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INSTITUTE

Consensual Assault

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Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the state government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the government, the community, the University and the Institute itself. The Institute's Director is Ms Terese Henning. The members of the Board of the Institute are Ms Terese Henning (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Dr Jeremy Prichard (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (community representative), Mr Rohan Foon (appointed by the Law Society of Tasmania) and Ms Kim Baumeler (appointed at the invitation of the Institute Board).

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Executive Summary

This Report discusses s 182(4) of the *Criminal Code 1924* (Tas) and examines whether there is a need to reform the provision. Section 182(4) governs what is commonly known as ‘consensual assault’, which refers to circumstances where an assault has been committed but the victim has consented to the act in question. Due to the wide definition of assault, the situations where questions of consent can arise are quite varied, from mutually agreed brawls and sporting contests to some forms of sexual activity.

Prosecutions of assaults and other serious offences of violence are commonplace in the criminal courts. As a rule, such cases involve a non-consenting victim. However, occasionally, cases involving a consenting ‘victim’ also make it to court. These are cases where the parties involved have willingly exchanged blows or inflicted violence upon each other, for example, where two individuals resort to a fist fight to resolve a disagreement. Section 182(4) of the *Criminal Code* sets out that where a person consents to an assault, then that assault will not be unlawful, save for certain circumstances where the *Code* sets out that consent will not be valid.

This section poses difficulties for the criminal justice system and legal scholars alike. The language used is archaic and open to wide interpretation, and case law provides at times contradictory guidance. In the search for a principled distinction between lawful and unlawful consensual assault, courts and legislatures have been obliged to balance public policy justifications for refusing to condone violence regardless of consent against competing claims of personal autonomy. This has proved to be no easy task, particularly in Tasmania.

This Final Report examines the current law on consensual assault in Tasmania which is contained in s 182(4) of the *Criminal Code*. It traces the history of this provision from its roots in the common law, and explains how successive common law authorities have informed the judicial interpretation of the provision. The Report contends that some aspects of s 182(4) lack clarity and do not reflect current concerns about when the law might appropriately negate consent to assault. It also expresses concern that the provision reflects an outmoded view of when consent should or should not operate as a defence to assault and leaves those who are particularly vulnerable to violence in the home outside the protection of the law.

The Report subsequently lays out a number of recommendations, attempting to strike an appropriate balance between respecting the personal liberty and autonomy of citizens and the public interest in preventing and condemning violence.

List of Recommendations

Recommendation 1 (p 41)

Section 182(4) of the Tasmanian *Criminal Code 1924* should be reformed to modernise its operation and scope and to remove uncertainties as to its application and interpretation.

Recommendation 2 (p 46)

Section 53(c) of the Tasmanian *Criminal Code 1924* should be amended to modernise its language by deleting the phrase ‘maim injurious to the public’ and replacing it with ‘grievous bodily harm, disfigurement or a disabling injury’.

Section 182(4) should be amended to proscribe consent to assaults committed by adults in private in the presence of a child or children where the assaults are of no benefit to the person or persons assaulted other than to gratify that person’s or those persons’ desire to participate in the assaults.

Recommendation 3 (p 48)

The Institute recommends that s 182(4) not be repealed but that instead it be reformed.

The Institute recommends that s 2A be amended to specify that a person does not freely agree to an act if that act occurs in circumstances of family violence within the meaning of the *Family Violence Act 2004*.

Recommendation 4 (p 53)

Section 182(4) should be amended to remove the conditions that currently abrogate consent to assault — that the assault be ‘otherwise unlawful’, ‘injurious to the public’ and ‘a breach of the peace’.

Section 182(4) should be amended to provide that consent will not be a defence in respect of assaults committed by adults in private, where they occur in the presence of a child or children where the assaults are of no benefit to the person or persons assaulted other than to gratify that person’s or those persons’ desire to participate in the assaults; in respect of assaults committed in public, where they are of no benefit to the person or persons assaulted other than to gratify that person’s or those persons’ desire to participate in the assaults; or where the assault is committed with the intention of causing serious personal injury that is of no benefit to the person or persons assaulted.

For the sake of clarity, s 182(4) should also provide that nothing in that section is intended to deprive people of the ability to consent to medical and surgical treatment or of the ability to participate in sporting activities, ordinary rough play and lawful public entertainments.

Recommendation 5 (p 54)

The Institute does not, *at this stage*, recommend amending the *Family Violence Act 2004* (Tas) to make violent conduct engaged in in the presence of children a family violence offence. Such reform should only occur following a dedicated study that draws on the experience and views of a wide pool of stakeholders, a pool that includes a large number of advocates against, and experts in, family violence.

Part 1

Introduction

1.1 Background

1.1.1 It is a longstanding principle of Tasmanian criminal law that an assault will not be unlawful where it is committed with the consent of the person assaulted. The boundaries of this provision are set out in s 182(4) of the *Criminal Code 1924* (Tas) (the ‘Code’). One part of a lengthy provision dealing with the offence of common assault, s 182(4) establishes rules about the availability of consent as a defence to assault.

1.1.2 This provision has proven to be difficult. In May 2015 the Attorney-General requested the advice of the TLRI on whether there is a need to amend s 182(4). The Attorney-General’s request was prompted by a number of concerns the Chief Justice has expressed about the provision, including how judges have adopted conflicting approaches to its interpretation and that some of the matters referred to in the section are difficult to explain to juries. More specifically, the Attorney-General noted the following difficulties with the circumstances stipulated in the section for when a consensual assault will remain unlawful:

- when it is ‘otherwise unlawful’;
- when it is a ‘breach of the peace’; and
- when it is ‘injurious to the public’.

1.1.3 These concepts lack clarity and do not reflect current concerns about when the law might appropriately negate consent to assault. Additionally, there is concern that the provision reflects an outmoded view of when consent should or should not operate as defence to assault. Written in the early 20th century, the provision contains the kinds of paternalistic policymaking common to that time, which may not aptly respond to our more liberal society. This paternalistic view may be seen as unjustifiably infringing people’s self-determination, their right to determine what types of forceful behaviour they will accept.

1.1.4 Attempts to set the parameters of the defence of consent in the domain of the consensual infliction of violence are inherently problematic. The task of defining when consent should not be a defence will inevitably involve the balancing of a number of competing interests. Public policy suggests that some limits to the defence are justified, if only as a matter of respect for human dignity. Society has an interest in the health and wellbeing of its members.

1.1.5 However, what is understood to be allowable reflects the paternalistic assumptions that were current at the time when the provision was drafted. Sport, for example, is seen as a socially valued activity and therefore consent may be available as a defence in the context of sporting activity even where serious harm is caused. This is true even of a sport like boxing, where inflicting harm is the main objective of the contest. In contrast, the infliction of relatively minor harm through sadomasochistic sexual activity between consenting adults has not been recognised as socially useful, and participants in that behaviour have been charged with and convicted of assault. The result of de-legitimizing the

defence of consent for particular categories of violence will be to preference prevailing social perceptions of that violence over participants' individual liberty, potentially at the risk of legal sanction. Accordingly, there is a view that consent should be a defence to all forms of assault, except in the circumstances stipulated in the generally applicable s 53 of the *Code*.

1.1.6 An additional concern arises from the fact that the common law antecedents of s 182(4) were directed at the problem of *public* violence. The state's primary concern was to limit the risk of a private dispute between individuals drawing in others and escalating into a public breach of the peace. However, the traditional common law basis for criminalising consensual assaults does not capture more modern concerns about violence, and in particular, concerns about violence inflicted in *private* in a domestic setting where there is a risk that it may be witnessed by children. It may be that the current formulation of s 182(4), which continues to signal very clearly its common law origins, is simply not adequate to the task of responding to the great diversity of circumstances in which the consensual infliction of violence and injury might arise.

1.1.7 The Issues Paper sought submissions on a range of proposals for amending s 182(4) and the great majority of submissions agreed that reform in some form is necessary. The majority agreed that s 182(4) has a valuable purpose in today's society and should be retained. Overall, submissions favoured a fine tuning of s 182(4) and related provisions, though tended to differ in the details of their recommendations. A distinct minority suggested making no change, or recommended very significant changes that would restrict s 182(4)'s operation, particularly in family violence contexts.

1.1.8 The recommendations made in this Final Report seek to synthesise the perspectives of these submissions. The aim is to provide certainty for all stakeholders in the application and operation of consent in situations of assault, while also addressing community concerns regarding violence in the home. The Report is concerned with the question whether consent should provide a defence to assault in all cases, or whether there are some circumstances, currently not recognised at law, in which the putative victim's genuine consent is immaterial to the accused's culpability for an offence.

1.1.9 Throughout this Report, the author uses the terms 'assault' and 'violence' interchangeably. It is acknowledged that the definition of common assault in the *Criminal Code* comprehends a wide range of behaviour including, but not limited to, the application of force. However, as assaults by the application of force attract the most community concern, and as consent to an attempted or threatened assault is almost nonsensical, assault by application of force serves as the focus of the Report.

1.1.10 Equally it is acknowledged, as it was in the Issues Paper, that the notion of 'consensual violence' is somewhat paradoxical and that violence is 'the epitome of non-consensuality'.¹ However, violence is to be understood here in a neutral legal sense stripped of its associations with non-consent, that is, the application of force to another person.

1.2 Terms of reference

1.2.1 At its meeting on 7 July 2015, the Institute's Board agreed to provide the requested advice to the Attorney-General about whether there is a need to reform s 182(4) of the *Criminal Code*. The terms of reference distilled from the Attorney-General's request are:

¹ Cheryl Hanna, 'Sex is not a Sport: Consent and Violence in Criminal Law' (2001) 42(2) *Boston College Law Review* 239, 240 n 8.

- whether conflicting approaches to the interpretation of s 182(4) justify its reform;
- whether the requirements of s 182(4) should be amended because they lack clarity and/or are difficult to explain to juries, and/or no longer reflect current concerns about when the law might appropriately negate consent to assault;
- whether s 182(4) should be repealed so that consent operates as a defence to all common assaults except as provided in s 53 (which negates consent for all offences to which it is relevant in stipulated circumstances); and
- whether s 182(4) should be reformed to encapsulate modern concerns about the consensual violence.

1.3 Conduct of the reference

1.3.1 In June 2017, in accordance with the reference received from the Attorney-General in July 2015, the Institute released an Issues Paper, *Consensual Assault*, Issues Paper No 24 for consultation. The Institute invited responses to the Issues Paper in a number of ways:

- by completing the Submissions Template available on the Institute’s website;
- by answering one, a select number or all of the questions set out in the Issues Paper;
- by providing a more detailed response to the Issues Paper; or
- by meeting with members of the Institute to discuss contributions.

1.3.2 The Institute received submissions to the Issues Paper from:

- The Honourable Chief Justice AM Blow OAM;
- Director of Public Prosecutions Mr DG Coates SC;
- Solicitor-General for Tasmania Mr Michael O’Farrell SC;
- Secretary for the Department of Police, Fire and Emergency Management Mr DL Hine;
- Executive Director of the Law Society of Tasmania Mr Luke Rheinberger;
- Senior Solicitor at the Women’s Legal Service Tasmania Ms Lakshmi Sundram;
- President of the Australian Lawyers Alliance Mr Henry Pill; and
- Ms Kim Baumeler.

1.3.3 The production of this Report has significantly benefitted from submissions and consultations with those named above. The Institute wishes to thank all those who took the time to respond to the public consultation and to meet with the Institute to discuss the matters raised in the Issues Paper.

Part 2

The Current Law

2.1 Consent as a defence to assault

Theoretical foundation

2.1.1 It hardly needs saying that the state has a legitimate right to criminalise assaults. State interference is justified because of the value that the law places on bodily integrity. There is also a public interest in protecting the right to security of the person as it promotes social cohesion and reduces the risk of violent public disorder. The state too has a duty under art 9 of the *International Covenant on Civil and Political Rights* to protect citizens' right to security of the person.² However, the law is a reflection (however imperfect) of the values and standards of the society it exists to regulate. So, whilst there is a presumption that the infliction of personal violence is wrong, the general rule will not apply where it would amount to an unwarranted interference by the state in the private lives of citizens or where the violence itself serves some other public good.

