

Consent in relation to sexual offences

**Legal Aid NSW submission
to the NSW Law Reform
Commission Consultation
Paper 21**

February 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.

Should you require any information regarding this submission, please contact:

Julia Brown
Senior Law Reform Officer
Strategic Law Reform Unit
Policy, Planning & Programs
(02) 9134 9378
Julia.Brown@legalaid.nsw.gov.au

Introduction

Legal Aid NSW welcomes the opportunity to provide a submission in response to the NSW Law Reform Commission Consultation Paper 21: *Consent in relation to sexual offences* ('Consultation Paper'). Legal Aid NSW is supportive of reviewing the effectiveness of laws in relation to sexual assault and evidence-based reform in this area.

Legal Aid NSW acknowledges the importance of improving the experience of complainants who participate in sexual assault trials. This objective needs to be balanced with other important considerations, namely the right of an accused to a fair trial.

Legal Aid NSW has considered varying perspectives on the issues presented in the Consultation Paper. We present the views of Legal Aid NSW's Domestic Violence Unit (DVU) who represent those who have experienced domestic and family violence (DFV) and we present the views of Legal Aid NSW's Criminal Law Division who represent those who have been accused of sexual offences. We acknowledge that consent in relation to sexual offences is a complex area of law and we hope that the breadth of experience of Legal Aid NSW practitioners will assist the NSW Law Reform Commission (NSW LRC) in its inquiry.

Given the complexity of this area of law, we are concerned about the impact any amendments relating to sexual consent may have on children and other vulnerable people (for example, those with a cognitive or mental impairment), who have reduced capacity to understand what may or may not constitute consent.

The laws of consent have particular importance in relation to young people for a number of reasons. Firstly, our experience shows that children have difficulties understanding sexual consent and education about consent is limited and ad hoc. Secondly, the legal consequences for a child engaging in sexual behaviour with a similar aged peer are the same as those for adults who engage in sexual behaviour with children. This can include lengthy custodial sentences, criminal convictions which can never be spent and being placed on the Child Protection Register¹.

Legal Aid NSW is also concerned that the statutory definition of consent now extends to lower levels of sexual offences such as sexual touching and sexual acts. Any changes to the statutory definition of consent should be carefully assessed in this context.

Legal Aid NSW supports opportunities to simplify the language and structure of the legislation regarding sexual consent.

We note that the interpretation and application of the law can have a significant impact on just outcomes in such matters. As a result, Legal Aid NSW is of the view that this complex area of law could benefit from a review of, and update to, the Bench Book.

Furthermore, any assessment of the effectiveness of any reform to the criminal law about consent should take into account other possible measures which may achieve such reform's objectives. For example, Legal Aid NSW notes that education would play an important role in addressing some of the concerns about the laws relating to sexual

¹ Under the *Child Protection (Offender Registration) Act 2000* (NSW).

consent. We support both a funded community education campaign as well as education for those working within the criminal justice system.

We respond to the questions listed as follows:

The meaning of consent

Question 3.1: Alternatives to a consent-based approach

(1) Should the law in NSW retain a definition of sexual assault based on an absence of consent? If so, why? If not, why not?

Legal Aid NSW supports the retention of a definition of sexual assault based on an absence of consent.

The current definition of consent in section 61HE of the *Crimes Act 1900* (NSW), as ‘free and voluntary’ agreement to sexual activity, is sufficiently broad and flexible to take account of the infinite and complex variety of sexual conduct among consenting individuals.

Question 3.2: The meaning of consent

(1) Is the NSW definition of consent clear and adequate?

As indicated above, in our view, the NSW definition of consent is clear and adequate.

(2) What are the benefits, if any, of the NSW definition?

The benefit of the NSW definition is that it already adequately encompasses a communicative consent model.

(3) What problems, if any, arise from the NSW definition?

Legal Aid NSW acknowledges that there are issues in the *application* of the NSW legislation in relation to consent. We are, however, of the view that these issues do not arise from the NSW definition of consent.

(4) What are the potential benefits of adopting an affirmative consent standard?

Legal Aid NSW recognises that a potential benefit of adopting an affirmative consent model is that it may assist a cultural shift away from traditional ‘rape myths’ (see below) and encourage people to seek consent more actively.

