

**REVIEW OF THE CONSENT PROVISIONS FOR SEXUAL ASSAULT OFFENCES IN THE  
*CRIMES ACT 1900***

**Legal Aid NSW submission**

**to the NSW Department of the Attorney General and Justice**

**April 2014**

Legal Aid NSW welcomes the opportunity to provide comments in response to the question of whether section 61HA of the *Crimes Act 1900* should apply to other sexual offences in the Act for which consent must be proved.

**Extending the statutory definition of consent to other sexual offences**

The focus of the review appears to be the extension of section 61HA of the *Crimes Act 1900* to the offence of indecent assault and presumably, as a corollary, the various aggravated forms of the offence. Legal Aid NSW does not support such an extension for the following reasons:

- The range of behaviours which can be the subject of an indecent assault charge are extremely varied. In many ways this category of offence, of all the sexual-related offences, is the broadest when considering the variety of possible actus reus, mens rea and temporal elements.

Indecency is not limited to sexual indecency, but extends to anything that an ordinary decent person would find "shocking, disgusting or revolting".<sup>1</sup> In relation to a non-sexual indecency case the extension of section 61HA would add confusion and complexity to the task of the fact finder as the provision is based on the underlying concept of sexual assault which would be wholly irrelevant to the matter.

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<sup>1</sup> *Knüller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435 at 458; [1972]2 All ER 898.

- It is difficult to envisage how section 61HA of the *Crimes Act 1900* as it is currently drafted could be extended to indecent assaults with a sexual element, when the provision is predicated on the notion of sexual intercourse. This of course is not an element of indecent assault.
- As noted in the Review paper, extending the section 61HA to other sexual assault charges will not in some instances do away with the need to provide the jury with the common law definition of consent in any case. This would still be required in indecent assault cases where the act of indecency and the assault are separate acts, or when non-sexual assault offences are included in the same indictment as sexual assault charges.

We note that consent is not an issue in relation to trials involving child sexual abuse where the alleged victim is or was, at the time of the offence, under the age of consent. This includes charges of indecent assault and its aggravated forms as outlined in section 77 of the *Crimes Act 1900*.

## **Conclusion**

Legal Aid NSW does not support the extension of section 61HA of the *Crimes Act 1900* to other sexual offences in the Act for which consent must be proved.

Thank you for the opportunity to provide these comments. Should you have any further questions, please contact Pilar Lopez at [Pilar.Lopez@legalaid.nsw.gov.au](mailto:Pilar.Lopez@legalaid.nsw.gov.au) or on (02) 9219 5933.

## **About Legal Aid NSW**

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*Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in grants of aid to private practitioners. Legal Aid NSW also funds a number of provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.*

*The Legal Aid NSW criminal law practice provides legal advice and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Court, Children Court, District Court, Supreme Court and Court of Criminal Appeal in summary hearings, committals, indictable sentences and trials, and appeals. Legal Aid NSW specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.*