2.1.2 As will be explained in greater detail below, essentially the law on consensual violence distinguishes between categories of conduct for which consent is a defence to assault (and hence where there is no culpability unless the Crown proves absence of consent) and categories where consent is immaterial. The decisive criterion is whether the activity is judged not to be in the public interest. For example, consent is recognised as a defence to assault in organised sports because they offer social benefits such as promoting a healthy lifestyle, providing legitimate forms of entertainment and fostering the development of values of team spirit and co-operation. Even for this kind of legitimate conduct, there are limitations. Consent will be immaterial in circumstances where force is applied maliciously, or where the force applied exceeds what is understood to be reasonable.

2.1.3 When considering a violent assault, the precise geometries of when consent is or is not legitimate can depend on larger philosophical perspectives. The moral limits of the criminal law are not settled, and it is worthwhile assessing different perspectives. Broadly speaking, there are three main competing approaches to criminalisation: liberalism, paternalism, and legal moralism. Each of these perspectives generates different answers about the appropriate degree of state intervention in the private activities of its citizens.

Liberalism

2.1.4 Adopting the liberal perspective on criminalisation, violence will only be subject to criminal sanctions where it breaches the harm principle. John Stuart Mill, most famously, expressed the harm principle thus:

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976), art 9(1). See Human Rights Committee, *Merits: Communication No 195/1985*, UN Doc CCPR/C/39/D/195/1985 (12 July 1990) ('*Delgado Páez v Colombia*'); Human Rights Committee, *Merits, Communication No. 916/2000*, 75th sess, UN Doc CCPR/C/75/D/916/2000 (22 July 2002) ('*Jayawardena v Sri Lanka*').

[T]he only purpose for which power can be rightfully exercised over any member of civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.³

2.1.5 Liberal ideals and values are implicit in the consent defence. If the only valid justification for interference with individual liberty is the prevention of harm to others, ‘one person cannot properly be prevented from doing something that will harm another when the latter has voluntarily assumed the risk of harm himself through his free and informed consent.’⁴ The liberal position does, however, recognise limits to the effect of consent and its conception of the autonomous individual is one who has the maturity and the capacity to make rational choices. This would exclude children and to some extent those with physical or mental disability. Strictly speaking, the liberal position does not place any restrictions on the gravity of harm that an individual can consent to. It even extends to permitting an individual to consent to his or her own death.

Paternalism

2.1.6 The second of the philosophical approaches to criminalisation is paternalism. This approach permits state interference in the actions of individuals even where the individual is only harming themselves. Gerald Dworkin characterised this kind of paternalistic interference as making use of the state’s coercive power with the only justification being the welfare of the individual being coerced.⁵ The paternalistic perspective holds that: ‘it is always a good reason in support of prohibition that it is probably necessary to prevent harm ... to the actor himself.’⁶ A paternalistic approach can be seen, for example, in the legal proscription of the consensual infliction of serious harm. The state is justified in legislating to deny individuals’ freedom of choice because it is done for their own good.

Legal moralism

2.1.7 The final approach is legal moralism. From this perspective, it is acceptable to deny individual liberty where it conflicts with society’s collective morality. Leading legal moralist Patrick Devlin wrote that shared morality underpins society, and that it follows that law can and should be made on the basis of that perceived social morality.⁷ The denial of individual choice then becomes justified where the activity is considered inherently immoral, regardless of whether it causes injury. This is the basis on which many categories of activity, such as the infliction of violence for sexual gratification, have conventionally been deemed not to be in the public interest. Past criminalisation of homosexuality, for example, has generally stemmed from legal moralism.

2.1.8 These approaches do not form the limits of legal philosophy, and are only parts of a wider system of normative jurisprudence. Normative jurisprudence is evaluative in nature and asks questions about the law — its purpose, its proper function and its value. This is in contrast with analytical jurisprudence, perhaps best exemplified by legal positivism, which chiefly seeks to clarify what the law is, rather than what are its purposes. Other broad systems of legal philosophy include natural law and critical theory, among others. It is the position of this Report that the evaluative approach of normative jurisprudence best addresses the issues at play with consensual assault.

³ J S Mill, *On Liberty*.

⁴ J Feinberg, *The Moral Limits of the Criminal Law*, (Oxford University Press, 1987–1990) vol 4, 165.

⁵ Gerald Dworkin, ‘Paternalism’ (1972) 56(1) *The Monist* 64, 65.

⁶ Feinberg, above n 4, vol 1, 26–27.

⁷ Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 10–11.

2.1.9 In Tasmania, s 182(4) of the *Code* governs questions about the limits of effective consent in the context of assault. However, the inconsistencies in the decided cases provide no sure guide as to how it is to be interpreted, much less do they suggest the possibility of a general theory of consent and violence. The approach to consensual violence evident in s 182(4) is that, beyond the limited exceptions that the law is prepared to endorse, the broader public interest in refusing to entertain consent to certain types of assault or to assaults that occur in certain circumstances trumps individual assertions of personal autonomy. Essentially, unless the activity has been identified as fulfilling some public good, s 182(4) obviates the need for the Crown to prove absence of consent where its components are proved.

2.1.10 As explained below (see [2.5]), the formulation of s 182(4) owes much to common law traditions dating back well over 100 years.⁸ The common law rules developed in response to a particular form of violence — public fist fights between men — and with a concern to avoid a particular form of harm — escalation to a public brawl. Those traditions reflect prevailing attitudes to violence, with violence in the private sphere, in particular, being largely ignored. Thus, as a mechanism for governing consensual violence, s 182(4) may not adequately account for family violence and circumstances where violence is witnessed by minors, as those were not significant concerns at the time of drafting.

2.1.11 There is a tension inherent in s 182(4). On the one hand, a case can be made for extending the reach of s 182(4) to certain types of violence currently perceived to be contrary to community values. On the other hand, there is also a case for recognising the validity of consent in all cases of assault because that accords with the community value of respecting individual autonomy. However, to some extent the latter approach views the current availability of the consent defence as depending on the conformity of the acts in question ‘to established gender roles, traditional relationship types and heterosexual orientation.’⁹ This has resulted in the criminalisation of acts, such as genuinely consensual sadomasochistic practices, that would otherwise fall within the bounds of the defence. Issues may also arise about whether the law infantilises women in attempts to protect them.

2.1.12 Herein lies the central dilemma — how can legislation at once abjure the paternalism of the old-fashioned common law approach while at the same time protect those categories of vulnerable people who were never contemplated by the original formulation of s 182(4).

2.2 The law in Tasmania

2.2.1 Section 184 of the Tasmanian *Criminal Code* creates the crime of unlawful assault. Assault is also an offence under s 35(1) of the *Police Offences Act 1935* (Tas) (‘*POA*’). Most common assaults¹⁰ are dealt with in the Magistrates Court pursuant to s 35 of the *POA*. Since s 184 and s 35(1) have the same ingredients, the *Code* principles of criminal responsibility, including the definition of ‘assault’ in s 182, apply to both offences.¹¹ The definition applies to all offences which require proof of an assault, including indecent assault (*Code* s 127; *POA* s 35(3)) and assault on a pregnant woman (*Code* s 184A). At common law assault and battery are distinct crimes with assault consisting of a threat to apply personal violence and battery consisting in the actual infliction of personal violence. The *Code*

⁸ *Coney and Others* (1882) 8 QBD 534 (‘*Coney’s Case*’) is usually identified as the origin of the provision.

⁹ Matthew Weait, ‘Harm, Consent and the Limits of Privacy’ (2005) 13 *Feminist Legal Studies* 97, 98.

¹⁰ ‘Common assault’ is the basic assault offence. Both the *Code* and the *POA* also provide for aggravated forms of assault which are treated as more serious assaults due to the particular circumstances — eg, the status of the victim, the type of harm caused or the intent of the offender.

¹¹ See s 36 *Acts Interpretation Act 1931* (Tas).

definition embraces both these offences as well as the crime of false imprisonment. Thus, an assault may take one of the following forms:

- (a) an act of intentionally applying force to the person of another directly or indirectly;
- (b) attempting to apply force to the person of another;
- (c) threatening by any gesture to apply force to the person of another;
- (d) an act of depriving another of his or her liberty.

2.2.2 For reasons described earlier, this Report is focused on assaults constituted by the actual application of force.

2.2.3 The prosecution must also prove that the assault was unlawful. There are a number of defences which would preclude a finding of unlawfulness, including self-defence (*Code* s 46), punishment of one's child for the purposes of correction (*Code* s 50), surgical operations performed in good faith (*Code* s 51), and the use of reasonable force in executing a lawful arrest (*Code* s 26). Relevantly for this Report, s 182(4) expressly provides for the defence of consent. This section reads:

Except in cases in which it is specially provided that consent cannot be given, or shall not be a defence, an assault is not unlawful if committed with the consent of the person assaulted unless the act is otherwise unlawful, and the injury is of such a nature, or is done under such circumstances, as to be injurious to the public, as well as to the person assaulted, and to involve a breach of the peace.

2.2.4 Whilst the putative victim's consent to the application of force generally affords a defence, there are two situations apart from s 182(4) in which an assault will still be unlawful notwithstanding that consent. The first is where it is expressly provided that the victim's consent is immaterial to criminal responsibility. For example, under s 53 of the *Code* no consent may be given to the infliction of death upon oneself nor to the infliction of an injury likely to cause death. Similarly, s 127 provides that the consent of a victim under the age of 17 years is no defence to a charge of indecent assault.

2.2.5 The second situation is where the defence of consent is not precluded expressly but the legislation provides an avenue for proving unlawfulness despite the existence of consent. It is this situation with which the current enquiry is concerned. In certain circumstances, the victim's consent is ineffective as an excuse or justification for an assault. The rules which operate to deny the exculpatory effect of consent are set out in s 182(4) of the *Code*.

2.3 The definition of 'consent'

2.3.1 'Consent' is defined in s 2A of the *Code* as 'free agreement'. The definition establishes that in the legal context consent is conceived as a positive state of mind. A positive consent standard allows the prosecution to rely on an absence of affirmative signals of consent as evidence that the victim was not consenting. This is made explicit by s 2A(2)(a) which reads: 'a person does not freely agree to an act if the person does not say or do anything to communicate consent'.

2.3.2 This legislative definition of consent was introduced in 2004¹² and the insistence on affirmative consent has been particularly significant in the law of rape and sexual assault. Previously, proof of absence of consent relied on proof that the victim lacked the capacity to consent or that submission was procured by force, or by the fraud of the accused in a very restricted sense. In other circumstances, coerced sex went unpunished. Section 2A(2) of the *Code* confirms that consent is to be understood as a positive state of mind by setting out examples of situations where it is presumed there is no consent. Included in the list are the traditional, common law derived categories of force, fraud and mistake but these vitiating circumstances have been supplemented to reinforce and strengthen the notion of free agreement, and to ensure that ‘absence of consent is not limited to cases where rational choice is impossible but is extended to circumstances where choice is affected in other ways.’¹³ These might include where consent is induced as a result of a power imbalance in a relationship or where one party is economically dependent on the other.

2.3.3 Whilst it occupies an important place in the context of sexual offences, the amended definition of consent is also relevant to the discussion of consensual assault. As will be discussed below, it may be that some of the difficulties identified in the operation of s 182(4) can be addressed by a more rigorous interrogation of the existence of valid consent in the first place.

2.4 The meaning of ‘consent’ in the context of assault

2.4.1 The reference to the putative victim’s consent in the context of the consensual infliction of violence in fact encompasses various gradations of consent. Consent may refer to the express agreement to the infliction of the injury which was in fact inflicted. It may refer to the express agreement to the infliction of some harm but not to the harm actually caused. It may be consent to the risk of harm which in fact results or it may be consent to the risk of some harm but not to the risk of harm as serious as that which actually results. There are further categories which contemplate implied consent to harm or the risk of harm.¹⁴ As will be seen, the legal response has been shaped according to the particular form of consent concerned.

2.5 The origins of s 182(4) and subsequent developments at common law

2.5.1 Section 182(4) is a unique provision, appearing as it does only in the Tasmanian *Criminal Code*. Both the Queensland and Western Australian Codes deal with consensual assaults only to the extent of providing that, ‘[t]he application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.’¹⁵ The Tasmanian provision seems to have its origins in the common law and specifically in the case of *Coney and Others*¹⁶ (‘*Coney’s Case*’), a case addressing the lawfulness of prize-fights. In some respects the separate components of s 182(4) reflect aspects of the reasoning in that case. At issue in *Coney’s Case* was the liability of spectators at a prize-fight for aiding or abetting the acts of assault of the combatants. The spectators’ ‘secondary’ liability relied upon proof that an offence had been committed. All the judges held that since prize-fighting was

¹² *Criminal Code* (Tas) s 2A(1), as amended by *Criminal Code Amendment (Consent) Act 2004* (Tas) sch 1 item 4.

