

OUR REFERENCE

DIRECTOR'S CHAMBERS



ODPP
New South Wales

YOUR REFERENCE

DATE

9 July, 2018

Acting Justice Carolyn Simpson
Commissioner
New South Wales Law Reform Commission

By email: nsw-lrc@justice.nsw.gov.au

Dear Commissioner

Preliminary submission to NSWLRC review on consent in relation to sexual assault offences

Introduction

Thank you for the opportunity to make a preliminary submission in relation to the NSW Law Reform Commission's review of section 61HA¹ of the *Crimes Act 1900*.

Sexual assault represents a significant proportion of the trial work undertaken by the ODPP and my Office has always taken an active interest in sexual assault policy and law reform².

The ODPP has been actively involved in the discussion and policy development that led to the introduction of section 61HA. The significant body of work leading up to the introduction of the provision should be carefully considered in this review.

Background

The genesis of section 61HA was the work of the Criminal Justice Sexual Offences Task Force ("the Taskforce"), which furnished a report "*Responding to Sexual Assault: The way forward*" in December 2005. Chapter 3 of that report deals extensively with the law of consent prior to the introduction of section 61HA, there is detailed analysis of the objective fault element and consideration of approaches taken in other jurisdictions. While the Taskforce were considering this issue the High Court delivered the decision in *Banditt v the Queen*[2005] HCA 80, which

¹ The Criminal Legislation (Child Sexual Abuse) Bill passed Parliament on 27 June 2018 and section 61 HA becomes s 61HE and is amended to adopt the terminology introduced by this Act but otherwise the provision is not relevantly amended.

² For instance the ODPP Chairs the Sexual Assault Review Committee, which is an interagency committee that meets quarterly to discuss issues that arise in sexual assault prosecutions. From these meetings the Committee regularly brings law reform issues to the attention of the Government.

highlighted the deficiencies of the law in relation to recklessness and consent from a contemporary view point.

In May 2007 the then Attorney General’s Department Criminal Law Review Division released a discussion paper “The Law of Consent and Sexual Assault” which largely drew on the Task Force report.

Following extensive further consultation the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* was passed in Parliament in November 2007 with provision commencing on 1 January 2008. In the second reading speech delivered by the then Attorney General it was noted that the new definition was a more contemporary and appropriate definition than under the common law and it 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.

In 2010 the Australian Law Reform Commission released report 114 “*Family Violence – A National Legal Response*” and made three recommendations³ in relation to consent in sexual assault offences. Relevantly it was recommended that there should be a statutory definition based on the concept of “free and voluntary” agreement, a provision setting out a non-exhaustive list of factors that may vitiate consent and a defence of honest and reason belief that consent was given. Section 61HA meets all these recommendations.

A statutory review was undertaken by the Department of Justice in 2013. The review concluded that the policy objectives of the consent provisions in section 61HA remain valid and that the amendments have not resulted in a high level of technical challenges⁴.

The statutory review recommended two relatively minor amendments that were introduced into the section in October 2014, applying the provisions to attempts, redefining “mistaken belief” relating to medical procedures so it applies to all health procedures.

ODPP statistics

A comparison of guilty pleas and acquittals in matters classified by the ODPP as adult sexual assault before and after the introduction of section 61HA is shown in figure 1.

Figure 1

		Total(2003-2009) ⁵	Total(2010-2017)
Trial Matters	Guilty Pleas	319	380
	Guilty Pleas %	34.2%	27.7%
	Acquittals	294	490
	Acquittals %	31.5%	35.7%
Trial Matters		932	1,372

³ Recommendations 25 -4, 25 – 5 and 25-6.

⁴ At page 5

⁵ The year 2009 is selected as the provision applied to offences committed after 1 January 2008 which will have taken sometime to reach trial.

