*, Monograph 35 (June 2011) 91.

²⁰ McMahon, M. Willis, J. ‘Mandatory jury directions in sexual assault trials in Victoria: Less a model than a cautionary tale’. *Criminal Law Journal* (2014) 38; 287.

²¹ Judicial Commission of NSW, *Conviction Appeals in New South Wales*, Monograph 35 (June 2011); 93.

offences, which accounted for 33.5% of misdirection cases.²² Not only does this have a considerable impact on resources and the principle of finality, but appeals also have a significant impact on victims of sexual assault

Definitions

We consider that clause 61H(4), which notes that ‘a reference in this Division to a part of the body includes a surgically constructed part of the body’ may inadvertently only capture penetration by the offender using a surgically constructed part of the body, and may not cover penetration of the victim’s surgically constructed body part. When read together with clauses 61HA(a)(i) and 61HB(1)(a), those clauses only refer to the acts of the offender. The drafting of clause 61H(4) should be amended to ensure that it covers references to a surgically constructed part of the body of any person (including the offender, the victim or another person).

Definition of “sexual intercourse”, “sexual touching” and “sexual act”

The proposed amendments to the definition of “sexual intercourse”, “sexual touching” and “sexual act” were not canvassed in the Consultation Paper. Any definitional changes have a far-reaching impact and merit further consultation and consideration. Such amendments invariably lead to lengthy legal arguments about meaning, as demonstrated in the recent case of the offence of female genital mutilation and the constructions of s 45 of the *Crimes Act*.²³

The current definition of sexual intercourse includes the penetration of the genitalia of a female person or the anus of any person, by any part of the body of another person or any object; the introduction of the penis of a person into the mouth of another person; or cunnilingus.²⁴ Cunnilingus does not require penetration and refers to oral stimulation of the female genitals with the mouth or tongue.²⁵

Clause 61HA would expand this definition of sexual intercourse to include the touching of the anus or penis with the mouth or tongue of another person. This is a significant change in the current law. Currently in NSW, if there is no penetration, touching the anus or penis with the mouth or tongue is the offence of “sexual touching”.²⁶ There is a nine-year difference between the maximum imprisonment penalties for these offences.

This change would put the categorisation of what constitutes rape and sexual assault in NSW out of step with a number of other Australian jurisdictions,²⁷ and what is recommended in the Model Criminal Code (**MCC**). The MCC separates the offence of sexual “penetration” from other acts of indecent touching.²⁸ The MCC unlawful sexual penetration offence includes penetration of the other person’s genitalia or anus by any part of the body of a person or any object, penetration of the mouth by a penis of a

²² *Ibid*, 94.

²³ *R v A2*; *R v Magennis*; *R v Vaziri* [2019] HCATrans 122 (12 June 2019).

²⁴ *Crimes Act 1900* (NSW) s 61HA.

²⁵ *BA v R* [2015] NSWCCA 189.

²⁶ *Crimes Act 1900* (NSW) s 61KC.

²⁷ *Crimes Act 1958* (Vic) s 38; *Criminal Code Act 1899* (Qld) s 349; *Criminal Law Consolidation Act 1935* (SA) ss 5 and 48.

²⁸ Model Criminal Code (May 2009) Division 2, 5.2.6.

person.²⁹ We are also concerned that such a change may lead to greater cross-examination about whether the relevant touching occurred on the anus as opposed to the buttocks and what constitutes the anus. This may cause difficulties, particularly for child complainants.

We oppose the expansion of the definition of “sexual intercourse” to include touching of the anus with the mouth or tongue, in absence further information on the rationale for expanding the current definition of “sexual intercourse” in this way.

²⁹ Ibid, 5.2.1.