¹³ Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 44 (Judy Jackson, Attorney-General).

¹⁴ This analysis is taken from the judgement of Lord Mustill in *R v Brown* [1994] 1 AC 212, 259.

¹⁵ *Criminal Code* (Qld) s 246(2); *Criminal Code* (WA) s 223.

¹⁶ (1882) 8 QBD 534.

inherently unlawful, the consent of the participants to the infliction of blows upon each other was no defence to a charge of common assault. Stephen J (co-incidentally the architect of the draft Code on which the Tasmanian *Code*, and thus s 182(4), is modelled) stated:

the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public, as well as to the person injured. ... In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even where considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances.¹⁷

His fellow judges found similarly:

the combatants in a prize fight [cannot] give consent to one another to commit that which the law has repeatedly held to be a breach of the peace. An individual cannot by such consent destroy the right of the Crown to protect the public and keep the peace.¹⁸

...

The true view is, I think, that a blow struck in anger, or which is likely or intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial ...¹⁹

2.5.2 These statements are echoed in the wording of s 182(4). The common law jurisprudence on the limits of consent as a defence to assault was developed in successive common law authorities, some of which are discussed below. The English authorities on consensual assault have been incorporated into the Australian common law, for example, in the Victorian case, *R v McIntosh* (discussed below at [4.2.4]), Vincent J applied *R v Brown*²⁰ (*'Brown's Case'*). Similarly, Kellam J in the Victorian case of *R v Stein*²¹ relied on both *R v Brown* and *R v Emmett*²² in his judgement (see [4.2.4]) and these cases have also influenced the interpretation of s 182(4), in particular, the meaning of the phrase, 'injurious to the public' (see [3.4] below).

2.5.3 For Australian Code jurisdictions,²³ it has been said that the English common law still provides a highly persuasive line of authority.²⁴ While courts in Code jurisdictions are not bound to follow common law authority, they may still do so and one justification for so doing is that a Code provision merely expresses a pre-existing common law principle.²⁵ For example, Wright J in *R v Holmes* stated

¹⁷ *Coney's Case* (1882) 8 QBD 534, 549.

¹⁸ *Ibid* 567 (Lord Coleridge CJ).

¹⁹ *Ibid* 539 (Cave J).

²⁰ [1994] 1 AC 212.

²¹ (2007) 18 VR 367.

²² [1999] EWCA Crim 1710.

²³ Namely, Tasmania, Western Australia and Queensland.

²⁴ *R v Holmes* (1993) 2 Tas R 232, 236. His Honour referred inter alia to *Re the Attorney-General's Reference (No 6/1980)* [1981] QB 715, *R v Brown* [1994] 1 AC 212, *Coney's Case* and *The Queen v Jobidon* (1989) 45 CCC (3d) 177.

²⁵ See *Murray* [1962] Tas SR 170.

that he was ‘compelled to the conclusion that the law of Tasmania as expressed in the Code ... coincides with the principle established by the English and Canadian decisions.’²⁶

2.5.4 The decision in *Coney’s Case* was consistent with the prevailing orthodoxy, viz:

- Everyone has a right to consent to the infliction upon himself of bodily harm not amounting to a maim.²⁷
- No one has a right to consent to the infliction upon himself of death, or of an injury likely to cause death, in any case ... or to consent to the infliction upon himself of bodily harm amounting to a maim, for any purpose injurious to the public.²⁸
- No one has a right to consent to the infliction of bodily harm upon himself in such a manner as to amount to a breach of the peace, or in a prize-fight or other exhibition calculated to collect together disorderly persons.²⁹

2.5.5 The term ‘maim’³⁰ has a technical meaning at common law which also reflects the concerns of the time that the *Code* was first drafted. It refers to an injury that renders a man less able to fight. Striking out a tooth was considered to be a maim while cutting off a man’s nose was not, the reason being that in the period of early firearms it was necessary to tear a paper cartridge with one’s teeth in order to load the weapon. As a result, a missing tooth may reduce a man’s fitness to fight, while a missing nose may have no such effect.³¹ In his submission to the Institute in relation to questions asked in the Issues Paper, Blow CJ noted that similarly archaic meanings are attached to other terms in s 182(4). For example, ‘injurious to the public’ originally described an injury which rendered a man less able to serve in the King’s armies. Now the term is generally interpreted as meaning ‘not in the public interest’, which itself is open to varying interpretations.

2.5.6 Despite the fact that the decision in *Coney’s Case* was limited to the particular facts of that case — ie, consent by the participants to any degree of injury during a prize fight could not be effective in law since the very nature of prize-fighting tends towards a breach of the peace — it is often cited as establishing a general rule as to the limits of effective consent to injury. So, for example, the case was referred to in *Donovan*³² where the English Court of Appeal was asked to consider the question whether the ‘victim’s’ consent was an answer to a charge of common assault where the accused caned her for the purposes of sexual gratification. Swift J, delivering the judgment of the Court, stated that one who beats another with the intention or likelihood of doing bodily harm is answerable for the harm caused. That is, as a general rule, in such circumstances the victim’s consent is immaterial:

²⁶ (1993) 2 Tas R 232, 236.

²⁷ James Fitzjames Stephen, *Stephen’s Digest of the Criminal Law* (Macmillan, 6th ed 1904) article 227, 165. This is replicated in s 53(c) of the *Criminal Code* (Tas).

²⁸ Ibid article 228, 165–6. This is replicated in s 53 of the *Criminal Code* (Tas).

²⁹ Ibid article 229, 166.

³⁰ This term is used in s 53 of the *Criminal Code* (Tas) and constitutes an injury that vitiates consent where its infliction is ‘for a purpose injurious to the public.’

³¹ Stephen, above n 27, article 228, 165–6.

³² *R v Donovan* [1934] 2 KB 498.

As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.³³

2.5.7 His Honour went on to list the exceptions to the general rule, including fighting with cudgels or foils and wrestling.³⁴ He gave two reasons why such activities were not inherently unlawful. First, such pursuits are engaged in in a spirit of friendship and the intent, or motive, is not to cause bodily harm, and second, they are ‘manly diversions, they intend to give strength, skill and activity, and may fit people for defence, public as well as personal, in time of need.’³⁵ Another category of exceptions to which his Honour referred were those acts which might be termed ‘rough and undisciplined sport or play’.³⁶ The gratification of ‘perverted desires’ was emphatically excluded as a category of exception with the result that caning of the victim, even with her consent, was unlawful.

2.5.8 His Honour acknowledged the statement in *Coney’s Case* that everyone has the right to consent to the infliction of bodily harm not amounting to a maim, but noted that ‘[t]his may have been true in early times when the law ... showed remarkable leniency towards crimes of personal violence, but it is a statement which now needs considerable qualification.’³⁷

2.5.9 *Donovan* highlights how the formulation of lawful consent to assault was influenced by earlier attitudes towards violence. What was generally understood to be acceptable stemmed from an engrained belief in the importance of the male population being able to engage in warfare for the state, and the specific sports and activities usually listed tend to encompass those traditionally preferred by the upper classes, such as fencing and rugby, and which were also considered to prepare men for battle. As discussed below, the prevailing standards of sexual morality of those times are also reflected in conceptions of lawful consent.

2.5.10 Changing times have brought changed interpretations. In *Attorney-General’s Reference (No 6 of 1980)*,³⁸ a case involving two youths ‘settling their differences’ by a fist fight in a public street, the Court of Appeal departed from the proposition laid down in *Coney’s Case* that it was the public nature of the spectacle, and the attendant risk of public disorder, which precluded the application of consent as a defence. Instead, the court reframed the decision in terms of a different notion of public interest. Lord Lane CJ referred to the need for a ‘new approach’ to criminalising consensual assault, one which took account of changing times. In particular, his Lordship observed that the reliance on the criminal law to manage threats to public order in this way was explicable in the context of a society with a poorly developed police force, but was inappropriate in modern times.

2.5.11 His Honour held that, regardless of whether the conduct occurs in public or in private,

it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason. ... it is an assault if actual bodily harm is *intended and/or caused*. This means that most fights will be unlawful regardless of consent.³⁹

³³ Ibid 507.

³⁴ Ibid 508.

³⁵ Ibid quoting Michael Foster, *Foster’s Crown Law* (Clarendon Press, 3rd ed) 259.

³⁶ *R v Donovan* [1934] 2 KB 498, 508.

³⁷ Ibid 507.

³⁸ [1981] QB 715.

³⁹ *Attorney-General’s Reference (No 6 of 1980)* [1981] QB 715, 719 (author’s emphasis).

2.5.12 This passage suggests that the defence of consent will be ousted in two situations: where actual harm is intended, and where actual harm is caused, regardless of intent. His Honour qualifies this by making reference to harm ‘for no good purpose’, which suggests that actual harm may be acceptable in the right circumstances, such as in recognised sport, but it otherwise ousts consent in any circumstance where actual harm is caused. This kind of test would be inconsistent with the principles of criminal responsibility for assault laid out in ss 184 and 182 of the *Code*. Effectively it would deprive an accused of the defence of consent even where the risk of causing bodily harm was entirely unforeseen. An accused would also be precluded from arguing that the harm was accidental. The *Code* offence requires proof of a subjective mental element, which, for an application of force type of assault is subjective recklessness — foresight — of the application of force. In fact, in his leading text on criminal law Williams suggests that this is, rather, a short hand reference to the alternative mental elements that will sustain a charge of assault; that is, a specific intention to cause bodily harm or subjective recklessness in that regard.⁴⁰

2.5.13 Perhaps the most significant, and most debated, modern statement on the lawfulness of consensual assaults is the House of Lords decision in *Brown’s Case*.⁴¹ This case concerned the lawfulness of the activities of a group of men who engaged in consensual homosexual sadomasochistic practices in private. The practices did not cause debilitating or permanent harm and none of the participants had reason to seek medical attention. However, actual bodily harm was caused in the form of cuts and some time was spent discussing the circumstances in which the participants came to know each other, which were considered to involve some amount of sexual grooming.⁴² The House had to determine whether, in cases of assault occasioning bodily harm,

consent is relevant in the sense either that the prosecution must prove a lack of consent on the part of the person to whom the act is done or that the existence of consent by such person constitutes a defence for the person charged.⁴³

2.5.14 If the general law as stated in *Attorney-General’s Reference (No 6 of 1980)* was correct then the accused could only escape liability if his or her conduct fell within a special category of exception. By a majority of 3 to 2 the court decided that *Attorney-General’s Reference (No 6 of 1980)* was correctly decided and further that sadomasochistic activities did not fall into an exception analogous to sporting contest or horseplay.

2.5.15 *Brown’s Case* is often contrasted with *Wilson’s Case*⁴⁴ decided in the Court of Appeal only four years later. In *Wilson’s Case* the sexual violence was inflicted by a husband upon his wife. At his wife’s request Mr Wilson branded his initials on his wife’s buttocks with a hot butter knife as a token of his affection. The Court distinguished Mr Wilson’s conduct from the activities in *Brown’s Case* on the basis that the wife instigated the act, there was no hostile intent, the injury was relatively minor and analogous to a tattoo. Russell LJ stated: ‘Consensual activity between husband and wife, in the privacy of the matrimonial home, is not ... normally a proper matter for criminal investigation.’⁴⁵

⁴⁰ Glanville Williams, *Textbook of Criminal Law* (Stevens, 2nd ed, 1983) 583.

⁴¹ [1994] 1 AC 212.

⁴² *Ibid* 236.

⁴³ *Ibid* 276.

⁴⁴ *R v Wilson* [1997] QB 47.

⁴⁵ *Ibid* 49.

2.5.16 While his Honour emphasised the distinction between the consequences of the branding which amounted to some bruising, relative to the bloodletting in *Brown's Case*,⁴⁶ he also acknowledged that matters such as these should be addressed on a case-by-case basis, responsive to prevailing mores of contemporary society.