Figure 2 shows the number of appeal to the Court of Criminal Appeal involving matters identified by the ODPP as adult sexual assault separated by type of appeal since 2010. It is noted that the proportion of appeals is relatively low compared to the number of trials that are run. I have not been able to have prepared an analysis of the appeals; such as the instance of the directions concerning “consent” or other issues relating to consent. I am able to provide the Commission with the names of the matters identified if required. The Departments statutory review conducted an analysis of relevant appeals available in 2013.

Figure 2.

		2010	2011	2012	2013	2014	2015	2016	2017	2018
CCA Conviction & Sent. Appeal (CAA)	Appeal allowed			1		1			1	
	Appeal dismissed	3	2	3		1	2	2	4	1
	Retrial	2	1	1						
	Total	5	3	5		2	2	2	5	1
CCA Conviction Appeal (CAC)	Appeal allowed	2	1			2	1	1		
	Appeal dismissed	5	1	3	9	8	6	1	4	1
	Remitted to a Lower Court				1				1	
	Retrial		1				1			
Total	7	3	3	10	10	8	2	5	1	
CCA Prosecution Appeal (CAP)	Appeal allowed	2			3	5			2	1
	Appeal dismissed	3	4	1	2	2	2	1	1	
	Retrial			1						
Total	5	4	2	5	7	2	1	3	1	
Court of Criminal Appeal		26	16	14	32	30	19	14	22	4

Whether section 61HA should be amended, including how the section could be simplified or modernised.

The constituent parts of section 61HA need to be considered in order to deal with the question of whether section 61HA needs to be amended, including how the section could be simplified or modernised.

The Meaning of Consent

The NSW definition of consent is broadly in step with other comparable jurisdictions that have reviewed their consent laws in the last 20 years.

In NSW it was ultimately determined to introduce a consent provision that requires “free and voluntary” consent, consistent with the other Australian jurisdictions of Queensland and Western Australia.

Alternative models that were considered by the Taskforce were the Canadian formulation “*the voluntary agreement of the complainant to engage in the sexual activity in question*” and the United Kingdom “*a person consents if he agrees by choice and has the freedom and capacity to make that choice*”.

Tasmania and Victoria use a similar formulation of “free agreement”.

Tasmania was one of the first jurisdictions in 2004 to introduce a statutory definition of consent. The Tasmanian provision states “a person does not freely agree to an act if the person... does not say or do anything to communicate consent”.

The question of whether it is desirable to adopt that concept from Tasmania requires consideration of the state of the law in NSW in light of the second decision by the Court of Criminal Appeal in the Lazarus matter (*R v Lazarus* [2017] NSW CCA 279). The Court found that the second trial judge had not considered the matters set out in section 61HA(3)(d) when it was mandatory to do so.

Bellew J considered what constituted a “step” for the purposes of section 61HA(3)(d):

The word “steps” is not defined in the Act but in my view there is no warrant to ascribe to it anything other than its natural and ordinary meaning. That meaning connotes doing something positive. The Collins English Dictionary defines the term “take steps” as meaning:

... to undertake measures to do something with a view to the attainment of some end ...

It follows that in my view, a “step” for the purposes of s. 61HA(3)(d) must involve the taking of some positive act. However, for that purpose a positive act does not necessarily have to be a physical one. A positive act, and thus a “step” for the purposes of the section, extends to include a person’s consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.

The consent laws in Victoria were more recently amended in 2014, in response to case law, and these amendments are relevant to this review.

Victorian consent laws previously relied on a subjective test that was derived from the House of Lords decision in *DPP v Morgan* [1976] AC 182. In Victoria calls were made to change the laws after a decision of the Victorian Court of Appeal in 2010 (*Worsnop v The Queen* [2010] VSCA 188), which had the effect of setting aside a number of other convictions before the court. Ultimately the High Court overturned the decision. However the Court of Appeal stated that there were still problems that “can only be addressed by urgent and wholesale amendment”.⁶

The amended section 36 was introduced into the *Crimes Act* 1958 in 2014. The Victorian formulation is that consent means “free agreement”. Section 36 (2) provides a non-exhaustive list of factors that vitiate consent. Further amendments in 2016 were introduced in response to the Royal Commission into Institution child sexual abuse criminal justice report. This included amendments concerning intoxication and the effect that has on reasonable belief (section 36B). Significantly Victoria have the *Jury Directions Act* 2015 and recent amendments to that Act provide directions about Misconceptions about consent section 46 (3) (c) – (e) and Reasonable belief in consent section 47 (3) (c) – (e).