One of the stated aims of the Victorian Law Reform Commission (VLRC), in recommending changes to sexual assault law in Victoria, was to ‘deal with problematic social attitudes towards sexual practices that unfortunately persist’ and to ‘dispel the enduring myth that a woman must show evidence of physical resistance in order to provide evidence of a lack of consent’². Since the introduction of Victoria’s communicative model of consent, a small sample of Victorian appellate cases

² Powell, A. et. al. ‘Meanings of ‘Sex’ and ‘Consent’. The Persistence of Rape Myth in Victorian Rape Law.’ (2013) Griffith Law Review; 456-480 at 457.

suggested there may be a shift towards a legal focus on the accused's state of mind (in addition to that of the complainant's/victim's) in cases where the accused gives evidence³. However, despite this review, there is limited evidence to date of the effectiveness of adopting affirmative consent standards to create such a cultural shift. The effectiveness may be more limited when changing from a communicative model of consent to an affirmative consent model.

Criminal laws are an important element of what must remain a multi-pronged response to the complex social issues around sexual violence. In Legal Aid NSW's experience, education is an effective method to bring about social and cultural change on a large scale.

The Children's Legal Service Community Legal Education Unit (CLS CLE) at Legal Aid NSW provides specialised crime prevention and education sessions to young people and their workers across NSW. In 2018, CLS CLE launched a workshop specifically about sexual consent, called 'Let's Talk About Consent'. The workshop was created as a result of discussions about sexual consent that arose during other CLE workshops delivered at schools, for example, workshops about sexting, age of consent and what constitutes child pornography. A growing demand for a workshop dedicated to the topic of consent stemmed from this work.

Many young people do not receive adequate sex education within the context of their home environment. Sex education available through Personal Development, Health and Physical Education (PDHPE) lessons at school is limited and many young people may not engage in such lessons due to truanting, suspension/expulsion or illness.

The 'Let's Talk about Consent' workshop addresses 'consent' specifically. It is primarily delivered at schools but also at youth groups. It targets both young people and their teachers and youth workers. It covers:

- the legal definition of consent in NSW,
- offences associated with non-consensual sexual activity, and
- how to negotiate sex ethically and responsibly.

In our experience, knowledge of sexual consent and ethical practices among young people is often misinformed, inconsistent and/or lacking. Anecdotally, the discussions generated by the 'Let's Talk About Consent' workshop, and feedback from teachers, young people and their workers, indicate that the workshop is performing an important and effective role in the cultural shift away from 'rape myths' and building more positive and responsible attitudes to consent. A copy of the 'Let's Talk About Consent' workshop material is attached.

Legal Aid NSW would support a funded, state-wide, community education program on sexual consent that starts in primary school and continues into high school. Such an education program should be targeted and age appropriate. It should cover the legal definition of sexual consent in NSW and the offences associated with non-consensual sexual activity, as well as ethical issues, interpreting verbal and non-verbal communication and negotiation around sex.

³ Ibid at 476.

Legal Aid NSW also strongly supports police, prosecutorial and judicial education. This could involve education about the use of rape myths in sexual assault trials and how this can be addressed⁴. Education for police could assist police in taking police statements.

Legal Aid NSW is available for further consultation in relation to education about sexual consent.

(5) What are the potential problems with adopting an affirmative consent standard?

Legal Aid NSW considers there are several problems with adopting an affirmative consent standard in legislation in NSW. Legal Aid NSW is concerned that the affirmative consent model may not result in increased conviction rates in sexual assault trials. In our experience, the most problematic area in sexual assault trials relates to evidentiary issues. There is often two versions of events, whether or not the accused gives evidence. Adjudicating disputes over the meaning of actions and communication (both verbal and non-verbal) is not resolved by an affirmative consent model. The nature of the crime often means there is limited corroborative evidence.

The affirmative model of consent may have limited impact on issues of credibility or reliability, which play a significant role in such trials. In proceedings which often involve complex factual scenarios, where there is a difference in facts asserted and/or where alcohol is frequently involved, an affirmative model would likely have little impact. The Victorian study referenced above noted that the Victorian reforms had not resulted in a substantial reduction in sexual assault case attrition or increased conviction rates⁵.

Legal Aid NSW is concerned that the affirmative consent model, when compared to the current NSW model, is unlikely to reduce undue focus on complainants during sexual assault trials. Both the affirmative consent model and the communicative consent model require assessment of the actions and communication of both the complainant and accused, including indirect, subtle and nonverbal communication.