2.6 Section 182(4) – the legal effect of the ‘victim’s’ consent

2.6.1 Assuming that the victim’s consent to the application of force has been given freely within the meaning of s 2A of the *Code*, s 182(4) specifically provides that the assault is nevertheless still unlawful if each of these four conditions is satisfied:

- the act is ‘otherwise unlawful’;
- the injury is of such a nature, or is done under such conditions as to be injurious to the public;
- the act is injurious to the person assaulted; and
- the act involves a breach of the peace.

2.6.2 The Crown bears the onus of proof in relation to all four matters.⁴⁷ It is not sufficient for the Crown to prove one or more of the elements listed above, they must prove all four.

Otherwise unlawful

2.6.3 There is a degree of uncertainty about when an act will be ‘otherwise unlawful’ in the context of this section. The condition is unique to Tasmania but it seems likely that it can be linked to Cave J’s judgement in *Coney’s Case*. His Honour distinguished between blows struck in anger and those struck in the context of sporting contests where there is no hostile intent and held that the former would amount to both an assault and a breach of the peace and would be, on that ground, unlawful in any case.⁴⁸ The implication is that, before a consensual assault can be ‘otherwise unlawful’ it must constitute an assault as well as some other offence. This is the sense in which it seems that the condition of ‘otherwise unlawful’ is generally understood in the context of s 182(4). For example, the act could be a breach of another provision of the *Code* such as s 178 (being armed in public), s 80 (taking part in an affray), s 81 (duelling) or s 82 (taking part in a prize fight).

2.6.4 The requirement that the conduct be ‘otherwise unlawful’ may have the effect of enabling consent to remain a defence to assault in cases like *Brown’s Case*. This means that, in Tasmania, consent would remain an operative defence to sadomasochistic consensual sexual conduct of the kind engaged in there. Consent would not be rendered immaterial by s 182(4).

2.6.5 The rationale for the requirement that the conduct be ‘otherwise unlawful’ may be that it supplies the attribute of wrongfulness that would otherwise be absent where there is consent. Ordinarily, where a putative victim consents to an application of force, one of the fundamental desiderata for the

⁴⁶ Ibid.

⁴⁷ *Woolmington v DPP* [1935] AC 462.

⁴⁸ As far back as 1693, it was observed that individuals could not, by their mutual consent, legitimise conduct which is itself unlawful ‘because ‘tis against the peace’: *Matthew v Ollerton*, 90 ER 438 (1693).

criminalisation of assault no longer applies — there is no violation of the victim’s physical integrity. If the conduct is ‘otherwise unlawful’ this retains its criminality in spite of consent.

Injurious to the public

2.6.6 The second hurdle for the Crown is to establish that the assault is injurious to the public. This phrase is not defined in the *Code* so it may be considered a ‘word of doubtful import’. According to established principles for interpreting words in legal Codes, where the meaning of a word (or phrase) is unclear it is permissible to look to the common law for a definition.⁴⁹ There have been a number of situations where the common law courts have considered the meaning of the phrase ‘injurious to the public’. In *Coney’s Case* it was held to mean ‘not in the public interest’, and this is generally the understanding evident in succeeding cases — both *Attorney-General’s Reference (No 6 of 1980)* and *Brown’s Case* refer to the infliction of bodily harm ‘for no good reason’. The more difficult question that remains is what sorts of activities are or are not in the public interest. As mentioned above, the phrase has an archaic origin in English law.

2.6.7 In his submission to the Institute, the Tasmanian Solicitor-General, Mr Michael O’Farrell, described this requirement as providing the policy reason for the state to intervene in the personal affairs of a citizen, and, in practice, the common law and the *Code* treat certain activities involving the application of force to another as non-criminal on the basis that they provide some social good. Games and sports, lawful chastisement or correction of children,⁵⁰ reasonable surgical interference,⁵¹ dangerous exhibitions and ‘well-intentioned horseplay’ are examples of activities considered to be within the scope of the social good. Activities involving the infliction of bodily harm which fall outside these well-established exceptions, including consensual sadomasochistic practices and at least some forms of intrusive body ornamentation, continue to be judged as injurious to the public.

Injurious to the person assaulted

2.6.8 The origin of the requirement (again unique to Tasmania) that the assault is injurious to the person assaulted clearly derives from Stephen J’s judgment in *Coney’s Case*:

When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured.⁵²

2.6.9 Apart from definitional questions about the degree of injury required and some potential arguments about whether only physical injury is contemplated, the requirement that the assault is injurious to the person assaulted is comparatively straightforward.

2.6.10 The phrase ‘injurious ... to the person assaulted’ is not defined. As ‘injurious’ is a word of doubtful import the common law can again be used in aid, however there are no cases from any jurisdiction that have interpreted the word in the context of assault. The Oxford English Dictionary defines the verb injure ‘[t]o do hurt or harm to; to inflict damage or detriment upon; to hurt, harm,

⁴⁹ *Bank of England v Vagliano Bros* [1891] AC 107.

⁵⁰ *Criminal Code 1924* (Tas) s 50.

⁵¹ *Ibid* s 51.

⁵² *Coney’s Case* (1882) 8 QBD 534, 549.

damage; to impair in any way’ and the noun injury as ‘hurt or loss caused or sustained by a person or thing, harm, detriment, damage’. However, despite the uncertainty as to its exact meaning, the word injurious or injury to the person must mean that some actual harm must be inflicted on the victim. The dictionary definition suggests that the threshold for harm is quite low and it may be satisfied by establishing mere ‘bodily harm’. In *Donovan*, bodily harm was defined in accordance with its natural meaning as ‘any hurt or injury calculated to interfere with health or comfort’.⁵³

Breach of the peace

2.6.11 The final condition that must be established if the Crown is to negate the effect of the victim’s consent is that the assault constitutes a breach of the peace. Although this phrase is not defined in the *Code*, the UK Court of Appeal case of *Howell*⁵⁴ provides an authoritative definition. According to *Howell* a breach of the peace occurs:

whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.⁵⁵

2.6.12 The essence of a breach of the peace is violence. That the phrase as used in the *Code* also carries this connotation was confirmed in *Nilsson v McDonald* where Blow J stated: ‘I think it must follow that those words [‘breach of the peace’] ... were intended to refer to the common law concept of a breach of the peace. ... There cannot be a breach of the peace ... unless there is violence or a likelihood of violence.’⁵⁶

2.6.13 In his submission to the Institute, the Solicitor-General suggested that the structure of s 182(4) attaches the breach of the peace to the injury, rather than the act itself. In this reading, rather than looking at what actions the accused took or the circumstances of the assault, it would instead be necessary to look at the effect of the assault on the victim and determine whether there is some feature of it that causes a breach of the peace. The drafting of the provision does appear to allow this reading, which is arguably inconsistent with the judgment of *Coney’s Case*, given that *Coney* refers to the acts in question. While this inconsistency is not inherently an issue given, as suggested above, that the *Code* was influenced by *Coney’s Case*, this Report contends that the language identified by the Solicitor-General is the result of a drafting error.

⁵³ *R v Donovan* [1934] 2 KB 498, 509.

⁵⁴ [1982] 1 QB 416.

⁵⁵ *Ibid* 427.

⁵⁶ [2009] TASSC 66, [42].

Part 3

The Need for Reform

3.1 Introduction

3.1.1 No explicit provision was made for the defence of consent in the draft Stephen Code on which the Tasmanian *Code* is based. Instead, common law defences to assault were intended to perform that function. The fact that, when it was ultimately enacted, the *Code* contained a provision dealing in some detail with the rules relating to consensual assaults suggests that the drafters intended to remove the ambiguity and subjectivity of the common law. This has not been achieved. It has been said that s 182(4) is ‘an anachronism in urgent need of reform’.⁵⁷ The need for reform may be justified on a number of grounds:

- section 182(4) has been interpreted inconsistently by the judiciary and its requirements are difficult for juries to understand;
- the requirement that the assault be ‘otherwise unlawful’ presents an almost insuperable barrier to conviction in some cases, effectively resulting in the provision not operating in the context of private violence;
- decisions on the meaning of ‘injurious to the public’ seem to be based more on policy grounds and/or personal prejudices than on the exposition of legal principles with the result that there is a lack of certainty, consistency and fairness in decisions relating to particular instances of consensual assault; and
- ultimately, s 182(4) is no longer apt to serve its original function, that is, to prevent harmful assaults (harmful to individuals and the community) to which even genuine consent should not be a defence.

3.1.2 It is in the interests of justice and the preservation of public confidence in the justice system that the application of legal rules and the imposition of punishment should occur in a consistent and principled way. Legal rules should not be determined as a matter of expediency or unexamined policy positions. Offences should be defined with reasonable certainty to ensure that the law is accessible and predictable and also to promote more efficient investigation of crime.

3.1.3 Despite its relative obscurity with the general public, s 182(4) is a significant component in the conceptualisation of assault in Tasmania. Its purpose is to set boundaries to consensual violence while at the same time preserving citizens’ liberty to make decisions about their own physical integrity. In this regard, the Australian Lawyers’ Alliance suggested in its submission to the Institute that the defence of consent to assault validates the importance of individual choice. Insofar as it does this, s 182(4) can be said to reflect contemporary social values, at least to some extent.

3.1.4 However, as the discussion at [2.5.6]–[2.5.16] demonstrates, the limits that s 182(4) sets for consensual assault derive from historical social concerns and conceptions which no longer reflect or

⁵⁷ Blackwood and Warner, *Criminal Law: Text & Cases* (University of Tasmania Law Press, 2015) vol 2, 573.

capture modern social values and problems. Moreover, there is uncertainty about the precise meaning of those limits. Such confusion undermines the role of s 182(4) in defining both the limits on consensual physical violence in our society and the extent of personal freedom. It is understood that consent to assault is generally accepted in areas like sport, correction of children and medical intervention.

3.1.5 However, beyond that understanding, the limitations that s 182(4) imposes on consent to assault remain obscure. While clarification might be achieved through judicial interpretation, as noted by the Chief Justice, this depends upon an appropriate case or cases coming before the Court. Consequently, the only real prospect of clarification being achieved with any certainty in the near future is if it is provided by the legislature.

3.2 Inconsistency in interpretation

3.2.1 Notwithstanding the existence of the detailed *Code* provision in s 182(4), the common law position in relation to the lawfulness of consensual assaults was expressly adopted in Tasmania in the case of *Holmes*.⁵⁸ That case involved numerous allegations of physical assault by the accused against his former partner. The accused's defence was that the activities in which he and his partner engaged were consensual. Adopting obiter dicta of Connolly J in the Queensland case of *Raabe*,⁵⁹ Wright J stated, 'I am compelled to the conclusion that the law of Tasmania as expressed in the Code, s 182(4), coincides with the principle established by the English and Canadian decisions.'⁶⁰

3.2.2 Justice Wright went on to direct the jury in accordance with the common law rules relating to consensual assaults, stating that if the jury was satisfied that the blows struck by the accused were likely or intended to cause bodily harm to the victim and that they constituted a breach of the peace then the consent of the victim was irrelevant and the assault was unlawful.⁶¹ He noted in passing that, accordingly, most fights would be unlawful despite consent but did not refer to the requirement in s 182(4) that the assault be 'otherwise unlawful'.

3.2.3 It should be noted that at the time that *Holmes* was decided, Connolly J's obiter statements in *Raabe* had already been considered by the Queensland Court of Criminal Appeal in the case of *Lergesner* and found to be incorrect.⁶²

3.2.4 Nevertheless, juries have been directed in subsequent cases in accordance with *Holmes*. However, in the unreported case of *Palmer*, which came before the Supreme Court in 2010, Blow J ruled that the direction in *Holmes* was incorrect. His Honour stated:

Because of the wording of our Criminal Code there is no place for a direction to the jury in this State that an assault that is consented to is unlawful if it was intended or likely to cause bodily harm and does cause bodily harm.⁶³

3.2.5 It is respectfully submitted that Wright J's conclusion that the law of Tasmania coincides with the common law is not correct. There is no requirement at common law that the assault be 'otherwise

⁵⁸ [1993] 2 Tas R 232.

⁵⁹ [1985] 1 Qd R 115.

⁶⁰ *Holmes* [1993] 2 Tas R 232, 236.

⁶¹ *Ibid* 234.

⁶² [1991] 1 Qd R 206, 212.

⁶³ *State of Tasmania v KA Palmer and ME Palmer*, quoted in *Lane v Purcell* [2011] TASM 19.

unlawful’ nor that it be injurious to the person assaulted. Moreover, there is no explicit requirement in s 182(4) that the blows struck by the accused were likely or intended to cause bodily harm.