Model directions should be considered for NSW as they are a positive step towards ensuring that juries are equipped to understand and analyse the evidence, particularly in respect of the way different people may respond to a sexual assault. For instance section 46 (3) provides “people who do not consent to a sexual act may not protest or physically resist the act (for example, the person may freeze and not do or say anything)”. A similar approach to jury directions has recently been adopted in NSW in relation to child sexual abuse.⁷ This would be a positive addition to the directions most frequently given in NSW that tend to mirror section 61HA(7) by referring to a lack of “physical resistance”. The Victorian model direction expands on that concept by specific reference to freezing or not saying anything.

⁶ Rape law in Victoria A Summary paper on options for reform Review of Sexual Offences, Criminal Law Review, Department of Justice 2013.

⁷ Criminal Legislation (Child Sexual Abuse) Bill 2018 inserts s239A Criminal Procedure Act, Warning May be given by Judge is complainants account differs.

Fault element

One of the most controversial areas of the law relates to the *mens rea* that the Crown must prove to establish sexual intercourse without consent.

It is evident from the analysis in the Taskforce report⁸ that the introduction of the objective fault element was considered very carefully and that the approach adopted in NSW is not dissimilar to the Australian Code states and Canadian and English approaches to state of mind.

It is strongly arguable that the current wording of section 61HA(3) reflects contemporary attitudes towards sexual relations.

Relevant issues relating to the practical application of section 61HA

In the preparation of this submission feedback and examples were sought from ODPP lawyers and Crown Prosecutors of acquittals where it was felt that the consent provisions were deficient. There was a very limited response to this request that I have referred to in this submission, which tends to suggest there are not significant problems.

An example raised relates to the section 61HA(6). Many complainants relate to occasions when the complainant is intoxicated by alcohol or drugs, despite the guidance provided from the section 61HA(6), issues remain in relation to proving a lack of consent where a complainant is affected by drugs or alcohol.

For example, in a 2016 trial⁹ where consent was the determinative issue, the jury returned a not guilty verdict where, even on the accused's version, the complainant was vomiting and "doing nothing but sitting" [under a shower], "with her head bowed down" at the time her shorts and underwear were removed and her vagina touched. When asked whether the complainant consented, the accused stated "she wasn't saying no, she wasn't objecting". When the accused later had sexual intercourse with the complainant, he stated that the only words spoken by either of them were when the complainant said "is this all you want from me".

Another relevant matter - Education

Education for the legal community and the wider community is an integral part of any discussion of what constitutes free and voluntary consent under the criminal law of NSW. In 2017 the Australian Human Rights Commission undertook a project on sexual assault and sexual harassment of university students. The purpose of the project was to provide an accurate picture of the nature and extent of sexual assault and sexual harassment at universities, and how universities respond to these incidents. The project consisted of two main elements, firstly, a national university student survey on sexual assault and sexual harassment and secondly an open call for submissions on sexual assault and sexual harassment at university. It built on the Commission's extensive experience leading projects of this kind, including the Review of the treatment of women in the Australian Defence Force and conducting national workplace sexual harassment surveys for the past 12 years. There is significant material available from the Human Rights Commissions research that could assist in the creation of an education package about consent.

⁸ At page 42.

⁹ Further details of this trial can be provided if required.

If the Commissioner and the NSWLR would like to meet with me and senior lawyers within my Office to further discuss any of the issues raised in this preliminary submission, I would welcome the opportunity.

Any inquiries in relation to this submission may be directed to [REDACTED] or [REDACTED]
[REDACTED]

Yours faithfully

[REDACTED]

Lloyd Babb SC
Director of Public Prosecution