Legal Aid NSW holds concerns that an affirmative consent model risks reversing the evidentiary onus of proof, where the prosecution is required to prove an element of a sexual offence (i.e. that there was no consent), simply by the absence of evidence that the complainant said or did anything to communicate consent. As a result, the evidentiary onus would shift to the defendant to prove that there was some communication of consent.

Legal Aid NSW is concerned about the complexity of the current law in relation to consent and is concerned that adopting a new model would not assist in providing clarity. While law reform is essential to keep laws relevant and reflective of community values, the objective fault element currently contained in section 61HE(3) of the *Crimes Act 1900* allows for the application of community standards. Under a new model, there may be appeals and time required to establish guidance in case law, which may adversely impact on victims and accused persons.

⁴ Consultation Paper at [2.99].

⁵ Powell, A. et. al. 'Meanings of 'Sex' and 'Consent'. The Persistence of Rape Myth in Victorian Rape Law.' (2013) Griffith Law Review; 456-480 at 457. This observation was a point in time reference made.

Finally, the impact of the recent extension of the statutory definition of consent to lower level sex offences (sexual touching and sexual acts) should be carefully assessed before any changes are made to the definition of consent. Arguably, the definition of ‘sexual act’ now extends to conduct that was previously addressed by civil law, such as sexual harassment.

(6) If NSW was to adopt an affirmative consent standard, how should it be framed?

Legal Aid NSW does not support adopting an affirmative consent standard.

Negation of consent

Question 4.1: Negation of consent

(1) Should NSW law continue to list circumstances that negate consent or may negate consent? If not, in what other ways should the law be framed?

There are arguments against changing the current list of discretionary factors into factors that will necessarily negate consent (except in relation to intoxication, as outlined below). Retaining discretion appropriately reflects the complexity of factors and scenarios that arise in sexual assault proceedings. For example, section 61HE(8)(b) lists ‘intimidatory or coercive conduct, or other threats, not involving threat of force’, as grounds that *may* negate consent. Such conduct covers a very broad range of behaviour that may not always negate consent.

On the other hand, there has been criticism of the utility of the factors that *may* negate consent as the prosecution still must prove the complainant did not consent. An option for reform is for the three factors that *may* negate consent to be redrafted so that, if established, they definitively negate consent (see consideration of the three factors below).

(2) Should the lists of circumstances that negate consent, or may negate consent, be changed? If so, how?

Intoxication

Legal Aid NSW suggests that, intoxication could be added to the factors that negate consent, if the wording was based on the Victorian legislation, *the person is so affected by alcohol or another drug as to be incapable of consenting to the act, or withdrawing consent to the act*⁶.

We consider such an amendment would overcome the current issue posed by section 61HE(8)(a) which requires determination of whether or not the level of intoxication is substantial. This amendment would also focus the juror on the question of whether or not the complainant was capable of consenting. We note this is the approach of many other Australian jurisdictions⁷. Should such a change be considered appropriate,

⁶ Section 36 (2) of the *Crimes Act 1958* (VIC).

⁷ VIC, NT, SA, TAS and the ACT.

‘substantial intoxication’ could be removed from the section of factors that may negate consent.

Intimidatory or coercive conduct, or other threat, that does not involve a threat of force

The distinction between section 61HE(5)(c) and section 61HE(8)(b) is unique to NSW. It is arguable that it is a confusing distinction which should be abolished. On this argument, the distinction diminishes the reality and experience of victims of DFV, by suggesting there is a difference between threats of force and threats that don’t involve force. Conduct and threats do not need to be physical in nature to cause fear and serious harm.

The alternate view is that there is an important distinction between threats of violence which will negate consent (in section 61HE(5)(c)) and non-violent threats which *may* negate consent (in section 61HE(8)(b)). On this argument, there is a broad range of non-violent conduct some of which may not negate consent. The terms ‘intimidatory or coercive conduct, or other threat, that does not involve a threat of force’ are sufficiently broad to encompass non-physical conduct and threats.

Should the NSW LRC consider merit in an amendment to remove section 61HE(8)(b) from the list of factors that may negate consent and/or expand the conduct listed in section 61HE(5)(c), Legal Aid NSW recommends robust consultation and consideration of the specific wording adopted. As highlighted above, this would be essential due to the breadth of behaviour covered in section 61HE(8)(b).