3.2.6 Instead, it is suggested that comments of Blow J in *Palmer* setting out what is required for proof of unlawfulness in such cases more accurately reflect the requirements of the provision. His Honour explained:

There’s got to be something that makes the particular offence unlawfully [sic] other than the provision in the Criminal Code that says you’re not allowed to assault one another. Now, if the fighting was outside the boundary of the property then there’s a provision in the *Police Offences Act* about disturbing the peace by fighting in a public place so that might make it unlawful even if there was consent.⁶⁴

3.2.7 There is a marked difference in onerousness in the tests propounded by the two judges. On the one hand, according to Wright J’s formulation almost all fights will be unlawful. Justice Blow’s approach however, makes the prosecution’s task more difficult where they argue that consent is immaterial. In a subsequent decision in the Magistrates Court, Magistrate Webster considered Blow J’s remarks without needing to reach a decision on the matter, explaining ‘[e]ven if I were to prefer the view ... expounded by Blow J ... I would reach the conclusion ... that consent did not provide a defence to the defendant in the circumstances of this case’.⁶⁵

3.2.8 In his submission to the Institute, the Chief Justice advised that the Court is aware of his position on *Holmes*, and that amongst the Tasmanian profession generally the case is understood to be probably incorrect. Nevertheless, *Holmes* remains an authority in this state, underlining the need for reform to remove all doubt about its application.

3.3 The requirement that the conduct be otherwise unlawful

3.3.1 The requirement that the assault be otherwise unlawful is generally understood to mean that it must constitute another offence, apart from an assault. Where fighting occurs in a public place it might also constitute the offence of public annoyance contrary to s 13 of the *POA*, or affray contrary to s 80 of the *Code*. This approach reflects the way in which the provision was originally conceived: that it should serve as a deterrent against public brawling between men. As a consequence, where violence is inflicted in private, and if the requirement of otherwise unlawful is strictly applied,⁶⁶ the assault will typically not amount to another separate offence, unless it occasions a wound or similar harm.

3.3.2 In practice, this means that unless some kind of serious harm is done, consent will remain a defence to an assault committed in private. In his submission to the Institute the Director of Public Prosecutions, Mr Daryl Coates, stressed that this can cause difficulties in a family violence context. Arguably, the provision is all but inoperative in those contexts.

3.3.3 The consequence is that the domestic sphere becomes an ‘unregulated zone’⁶⁷ where s 182(4) is concerned. If s 182(4) cannot operate to negate consent, in cases of private violence then charges of

⁶⁴ *State of Tasmania v KA Palmer and ME Palmer*, quoted in *Lane v Purcell* [2011] TASM 19.

⁶⁵ *Lane v Purcell* [2011] TASM 19, 24.

⁶⁶ Note that Wright J in *Holmes* did not single this criterion out as a separate requirement of s 182(4).

⁶⁷ Katherine O’Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985).

assault can only be sustained where the Crown negates consent within the meaning of s 2A. Women in particular are most at risk of violence within the home.⁶⁸ If s 182(4) in effect does not apply to violent interactions in that context then it will not accord women and children any protection from assault in the environment where they are most at risk. If this provision is almost entirely ineffectual in the private arena, it will have an insignificant role to play in combatting the major social problem of family violence. Yet, this is a social ill that s 182(4) should arguably target. It could do this by rendering consent, genuine or otherwise, irrelevant in nominated circumstances of intra-familial assault.

3.3.4 ‘Otherwise unlawful’ is perhaps the most problematic requirement of s 182(4) in the modern context if we consider it to be legitimate to outlaw some forms of assault regardless of consent, specifically, those that occur in the context of familial violence. Private violence has become a matter of significant public concern and the requirement of otherwise unlawful can represent a substantial barrier to the application of s 182(4) in its prosecution. Reform is warranted to prevent familial violence being quarantined from the operation of s 182(4) in this way.

3.3.5 However, if the requirement of otherwise unlawful is simply abolished to facilitate the prosecution of familial violence, there is a significant risk that the provision will be drawn too widely and catch conduct which ought not be criminalised. The proposals for reform in Part 5 seek to achieve a means by which consent can be obviated in familial violence cases, without criminalising genuinely consensual conduct that injures no one beyond those who consent to the assault, as well as meeting the requirement of necessary wrongfulness that is otherwise absent in the case of consensual assaults.

3.4 Injurious to the public: decisions based on policy rather than principle

3.4.1 As noted above, the concept of ‘injurious to the public’ is a familiar concept at common law. While originally possessing an archaic meaning, it is now interpreted as ‘not in the public interest’. The common law approach is to adopt an initial presumption that assaults are not in the public interest (and therefore unlawful) and then consider whether the particular factual scenario of the case brings it within a recognised exception to the prima facie rule. This approach can be criticised on the grounds that it is largely based on poorly articulated historical exceptions which may no longer be contemporarily relevant or accepted and it is in many ways an arbitrary expression of the presiding judges’ particular prejudices.⁶⁹

3.4.2 The categories of activities involving the infliction of violence that have been recognised as in the public interest or undertaken for a good purpose are organised games and sports, including regulated boxing matches, lawful chastisement or correction of children,⁷⁰ reasonable surgical interference,⁷¹ dangerous exhibitions and ‘well-intentioned horseplay’. The ‘category approach’ to criminalisation is problematic as the absence of general criteria for determining whether an activity is in the public interest is ill-suited to dealing with novel examples of consensual violence. It also gives no clue as to the amount

⁶⁸ Australian Bureau of Statistics (ABS), ‘Personal Safety, Australia’, Table 19 Experience of Assault Since the Age of 15, *Location of Most Recent Incident of Assault by Type of Assault and Sex of Perpetrator*, (2012) cat no 4906.0.

⁶⁹ An interesting illustration comes from the case of *Bravery v Bravery* [1954] 3 All ER 59 where Denning LJ held that vasectomies were criminal on the basis that an ‘operation ... done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attaching to it ... is plainly injurious to the public interest’: at 68. Sir Raymond Evershed MR and Hodson LJ strongly dissented from this perspective, however.

⁷⁰ *Criminal Code 1924* (Tas) s 50.

⁷¹ *Ibid* s 51.

of violence that one can lawfully inflict on another, save to say that the infliction of harm not amounting to ‘bodily harm’ is not unlawful.

3.4.3 Some of the recognised exceptions stake an unimpeachable claim for public utility — surgical operations performed in good faith and with reasonable care and skill for example⁷² — whilst the claims of other types of activity are less convincing. Among the most contentious is the sport of boxing. In these grey areas, it is often difficult to discern a consistent rationale for their exemption. There is no unifying theme for the exceptions although there is arguably some indication that much depends on whether the court finds the particular conduct immoral or distasteful. An examination of the different ways courts have responded to allegations of assault in two important areas of human activity — sport and sex — illustrates the arbitrariness with which such distinctions have often been drawn.

Sporting contests

3.4.4 Violence that would normally constitute an assault is not unlawful where it is inflicted in the context of a properly conducted sporting contest. The justification for this exception has its origins in eighteenth century ideas of ‘manly diversions’. Although contact sports risk physical harm to the participants, there is a public interest in promoting such activities as they ‘give strength, skill and activity, and may fit people for defence, public as well as personal’.⁷³ The skills needed to be a strong warrior are honed by engaging in violent sport, and a link between sport and combat goes back thousands of years, with the ancient Olympic Games acting as an effective substitute for warfare.⁷⁴ The contemporary acceptance of violence in sport reflects more the physical and mental health benefits of physical activity rather than its capacity to train effective soldiers, as well as an understanding that organised sporting competitions have their own self-regulating processes which are designed to ensure that only violence that is within the rules of play is sanctioned.

3.4.5 From a sociological perspective, the acceptance of violence in a controlled sporting context may be understood as a relatively safe outlet for the expression of natural human aggression. Thus:

Sport institutionalizes calculated violence without loss of self-control, while spectators have the opportunity to vicariously enjoy the excitement of contest without the actual violence of earlier spectacles such as gladiatorial struggle.⁷⁵

With this in mind, in creating an exception to the general rule for sporting violence, the law does not condone violence but arguably controls it.

3.4.6 Participants in contact sports may impliedly consent to a more or less continual risk of violence. Many popular games involve bumps, tackles and shepherds, allowed and encouraged by the rules. It is also accepted that the rules will be broken on a regular basis. There is no unlawful assault in these situations because in addition to impliedly consenting to the use of force, reasonable players will also anticipate breaches of the rules.⁷⁶ As noted above, the courts have consistently held that participation in contact sport is not contrary to the public interest but in fact is to be generally encouraged in a modern

⁷² Ibid.

⁷³ *R v Donovan* [1934] 2 KB 498, 508 (Swift J).

⁷⁴ Wendy J Raschke, *The Archaeology of the Olympics: The Olympic and Other Festivals in Antiquity* (The University of Wisconsin Press, 1988) 23.

⁷⁵ Larry Ray, *Violence & Society* (Sage, 2011) 48, quoted in Jennifer A Brobst, ‘Why Public Health Policy Should Redefine Consent to Assault and the Intentional Foul in Gladiator Sports’ (2015) 29 *Journal of Law and Health* 248.

⁷⁶ *Re Jewell and Crimes Compensation Tribunal* (1987) 1 VAR 370, 371.

society. The criminal law will only intervene where there is an egregious breach of the rules, and sometimes not even then.⁷⁷ In *Tasmania v Medcraft*⁷⁸ Blow CJ commented:

Australian Rules football involves a lot of physical contact. It involves the use of substantial force in certain situations. It is common to see on television assaults by Australian Rules players that could quite appropriately become the subject of criminal charges, but it is not common for prosecutions to be instituted in such cases. However that is no reason why a player who commits a crime during a game should receive a sentence of less severity than would be appropriate for a similar assault committed in other circumstances.

3.4.7 Similarly, in *Emmett v Arnold*, his Honour noted, '[w]hen a player participates in a contact sport, that player impliedly consents to the use of some degree of force. Whether the use of force on a particular occasion exceeds the degree of force that was impliedly consented to is a question of fact.'⁷⁹

3.4.8 Some physical contests come within the sporting exception but others do not and it is often difficult to identify the principled basis upon which such distinctions are made. The sport of boxing is a case in point. Boxing matches are conducted in a spirit of hostility and the aim of the participants, at least for competition and professional bouts, is to cause sufficient physical damage to one's opponent to put them out of the contest. Indeed, what sets this sport apart from other physical contests is that, '[i]n contrast to boxing, in all other recognised sport, injury is an undesired by-product of the activity'.⁸⁰ And yet, although the trading of blows in a boxing match amounts to assault and although the activity is intended to cause bodily harm the courts have determined that this particular violent activity should not be criminalised as it serves some public good.

3.4.9 Amongst the public benefits that have been claimed for boxing are that it provides opportunities for participants to develop a set of skills and physical fitness; it engenders respect for the rules of sport; it creates a sense of personal achievement; and, when the sport is practised in a club setting, it provides a sense of community. It has been endorsed as a way of connecting with disaffected youth and tackling youth gang violence where other methods have failed.⁸¹

3.4.10 Part of the difficulty in categorising sporting contest is that the courts must engage in what is essentially a cost-benefit analysis in which quantifiable variables such as risk of injury and seriousness of potential harm are weighed against incommensurables such as the value to be ascribed to risky behaviours which are said by some to generate a profound sense of living life with intensity. Additionally, there is an atmosphere surrounding sport that amounts to keeping the law out, and that issues regarding violence and injury in sport should be resolved through internal processes.⁸²

⁷⁷ In *Re Jewell* (ibid) it was ruled that a player who had suffered brain damage 'in the course of a vigorous tackle which was both in breach of the rules of the game and capable of constituting an assault in ordinary circumstances' was not entitled to compensation.

⁷⁸ *Tasmania v Medcraft*, Comments on Passing Sentence (1 July 2016).

⁷⁹ *Emmett v Arnold* [2006] TASSC 5, [9].

⁸⁰ G D Lundberg, 'Boxing Should Be Banned in Civilised Countries' (1983) 249(2) *JAMA* 250, 250.

⁸¹ Nicole Jeffery, 'A Cop Who Cared Made All the Difference for Damien Hooper', *The Australian* (online), 10 June 2010 <<http://www.theaustralian.com.au/news/nation/a-cop-who-cared-made-all-the-difference-for-damien-hooper/story-e6frg6nf-1225877650900>>.