Abuse of a position of authority or trust

In some other Australian jurisdictions⁸, abuse of position of authority negates consent. One option is to redraft the factor so that its application is narrower in scope and make it a factor that would definitively negate consent.

Another option would be to retain the current provision in the list of factors that may negate consent. The argument for this is that the current provision recognises that abuse of positions of authority or trust can occur within a broad range of relationships and may not always negate consent.

Knowledge about consent

Question 5.1: Actual knowledge and recklessness

(2) Should the term ‘reckless’ be replaced by ‘indifferent’? If so, why? If not, why not?

Legal Aid NSW has considered varying views on replacing the term ‘reckless’ with ‘indifferent’. We have considered the suggestion made by the NSW Bar Association that ‘recklessness’ in section 61HE(b) should be replaced with ‘the person is indifferent as to lack of consent by the other person to sexual activity’.

In our experience, jury directions on recklessness are particularly complex. A benefit of such a change would be that juries are assisted by simplifying the current direction based on the common law understanding of recklessness.

⁸ QLD, ACT and TAS.

However, we also note that such a change could further narrow the law in relation to knowledge of consent, in a climate of already low conviction rates in such matters.

Question 5.2: The ‘no reasonable grounds’ test

(1) What are the benefits of the ‘no reasonable grounds’ test?

Legal Aid NSW supports the objective fault element contained in section 61HE(3). It supports the inclusion of community standards in relation to sexual conduct and ensures ‘a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour’⁹.

(2) What are the disadvantages of the ‘no reasonable grounds’ test?

Legal Aid NSW notes that it is arguable that this section has been too narrowly construed. This is because the test requires consideration of whether the accused had *any* reasonable ground(s) for his/her mistaken belief that the victim consents¹⁰. On this view, the section has not fully lived up to the original intention of overturning *DPP v Morgan*¹¹ and to ‘ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour’¹². Should the NSW LRC see merit in this view, an option to address this would be to amend the wording to ‘*the person’s belief in consent was not reasonable in all the circumstances.*’

On the other hand, it is arguable that the 2007 reforms that introduced the ‘no reasonable grounds’ test unequivocally altered the common law position under *DPP v Morgan*, and that no further amendment is necessary. The Consultation Paper notes¹³ that, in a 2013 review of the law, the NSW Department of Justice concluded the policy objectives of the law remained valid. The Department found the amendments were still ‘firmly supported’ by representatives of people who have experienced sexual assault. As only a limited number of appeals had raised issues about the definition of consent, the Department concluded the definition ‘is understood and is working in NSW’s courts’¹⁴.

Question 5.3: A ‘reasonable belief’ test

(1) Should NSW adopt a ‘reasonable belief’ test? If so, why? If not, why not?

A possible benefit in replacing the test of ‘reasonable grounds’ with a ‘reasonable belief’ in consent would be to simplify the test. ‘Reasonable belief’ is a concept that may be more easily understood by a jury.

⁹ Second Reading Speech on the Crimes Amendment (Consent — Sexual Assault Offences) Bill 2007.

¹⁰ *Lazarus v R* [2016] NSWCCA 52, [156].

¹¹ *DPP v Morgan* [1976] AC 182.

¹² Second Reading Speech on the Crimes Amendment (Consent — Sexual Assault Offences) Bill 2007.

¹³ At [2.67].

¹⁴ NSW, Department of Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (2013), 18.

Question 5.5: Evidence of the accused's belief

(1) Should the law require the accused to provide evidence of the 'reasonableness' of their belief? If so, why? If not, why not?

Legal Aid NSW does not support the proposal that the law should be amended to require the accused to provide evidence of the 'reasonableness' of their belief. A criminal offence carrying the significant sanction of imprisonment should remain subject to the fundamental safeguard of the presumption of innocence, where the burden of proof lies on the prosecution.

Question 5.6: 'Negligent' sexual assault

(1) Should NSW adopt a 'negligent' sexual assault offence? If so, why? If not, why not?

Legal Aid NSW does not support the creation of a 'negligent' sexual assault offence.

Legal Aid NSW acknowledges the potential benefits in adopting the NSW Bar Association's suggestion that the objective basis for deeming knowledge of a lack of consent be addressed through a new lesser offence of 'negligent sexual assault.' A new offence, with a significantly lower maximum penalty, could facilitate charge negotiations and increase early guilty pleas.