⁸² Jack Anderson, 'The law remains silent when it comes to sporting violence', *The Conversation* (online), 22 August 2014 <<https://theconversation.com/the-law-remains-silent-when-it-comes-to-sporting-violence-30751>>.

Consensual sexual violence

3.4.11 An area in which an exception has not been recognised at common law is the consensual infliction of pain for the purpose of enhancing sexual pleasure. Assuming that a degree of harm is caused, the common law treats the person who inflicts violence in the course of sexual activity as a criminal.

3.4.12 As discussed above, an illuminating example stems from the majority judgment of the House of Lords in *Brown's Case*,⁸³ which held that sadomasochistic acts, in private, involving no permanent injury and with the consent of all the participants are injurious to the public and punishable as an assault. Prosecution in *Brown's Case* arose as a result of police obtaining video which they believed showed people being tortured before being killed. Launching a murder investigation named Operation Spanner, police eventually apprehended a group of sadomasochistic homosexual men depicted in the video. Though no murder had been committed, and though all the men involved stated they willingly participated, charges were laid against them — including the purported victims.

3.4.13 In finding that consent was not relevant in this case, the majority arguably allowed a degree of homophobic bias to influence their decision, suggesting that certain kinds of conduct should be prohibited and punished by the criminal law because they are immoral according to the values and norms of a civilised society. The majority's moral repugnance at the activities is abundantly clear in this statement by Lord Templeman:

It is not clear to me that the activities of the appellants were exercises of rights in respect of private and family life. But assuming that the appellants are claiming to exercise those rights I do not consider that Article 8 [of the *European Convention on Human Rights*] invalidates a law which forbids violence which is intentionally harmful to body and mind.

Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.⁸⁴

3.4.14 Whilst those convicted were not singled out because they were homosexual, at least not overtly (so much is made plain in their unsuccessful appeal to the European Court of Human Rights),⁸⁵ it is clear that other examples of sadomasochistic behaviour or 'unusual' sexual preferences have not been considered injurious to the public, and therefore impermissible. For example, *Brown's Case* is often contrasted with *Wilson's Case*⁸⁶ decided in the Court of Appeal only four years later. Whereas *Brown's Case* concerned the sadomasochistic activities of a group of homosexual men, in *Wilson's Case* the sexual violence was inflicted by a husband upon his wife. At his wife's request Mr Wilson branded his initials on his wife's buttocks with a hot butter knife. He explained that she had wanted him to give her a tattoo as a token of his affection but he didn't know how to. They mutually agreed that he would brand her with a hot butter knife. In upholding the appeal, the Court distinguished Mr Wilson's conduct from the activities in *Brown's Case* concluding,

there is no factual comparison to be made between the instant case and the facts of either *Rex v Donovan* [1934] 2 KB 498 or *Reg v Brown* [1994] 1 AC 212: Mrs Wilson not only consented to that which the appellant did, she instigated it. There was no aggressive intent on the part of the appellant. On the contrary, far from wishing to cause injury to his wife, the

⁸³ *R v Brown* [1994] 1 AC 212.

⁸⁴ *Ibid* 237.

⁸⁵ *Laskey v United Kingdom* (1997) 24 EHRR 39, [47].

⁸⁶ *R v Wilson* [1997] QB 47.

appellant's desire was to assist her in what she regarded as the acquisition of a desirable piece of personal adornment, perhaps in this day and age no less understandable than the piercing of nostrils or even tongues for the purposes of inserting decorative jewellery.⁸⁷

3.4.15 The conduct in both *Brown's Case* and *Wilson's Case* satisfies the test for an unlawful assault laid down in *Donovan*, ie 'that a blow ... which is likely or intended to do corporal hurt, is an assault' (see [2.5.1] above). Further, a number of arguments raised and then rejected in *Brown's Case* were successfully raised in *Wilson's Case*, resulting in an overturned conviction. While a distinction in the severity of violence between both cases was made, arguably it is the case that the court in *Wilson's Case* was more inclined to allow the activity on the basis that it took place between members of a traditional relationship.⁸⁸

3.4.16 *Wilson's Case* in turn contrasts with the unreported case of *Emmett*⁸⁹ where a cohabitating heterosexual couple, who would later marry, engaged in 'risky' sexual behaviour which attracted criminal sanction for the male partner. Two acts were in question: asphyxiation with a plastic bag, and a burn to the chest with lighter fluid, and in both cases some element went wrong and the female partner presented to her doctor with health concerns. While in both cases there was no lasting harm, the court held that the acts in question were not of a type that the female partner could consent to. In this regard, the court in *Emmett* followed the majority in *Brown's Case*.

3.4.17 Of note is that while all participants in *Brown's Case* were charged, including those considered to be the victims, in both *Wilson's Case* and *Emmett* only the partner who had committed the act was charged. Whether unconscious or otherwise, a bias is displayed in that case.

3.4.18 The counter argument is that the majority decision in *Brown's Case* is an instance of the right to individual autonomy being trumped by the higher interest in protecting human dignity. Given the apparent severity of the violence in question, even though it did not result in lasting injury, it might be argued that by refusing to sanction sexual violence, particularly where it involves one participant dominating another, the majority judges endorsed a normative stance in relation to non-violent standards of sexual behaviour. This argument relies on ignoring what can only be said to be homophobic elements of the judgment in *Brown's Case*.

3.4.19 Additionally, it constitutes a paternalistic approach and leaves those who genuinely consent exposed to criminal sanctions, as would appear to be the case in *Emmett*. As the contradictory approaches adopted in these cases reveal, the choice to criminalise certain activities is determined by subjective preferences and can reflect prejudices regarding non-standard but still consensual sexual conduct. Rather than endorsing a general non-violent standard for sexual conduct, the majority judgment in *Brown's Case* appears to have endorsed a prescriptive approach to acceptable sexual behaviour which can be considered at odds with the mores of contemporary society. The decisions in *Brown's Case* and *Wilson's Case* demonstrate that the intrusion of prejudices and individual bias may preclude optimum judicial decision-making in this difficult area.

3.4.20 A final observation can be made regarding how the courts deal with sporting violence as opposed to sexual violence. In both *Brown's Case* and *Wilson's Case*, the test that was applied (although ultimately with different results) was the test from *Donovan* — that is, whether the violence was intended or likely to cause *bodily harm*. In contrast, McInerney J in the case of *Pallante v Stadiums Pty*

⁸⁷ Ibid 49.

⁸⁸ *R v Wilson* [1997] QB 47.

⁸⁹ *R v Emmett* [1999] No. 99011191/Z2.

*Ltd*⁹⁰ held that consent would be treated as nugatory if, in the context of a sporting match, blows were struck ‘with the predominant intention of inflicting *substantial bodily harm*’.⁹¹ This suggests that a much greater degree of violence is tolerated in cases of sporting violence.

3.5 Consensual assaults in the family violence context to which even genuine consent should not be a defence

3.5.1 There are three critical elements in relation to consensual assault in the context of family violence: first, whether s 182(4) should be reformed to abrogate consent to assault in the context of family violence; second, if so, when it should do this, and third, whether the issue of consent to assault in circumstances of family violence should be regulated only by s 2A of the *Code*. If the latter approach is adopted, assault in circumstances of family violence would only be criminalised where consent is absent.

3.5.2 As the law in Tasmania currently stands there is confusion about whether s 182(4) can abrogate consent to assaults perpetrated in private. While Wright’s J’s construction of s 182(4) in *Holmes* enables it to nullify consent to assault in the context of family violence,⁹² his interpretation was rejected by Blow CJ in *State of Tasmania v KA Palmer and ME Palmer*.⁹³ According to Wright J, s 182(4) renders applications of force that are likely or intended to cause bodily harm to the victim and that constitute breaches of the peace unlawful regardless of the victim’s consent.⁹⁴ However, Wright J’s interpretation makes no reference to the requirement in s 182(4) that the assault be ‘otherwise unlawful’. As discussed above, it is difficult to see how that requirement could be satisfied where consensual assaults are performed in private. If interpreted according to its own terms, it is unlikely that s 182(4) will abrogate consent to assault in circumstances of private family violence. Accordingly, this Report contends that s 182(4) simply does not operate as intended within the private sphere.

3.5.3 Decisions about this matter must take into account the difficulties and complexities surrounding consent to assault in the family violence context. Further, submissions were not agreed on the prevalence of consent in the family violence context, or the importance of eliminating the possibility of it being raised.

3.5.4 Arguments against state intervention in the home on the grounds of a right to privacy and personal autonomy have been well aired⁹⁵ but, to date, there has been little analysis of the negative implications of a laissez-faire approach to consensual violence in relation to domestic partners. An approach that criminalises assault in family violence situations only where there is an absence of genuine consent would conform to a liberal perspective on criminalisation, and may be justified by some on that basis alone. However, to some extent such an approach runs counter to national initiatives to reduce family violence (see below at [3.5.16]). It also fails to take account of the problematic nature of genuine consent to violence between family partners.

⁹⁰ [1976] VR 331.

⁹¹ *Ibid* 343 (emphasis added).

⁹² See [2.2.1]–[2.2.2] above.

⁹³ Quoted in *Lane v Purcell* [2011] TASM 19 and see discussion at [3.2.4].

⁹⁴ *R v Holmes* (1993) 2 Tas R 232, 234.

⁹⁵ See, eg, Claire Bessant, ‘Protecting Victims of Domestic Violence – Have We Got the Balance Right?’ (2015) 79(2) *Journal of Criminal Law* 102.

3.5.5 The reality is that it is only in a minority of cases that legal authorities become involved in family violence cases. As noted elsewhere,⁹⁶ for a variety of reasons victims of intimate and domestic violence fail to report what has happened to them to the police. Moreover, as noted in the submission of Australian Lawyers Alliance president Henry Pill, a persistent difficulty in family violence cases is victims later recanting their accusations. Further, there is a large hidden figure of domestic violence.⁹⁷ Embarrassment, fear of court proceedings and of the social, physical and economic consequences deter victims from reporting violence perpetrated upon them by their partners and, thereafter, result in high rates of attrition and discontinuance for prosecutions in sexual and domestic assault cases.⁹⁸

3.5.6 The Report on the Victorian Royal Commission into Family Violence describes family violence as a pattern, not an event:

Family violence differs from other forms of violence: it is generally underpinned by a pattern of coercion, control and domination by one person over another. ... These measures are designed to erode the victim's self-confidence and make them unduly dependent on the other person. ...

The pattern often involves an escalation of the violence, so that unacceptable behaviour becomes 'normalised' over time or a person's mental wellbeing is eroded to the point that they come to believe they deserve the violence.⁹⁹

3.5.7 A victim of family violence may not recognise this process as it progresses and may dismiss the onset of violent behaviour as an aberration. Over time, victims become de-sensitised to the violence and begin to lose perspective about what counts as healthy and acceptable behaviours in a relationship. This means that genuine consent to assault may simply not be understood by those involved and/or those tasked by the law with determining its presence or absence.

3.5.8 It is a historical and contemporary fact that violence between domestic partners has been and continues to be trivialised by police, by courts and by 'offenders', and often dismissed as no more than a by-product of a volatile relationship where partners communicate with violence.

3.5.9 All these matters render the notion of genuine consent to assault and proof of its absence problematic in family violence cases. For example, for the reasons noted above and other complex reasons other than their truth, victims may acquiesce to assertions of consent to assault by violent partners. However, to simply eliminate the possibility of consent being raised is arguably among the most paternal actions that the legislature can take, one that would amount to effectively establishing, by law, that women are simply less able to freely agree than men.

3.5.10 In determining whether and when it might be wise to abrogate consent to assault in family violence situations it is important to recognise that such violence does not have a singular nature.

⁹⁶ T Henning and J Hunter, 'Finessing the Fair Trial for Complainants and the Accused: Mansions of Justice or Castles in the Air?' in P Roberts and J Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing, 2012) 347.

⁹⁷ See ABS, above n 68, Table 25 which reveals 80% of women who experienced partner violence since the age of 15 did not report the incident to police.

⁹⁸ See for example, the study by M Heenan and S Murray, reported in *Study of Reported Rapes in Victoria 2000–2003: Summary Research Report* (Office of Women's Policy, Department for Victorian Communities, 2006).

⁹⁹ Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 17.