In addition, just as there is a myriad of consensual sexual conduct, there is a myriad of circumstances involving non-consensual sexual conduct. These range from cases involving:

- random sexual assault by a stranger(s) where knowledge of lack of consent is unequivocal;
- matters where a perpetrator is indifferent to the views and wishes of the complainant;
- matters involving complex and contested factual scenarios where both parties are intoxicated by alcohol and/or drugs and where there is a genuine, but mistaken, belief in consent. This scenario, typically involving teenagers, arises regularly in our practice.

Under the present formulation of 'knowledge about consent' in section 61HE(3), a conviction in respect of each of the above scenarios attracts the same potential maximum penalty of 14 years imprisonment. A genuine but mistaken or unreasonable belief in consent may reflect a lesser degree of moral culpability than those cases where there is actual knowledge of non-consent. However, where conviction follows trial by jury, the sentencing judge is not privy to the reasoning of the jury and their determination as to which limb of the consent provision has been applied (unless this is indisputable based on the Crown Case and evidence put to the jury).

Nevertheless, there are number of countervailing considerations, from the perspectives of both victims and accused. From the perspective of some victims, when considering a harm-based approach, no matter what the defendant's culpability may be, the harm caused to the victim remains the same and should not be treated as less serious where the defendant was reckless or negligent to whether the victim was consenting. Further, a negligent sexual assault offence may send a message to the wider community that the

offence is not considered as serious as other offences. There is a risk that this may deter victims from reporting these offences in some circumstances. This is a serious concern when research shows 9 out of 10 women already do not report sexual violence to police¹⁵. Further, there is no rigorous evidence that the creation of a lesser offence will result in increased conviction rates. Such a change may in fact lead police and prosecutors to pursue a lower charge than what the criminality of the offending warrants (as acknowledged in the Consultation Paper at [5.67]).

From the defence perspective, there is some risk that prosecution of a negligent sexual assault offence would disproportionately, and potentially unfairly, criminalise accused who are disadvantaged by reason of their age, or mental or cognitive impairment.

The NSW LRC refers to the relatively new offence of negligent sexual assault enacted in Sweden in July 2018. The Swedish offence was introduced against a quite different legislative history than the NSW sex offence provisions. It was not supported by a number of stakeholders, including the Swedish Bar Association and the Council on Legislation¹⁶ on the basis that predetermining what actions will be punishable cannot be done with sufficient accuracy¹⁷.

A new offence would also not avoid the inherent evidentiary difficulties highlighted earlier in this submission. It could also add to an already complex and confusing area of law, including causing confusion for the community, jurors, lawyers and judges.

Bearing in mind these complex considerations, we suggest caution and clear evidence are needed before considering further whether a negligent sexual assault offence should be introduced in NSW. Legal Aid NSW does not support its introduction at this time.

Question 5.8: Defining 'steps'

(1) Should the legislation define 'steps taken to ascertain consent'? If so, why? If not, why not?

(2) If so, how should 'steps' be defined?

The argument against any further definition of 'steps' is that the interpretation of 'steps' in *R v Lazarus [2017]*¹⁸ as a positive act provides sufficient guidance, as well as flexible application to account for the wide range of cases to which it applies. On this approach, no further prescription is necessary.

On the other hand, there have been concerns that 'any steps' within section 61HE(4)(a) has been interpreted to mean a positive step '*but which need not be physical*'¹⁹; that is, it relies particularly on the subjective state of mind of the accused. On this argument, one option would be to change 'any steps' to '*reasonable steps*'.

¹⁵ ABS, *Personal Safety Survey*, 2016, 4906.0.

¹⁶ An independent body made up of current and former Justices from the Supreme Court and Supreme Administrative Court that tests the constitutionality of proposed legislation.

¹⁷ See <http://www.loc.gov/law/foreign-news/article/sweden-parliament-makes-lack-of-consent-the-basis-for-rape-charges-introduces-criminal-liability-for-negligent-sexual-assault/>

¹⁸ *R v Lazarus [2017]* NSWCCA 279 [147]

¹⁹ *Ibid.*

Issues related to section 61HA

Question 6.2: Language and structure

(1) Should changes be made to the language and/or structure of s 61HA (and the new s 61HE)? If so, what changes should be made?

Overall, whether the list of factors that negate or may negate consent remain or not, the order of the entire section 61HE should be reviewed to improve its readability. Provisions about the negation of consent should follow directly after provisions on the definition of consent, rather than after provisions about knowledge of consent. This approach is taken in nearly all other Australian jurisdictions²⁰.

Question 6.3: Jury directions on consent

(1) Are the current jury directions on consent in the NSW *Criminal Trial Courts Bench Book* clear and adequate? If not, how could they be improved?

Legal Aid NSW supports a review of jury directions, informed by relevant experts, regarding topics including:

- rape myths;
- The existence of a prior intimate relationship, or past sexual relationship;
- withdrawal of consent;
- common responses to sexual offences, including a freeze response that prevents a complainant from moving or speaking; and
- sexual assault in a DFV context.

Interpretation of the law and application of community standards can be particularly problematic when considering the following evidence in relation to sexual assault:

- Women are most likely to experience sexual assault by a male known to them (87%)²¹;
- Research by the Australian Institute of Criminology based on a sample of sexual assault cases found almost 42% of defendants were current partners, former partners or family members. Despite this, 'stranger rapes' are more likely to proceed to trial and conviction than those involving intimate partners²²;
- Research shows that juror judgments in rape trials are more influenced by attitudes, beliefs and biases about rape than objective facts²³; and
- The *National Community Attitudes towards Violence Against Women Survey* found that rape myths are still prominent in community attitudes towards sexual assault, with only 81% Australians agreeing it's a criminal offence for a man to have sex with his wife without consent, and 64% agreeing women are more likely to be raped by someone they know than a stranger²⁴.

²⁰ ACT, QLD, TAS, NT, SA and VIC.

²¹ ABS, *Personal Safety Survey*, 2016, 4906.0.

²² Australian Institute of Criminology, *Trends & Issues*, No. 291, 2005

²³ Taylor N. 2007. *Juror attitudes and biases in sexual assault cases*. Trends & issues in crime and criminal justice No. 344. Canberra: Australian Institute of Criminology.

²⁴ ANROWS, *Australians' attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes Survey towards Violence against Women Survey* by Webster, K., Diemer, K., Honey, N., Mannix, S., Mickle, J., Morgan, J., Parkes, A., Politoff, V., Powell, A., Stubbs, J. & Ward, A.

As a result, Legal Aid NSW recommends particular attention be paid to the application and interpretation of law, in addition to the law itself.

Question 6.5: Legislated jury directions

- (1) Should jury directions on consent and/or other related matters be set out in NSW legislation? If so, how should these directions be expressed?**
- (2) What are the benefits of legislated jury directions on consent and/or other related matters?**
- (3) What are the disadvantages of legislated jury directions on consent and/or other related matters?**

Legal Aid NSW does not support legislated jury directions. Mandatory, codified, jury directions can unsettle and complicate law which has developed over many years. We agree with the NSW LRC conclusion in its 2012 Report on jury directions²⁵ that it is preferable for the Bench Book to contain suggested directions that can be tailored to the individual case and that can evolve in response to appellate decisions.

We note that ‘Guiding Principles’ are legislated in Victoria²⁶. The purpose of Guiding Principles is to assist with interpreting and applying laws in relation to sexual assault. The ALRC Consultation Paper, *Family Violence—Improving Legal Frameworks* proposed that all state and territory sexual offences should have similar guiding principles²⁷. Those who support this option consider that the benefit of such principles would be an educative role in the application and interpretation of the law, as well as for the general community.

However, as with codified jury directions, such principles in legislation provide a degree of inflexibility that may be inappropriate for the type of information contained within them. As the community develops its understanding of sexual assault, legislative amendment would be required to ensure such a provision remains reflective of community standards. Whereas, if such information were contained in the Bench Book, the task of updating guiding principles would be significantly easier.

Guiding principles contained in legislation may further complicate the process of summing up and/or explaining relevant law to a jury, which is already an exceedingly complex task. It may make the process more open to error. Weight may be given to one guiding principle that is entirely irrelevant in the circumstances of the case.

Should the NSW LRC nevertheless consider that guiding principles may still be appropriate and helpful, Legal Aid NSW recommends further consultation be undertaken to ensure they address modern standards and expectations in relation to sexual interaction and principles within and beyond the Victorian scheme that warrant consideration.

²⁵ New South Wales Law Reform Commission. ‘Report 136: Jury directions’. November 2012. <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-136.pdf>

²⁶ Section 37B of the *Crimes Act 1958*.

²⁷ ALRC Consultation Paper, *Family Violence—Improving Legal Frameworks*; CPS 1 at 16-17