Typologies of family violence

3.5.11 The foregoing discussion conceals the reality that family violence is not homogenous in nature. Not all violence perpetrated in the home or between intimate partners involves serious violence used as a control mechanism against partners. The motivations for and expressions of violent behaviour in a domestic context are complicated by individual characteristics of perpetrators such as an inability to regulate emotional responses to stressful situations and poor communication skills, as well as by cultural norms about relationships, violence and gender roles.

3.5.12 Family violence is recognised as a gendered crime, but that is not to say that women do not engage in violence against their partners. However, when the violence is understood within the wider context of the relationship, it seems more likely that women will suffer serious physical injury and negative emotional states such as fear and depression or post-traumatic stress. Family violence scholars have developed typologies of family violence which include female perpetrators and these classifications attempt to capture the very context specific nature of such violence.

3.5.13 One of the first to describe typologies of family violence was Michael Johnson.¹⁰⁰ Johnson reviewed the evidence from large-scale surveys and both qualitative and quantitative data from women's shelters and other agencies to get a picture of the nature of violence that was occurring in the home. He originally identified two distinct categories violence. He described the first as 'common couple violence' — occasional outbursts of violence perpetrated by either member of the couple — and the second as 'patriarchal terrorism' — systematic violence most often perpetrated by a male, which escalates over time, used as a means of exerting control and dominance over the other partner. Johnson's typologies have evolved and now generally include two further categories described as violent resistance (the violence used by a victim of intimate terrorism in defending herself) and mutual violent control.¹⁰¹

3.5.14 The type of familial violence which is most likely to be implicated in proposals to reform the law relating to consensual assault is mutual violent control. Within this category lie additional sub-typologies which Johnson describes as follows: relationships where mutual violence is inflicted as a means of exerting control over the other partner; relationships where both partners readily resort to violence as a way of communicating because of difficulties controlling their emotions;¹⁰² and relationships where one partner responds instinctively with physical violence if they feel they are being ill-treated by the other — Langhinrichsen-Rohling provides the example of women who are 'socialized to hit [their partner] under certain circumstances'.¹⁰³

3.5.15 If reforms are to be instituted, either by amendment to s 182(4) or otherwise, to penalise consensual violence in a familial context, both legal paternalism and legal moralism might provide the theoretical framework for doing so. From a paternalist perspective, such reform is justified on safety grounds and reflects a belief that a woman in a violent relationship may be unable to make rational decisions in her own best interests. Legal moralists would defend such reforms on the grounds that

¹⁰⁰ M P Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women' (1995) 57 *Journal of Marriage and the Family* 283.

¹⁰¹ MP Johnson and K J Ferraro, 'Research on Domestic Violence in the 1990s: Making Distinctions' (2000) 62 *Journal of Marriage and the Family* 948.

¹⁰² The accused's defence in *Holmes* was that both parties were 'in a highly emotional state and willingly engaged in violence towards each other.'

¹⁰³ Jennifer Langhinrichsen-Rohling, 'Controversies Involving Gender and Intimate Partner Violence in the United States' (2010) 62 *Sex Roles* 179, 187.

familial violence is simply wrong in itself. From both perspectives, the conduct would be criminal even though there was harm or potential harm only to the person to whom the force was applied with consent.

National initiatives to reduce violence

3.5.16 Any moves to liberalise the law on consensual assault must take account of the complex dynamics of power and vulnerability at play in family violence situations. Absence of consent may be the appropriate indicia of criminality for violence which falls within the first of Johnson's classifications ('intimate terrorism') but is likely to be inapplicable where the violence might be classified as mutual violent control. An absence of regulation of violence that might be classified as 'mutual violent control' in the domestic sphere is at odds with national initiatives to reduce the prevalence of family violence. It can, therefore, be challenged from the perspective of legal moralism.

3.5.17 The law serves an important educative function and if it tacitly condones violence in the home it teaches those who perpetrate such violence as well as those who suffer it that private violence is acceptable. Where the law fails to impose sanctions for the consensual infliction of injury there is a risk that those who are involved will lose sight of the fact that resort to violence is not a socially acceptable way to resolve differences. It is on this basis and on the basis of the harm and/or potential harm to the mutual perpetrators that legal paternalism and legal moralism would justify criminalisation of this conduct regardless of consent. Legal liberalism, may not, however, accept these justifications for criminalising this conduct despite the presence of consent.

3.5.18 Additionally, those who witness the violence (who are likely to be children) may also learn that violence is an acceptable way to behave and may consequently resort more readily to violence in their own lives. In this situation, all three main perspectives on criminalisation would justify precluding consent as a defence to the conduct.

3.5.19 The Final Report of the Royal Commission into Family Violence notes that violence in the home affects children in many ways. The love and sense of security that a child should receive from their parents is replaced by fear and anxiety about their own safety and the safety of other family members. The Final Report stated:

The Commission was told they might be burdened by the 'secret' at home and are more likely to suffer from learning difficulties, trauma symptoms and behavioural problems. Such children can also have problems with bedwetting and disturbed sleep, and be plagued by flashbacks and nightmares. Additionally, their social skills may be affected and they might have difficulty regulating their emotions, trusting others and forming relationships.¹⁰⁴

3.5.20 These observations are likely to be true for both consensual and non-consensual violence. As an acknowledgment that violence in the home is detrimental to children, s 13 of the *Family Violence Act 2004* (Tas) (the 'FVA') makes it an aggravating factor for sentencing purposes that the offender knew or was reckless as to whether a child was present. In addition, an 'affected child' (that is, 'a child whose safety, psychological wellbeing or interests are affected or likely to be affected by family violence') under s 4 of the FVA is by definition an 'at risk' child for the purposes of the *Children, Young Persons and Their Families Act 1997* (Tas).¹⁰⁵

¹⁰⁴ Victoria, above n 99, vol II, 106 (footnotes omitted).

¹⁰⁵ See *Children, Young Persons and Their Families Act 1997* (Tas) s 4(1)(ba).

3.5.21 The failure to regulate consensual sexual violence between partners also risks blurring the distinction between physical violence and consensual sexual touching. Some argue that our culture normalises male sexual aggression against females in a variety of contexts, including in films, advertising and ‘mainstream’ pornography. These cultural norms are important in shaping ‘the contents of an individual’s sexual script for consensual sexual interactions’.¹⁰⁶ Accordingly, the use of force and coercion may not be viewed as incompatible with consensual sex. It is highly problematic if, where consent is contested, the question of the validity of consent is addressed through the lens of aggressive male dominance and female subjugation and submission. The effect of condoning private consensual sexual violence may be, therefore, to reinforce a normative standard of sexual relations that is violent, non-communicative and disrespectful.

Transmission of HIV

3.5.22 There are a number of other areas of human activity in which the question of consent to the infliction of physical harm is problematic. One which has received considerable court attention is consent to the risk of acquiring a sexually transmitted infection and in particular HIV.

3.5.23 The question of consent is often central in cases involving the transmission of HIV, either through sexual activity or through sharing intravenous needles. Traditionally, at common law, consent to the sexual activity itself was a defence, regardless of whether or not the complainant had consented to the consequential harm. In the leading case of *R v Clarence*¹⁰⁷ the accused had sexual intercourse with his wife, knowing that he was infected with gonorrhoea. She also became infected as a result. The fact that she would not have consented had she known of his condition was irrelevant. It should be noted that such a situation would be covered in Tasmania in accordance with the definition of consent in s 2A of the Tasmanian *Code* and the wife’s consent would be vitiated by the fraud of her husband in concealing his infectious status.

3.5.24 However, more recent cases have recognised HIV infection as a specific type of harm that requires explicit consent. In *R v Dica*¹⁰⁸ the trial judge directed the jury that consent was no defence to the reckless infection of a number of women with HIV since, following *Brown’s Case*, as a matter of public policy, where serious harm is inflicted for the purpose of sexual gratification, consent cannot operate as a defence. In overturning the conviction, Judge LJ in the Court of Appeal said that *Brown’s Case* should be confined to cases involving the violent and deliberate infliction of harm. In this case the participants did not intentionally spread the virus let alone do so for the purposes of sexual gratification. They were merely prepared to run the risk of infection in the same way that they consented to the risk of other possible undesirable consequences of sexual intercourse. Where the ‘complainant’ consents to the risk of infection with HIV (or any other sexually transmitted infection) consent would operate as a defence. His Lordship observed: ‘The problems of criminalising the consensual taking of risks like these include the sheer impracticability of enforcement and the haphazard nature of its impact.’¹⁰⁹ He went on to observe that adults take risks with their health in other contexts where it has never been suggested that criminal sanctions should follow, citing as an example, a parent who comforts a child

¹⁰⁶ Paulina Tomaszewska and Barbara Krahe, ‘Attitudes Towards Sexual Coercion by Polish High School Students: Links with Risky Sexual Scripts, Pornography Use, and Religiosity’ (2016) 22(3) *Journal of Sexual Aggression* 291, 292.

¹⁰⁷ (1889) 22 QB 23.

¹⁰⁸ [2004] EWCA Crim 1103.

¹⁰⁹ *Ibid* [51].

with a serious, contagious illness by taking their hand and thereby runs the risk of becoming infected themselves.¹¹⁰

3.5.25 Judge LJ also suggested that in some cases, it may be appropriate to assume the existence of consent. Those who choose to engage in unprotected ‘casual sex between complete strangers’ could be deemed to have consented to the risk of contracting HIV.¹¹¹ However, in the later case of *R v Konzani*¹¹² his Lordship retreated from this position, holding that only informed consent would act as a defence.¹¹³ The Canadian Supreme Court has similarly suggested that only informed consent will amount to effective consent in law. In the case of *R v Cuerrier*¹¹⁴ the court held that, where the appellant failed to disclose his HIV status, consent to sexual intercourse was vitiated by fraud.

3.5.26 The decision in *Dica* was approved by the Victorian Court of Appeal in *Neal v The Queen*.¹¹⁵ The court held that it was consistent with the decision in *Brown’s Case* and also ‘accords with the fact that it has not been thought necessary to criminalise those who recklessly take or accept the risks associated with consensual sexual intercourse.’¹¹⁶

3.5.27 In Tasmania, in light of the expansive definition of consent in s 2A of the *Code* it may be that a failure to disclose HIV status would amount to fraud which vitiates consent per s 2A(f). This would seem to be a rejection of any notion of ‘deemed consent’ and accords with the position in *Cuerrier* that only informed consent will amount to effective consent in law.

3.5.28 What we see here is a difficulty with the quantitative approach to harm. The sex lives of adults, and the risks associated with them, should not normally be the business of government. Save some extenuating circumstance, such as obtaining consent by fraud, it is not in the interests of either citizens or government that government intervene in the bedroom.

¹¹⁰ Ibid.

¹¹¹ Ibid [47].

¹¹² [2005] 2 Cr App R 14.

¹¹³ Ibid [41].

¹¹⁴ [1998] 2 SCR 371.

¹¹⁵ [2011] VSCA 172 (15 June 2011).

¹¹⁶ Ibid [71].

Part 4

The Law in Other Jurisdictions

4.1.1 In light of the foregoing criticisms of s 182(4) as an instrument for regulating the domain of consensual assaults, we might consider whether other jurisdictions offer a suitable, principled model for reform. This Part examines the law in Australian states and territories as well as international common law jurisdictions in relation to private acts of consensual violence. The focus is on private violence since public violence (such as affrays, duelling and prize-fights) is legislated for separately and does not give rise to similar complex questions of principle.

4.2 Common law

New South Wales, Australian Capital Territory and Victoria

4.2.1 The offence of common assault in New South Wales is a creature of both the common law and statute. The *Crimes Act 1900* (NSW) creates separate maximum penalties for common assault (s 61) and assault occasioning bodily harm (s 59) but does not otherwise describe the ingredients of the offences. Section 26 (common assault) and s 24 (assault occasioning bodily harm) in the ACT *Crimes Act 1900* are cast in essentially identical terms.¹¹⁷ Common assault is a common law offence in Victoria, but s 31 of the *Crimes Act 1958* (Vic) also creates five distinct statutory offences which require an assault committed with a particular intent. Assault is defined in relation to the offences contained in s 31 offences but this definition has no application to the common law offence. Accordingly, the common law rules relating to assault apply in each of these jurisdictions. For example, Refshauge J in *The Queen v Kristy Louise McGuckin* referred the court to the leading common law definition of assault for the elements of the offence.¹¹⁸ The definition derives from the United Kingdom case of *Fagan v Commissioner of Metropolitan Police*:¹¹⁹ ‘An assault is any act which intentionally or possibly recklessly causes another person to apprehend immediate and unlawful personal violence.’

4.2.2 No explicit reference to consent is made in the respective legislative provisions but absence of consent is an element of the common law offence. So much is clear from the decided cases, including *Fagan v Commissioner of Metropolitan Police*. The NSW Court of Appeal has held that ‘the term assault involves the notion of want of consent. Thus in general terms it may be said that an assault with consent is no assault at all.’¹²⁰

4.2.3 The scope of consent as a defence has been considered in a number of cases in these jurisdictions. Essentially, the availability of the consent defence depends on the degree of harm caused or risked and the purpose for which the act was committed. This reflects the ‘category approach’ to

¹¹⁷ Although the ACT has enacted a *Criminal Code*, the offence of assault is still contained in its *Crimes Act*.

¹¹⁸ His Honour stated: ‘See, for the elements of assault, *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439 at 444’: *The Queen v Kristy Louise McGuckin* [2014] ACTSC 242, [28]. See too *Nash v State of New South Wales* [2015] NSWDC 144; *The Queen v Cordell* [2009] VSCA 128.

¹¹⁹ [1969] 1 QB 439, 444 (James J).

¹²⁰ *R v Bonora* (1994) 35 NSWLR 74, 78.

criminalisation evident in the common law position in the UK. Accordingly, in these jurisdictions consent would be a defence to the infliction of harm in organised games and sports, including regulated boxing matches, lawful chastisement or correction,¹²¹ reasonable surgical interference,¹²² dangerous exhibitions and ‘well-intentioned horseplay’.

4.2.4 On the other hand, consent may not be a defence to the infliction of injury for the purposes of sexual gratification. In the Victorian case of *R v McIntosh* the accused engaged in erotic asphyxia with his consenting sexual partner by tying a rope around his neck, resulting in death. Justice Vincent held that if the sadomasochistic activity involves the infliction of significant physical injury ‘or the reckless acceptance of the risk that it will occur, then the consent of the victim will not be recognised.’¹²³ In *R v Stein*, which also involved sadomasochistic activities resulting in death, it was held that if the victim had consented to being gagged, it would not absolve the accused of liability because the accused’s placing of the gag in the victim’s mouth exposed the victim to a foreseeable risk of serious physical injury.¹²⁴

4.2.5 Different considerations apply where the case involves the consent of a victim to the risk of contracting HIV through sexual activity. The Victorian Court of Appeal held in *Neal v R* (see [3.5.26] above) that, in accordance with the English Court of Appeal case of *R v Dica*,¹²⁵ informed consent is capable of providing a defence to a charge of *recklessly* endangering a person with HIV through sexual intercourse.¹²⁶ However, it was also held in *Neal* that it cannot be suggested, as it was in the New Zealand case of *R v Lee*,¹²⁷ that the defence can apply in the case of an *intentional* infliction of serious injury.¹²⁸

4.2.6 Respectively, the law in these jurisdictions gives little guidance as to the scope of consent as a defence to a charge of assault. Instead, arguably, the difficulties of the common law category approach to the criminalisation of consensual assault are perpetuated, ie, the decided cases reveal an inconsistent, paternalistic and out-dated approach to criminalisation, they do not provide adequate guidance for dealing with novel categories of violence and the law fails to protect those who are most vulnerable.

4.3 Legislative provisions

Queensland and Western Australia

4.3.1 In Queensland and Western Australia, the offence of assault is contained in their respective Criminal Codes. Sections 245 and 246 of the *Queensland Code* and ss 222 and 223 of the *WA Criminal Code* are in essentially identical terms. The relevant sections of the *Queensland Code* for present purposes are:

¹²¹ In Tasmania, this defence is contained in s 50 of the *Code*.

¹²² In Tasmania, this defence is contained in s 51 of the *Code*.

¹²³ [1999] VSC 358, [11]–[15].

¹²⁴ [2007] VSCA 300.

¹²⁵ [2004] EWCA Crim 1103.

¹²⁶ (2011) 213 A Crim R 190, 214.

¹²⁷ [2006] 3 NZLR 42.

¹²⁸ (2011) 213 A Crim R 190, 214.

245. Definition of assault

(1) A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, *without the other person's consent*, or *with the other person's consent if the consent is obtained by fraud ...* is said to assault that other person, and the act is called an assault.

246. Assaults unlawful

...

(2) The application of force by one person to the person of another may be unlawful, although it is *done with the consent* of that other person.

4.3.2 Similarly, the Western Australian *Code* provides:

222. Term used: assault

A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, *without his consent*, or *with his consent if the consent is obtained by fraud ...* is said to assault that other person, and the act is called an assault.

223. Assault is unlawful

...

The application of force by one person to the person of another may be unlawful, although it is *done with the consent* of that other person.

4.3.3 Apart from indicating that an assault may be unlawful notwithstanding the existence of genuine consent, these provisions offer no guidance as to the limits of the consent defence. In the 1985 case of *R v Raabe* a majority of the Queensland Court of Criminal Appeal held, in contrast to the position at common law, that consent may be a defence both to common assault or assault occasioning bodily harm resulting from a fist fight.¹²⁹ In *Lergesner v Carroll* the Queensland Court of Criminal Appeal unanimously held that consent could be a defence to such offences.¹³⁰ However, the court also concluded:

the legislature has set limits in the area where a person can consent to conduct. Beyond this limit it becomes irrelevant whether the conduct involved an assault, as an incident of it, or whether it involved conduct that was consented to. Relevant examples include grievous bodily harm (s 320) and wounding (s 323).¹³¹

4.3.4 In both cases it was held that there could be no recourse to the common law in construing the *Code* provisions on assault given that they are unambiguous and absence of consent is clearly an element of the charge.¹³² This amounts to a major departure from the common law position of penalising certain types of conduct on public policy grounds and suggests that the consensual infliction of violence will only be criminal where it causes a certain level of injury. This approach, which attempts to distil the problem to one of degree, is criticised below (see [5.2.3]) on the grounds that the question of the degree of harm and whether that harm is justified cannot be divorced from the context in which the assault occurs.

¹²⁹ [1985] 1 Qd R 115.

¹³⁰ [1991] 1 Qd R 206.

¹³¹ *Ibid* 218.

¹³² *Ibid* (Cooper J); *Raabe* [1985] 1 Qd R 115, 125 (Derrington J).

Northern Territory

4.3.5 In the Northern Territory, common assault is an offence under s 188(1) of the *Criminal Code* (NT). Section 188(1) provides that any person who unlawfully assaults another is guilty of an offence. Under s 188(3) if the assault is indecent and the person assaulted is under 16 years of age, it is no defence that the person assaulted consented to the act.

4.3.6 Assault is defined in s 187 of the NT *Code*:

187. Definition

In this Code assault means:

(a) the direct or indirect application of force to a person *without his consent* or *with his consent* if the consent is obtained by force or by means of menaces of any kind or by fear of harm or by means of false and fraudulent representations as to the nature of the act or by personation; or

...

other than the application of force:

...

(d) in the course of a sporting activity where the force used is not in contravention of the rules of the game; or

...

4.3.7 This definition is more extensive than that found in other jurisdictions, including in Tasmania. Notably, under s 187(a), the prosecution must prove that the application of force was without the consent of the victim. Absence of consent in s 187(a) expressly includes situations in which apparent consent is obtained by force, threats or fraud. Consent is not otherwise defined in the *Code*. Thus, the position in the Northern Territory mirrors that of Queensland and Western Australia in that absence of consent is clearly an element of the charge which the prosecution must prove beyond reasonable doubt.

4.3.8 Section 187(d) of the Northern Territory *Code* explicitly provides that an assault is lawful if it is in the course of a sporting activity where the force used is not in contravention of the rules of the game. To date there have been no cases directly on point so it remains to be determined conclusively whether the common law on the scope of consent as a defence to an assault is ousted by the express exception for sporting activity provided in s 187(d).

South Australia

4.3.9 In South Australia, the offence of assault is contained in the *Criminal Law Consolidation Act 1935* (SA). Section 20 provides a definition of assault:

20. Assault

(1) A person commits an assault if the person, *without the consent* of another person (the victim)—

(a) intentionally applies force (directly or indirectly) to the victim. ...

4.3.10 As is the case in Queensland, Western Australia and the Northern Territory, absence of consent forms part of the definition of assault and is an element of the offence that the prosecution must prove. Section 22 of the Act deals more extensively with the limits of consent than comparable legislation in

the other domestic jurisdictions. It provides that consent can be a defence to offences within division 7A, including the offences of ‘causing serious harm’, ‘causing harm’ and ‘acts endangering life or creating risk of serious harm’. The section also provides a non-exhaustive list of situations in which consent would operate as a defence. These examples closely track the common law and continue to rely on a general test of ‘accepted in the community’:

22—Conduct falling outside the ambit of this Division

(1) This Division does not apply to the conduct of a person who causes harm to another if the victim lawfully *consented* to the act causing the harm.

...

(3) A person may *consent* to harm (including serious harm) if the nature of the harm and the purpose for which it is inflicted fall within limits that are generally accepted in the community.

Examples—

1. A person may (within the limits referred to above) consent to harm that has a religious purpose (eg male circumcision but not female genital mutilation).

2. A person may (within the limits referred to above) consent to harm that has a genuine therapeutic purpose (eg a person with 2 healthy kidneys may consent to donate 1 for the purpose of transplantation to someone with kidney disease).

3. A person may (within the limits referred to above) consent to harm for the purpose of controlling fertility (eg a vasectomy or tubal ligation).

4. A participant in a sporting or recreational activity may (within the limits referred to above) consent to harm arising from a risk inherent in the nature of the activity (eg a boxer may accept the risk of being knocked unconscious in the course of a boxing match and, hence, consent to that harm if it in fact ensues).

(4) If a defendant’s conduct lies within the limits of what would be generally accepted in the community as normal incidents of social interaction or community life, this Division does not apply to the conduct unless it is established that the defendant intended to cause harm.

However, even within these limits, the defence of consent is precluded where the accused intended to cause harm (s 22(4)).

4.3.11 Authorities on the interpretation of this provision tend to be limited to situations involving the exchange of blows in the context of sporting matches.¹³³ Just how South Australian courts would adjudicate instances of consensual violence that have proved contentious in the common law is unclear, but regardless, the legislation may still be criticised on the grounds that it preserves reliance on the subjective perspective of the presiding judge.

4.4 The law in overseas jurisdictions

Canada

4.4.1 Section 265 of the *Criminal Code* RSC 1985 provides the definition of assault:

¹³³ See, eg, *McKenzie v Police (SA)* [2015] SAS 78; *Sutton v Police* [201] SAS 294.

(1) **Assault** - A person commits an assault when

(a) *without the consent* of another person, he applies force intentionally to that other person, directly or indirectly; ...

4.4.2 There is no equivalent to s 182(4) in the Canadian *Code*. As is the case in Queensland, Western Australia and the Northern Territory, absence of consent is an ingredient of the offence that the prosecution must prove. In *Dix*, which involved two men in a bar agreeing to a fight outside, the court accepted that absence of consent was a necessary element of the offence to be proved by the Crown.¹³⁴ However, the case of *R v Jobidon*, which also involved a fist fight in a parking lot outside a bar, signalled a change in the courts' interpretation of the scope of consent as a defence to assault.¹³⁵ The Supreme Court of Canada confirmed that common law principles informed the relevant provisions of the Canadian *Criminal Code* and held in relation to s 265 that:

the policy of the common law will not affect the validity or effectiveness of freely given consent to participate in rough sporting activities, so long as the intentional applications of force to which one consents are within the customary norms and rules of the game. Unlike fist fights, sporting activities and games usually have a significant social value; they are worthwhile.¹³⁶

4.4.3 The court further provided that common law limitations will not vitiate consent to medical or surgical treatment or to the activities of stuntmen, which are risky but create a socially valuable cultural product. Similarly, in *R v Welch* the Ontario Court of Appeal held that the extent to which consent may form a defence to assault is to be determined according to public policy and public interest.¹³⁷

4.4.4 In *R v Paice* it was held that for consent to be vitiated under the rule in *Jobidon*, serious bodily harm must be both intended and caused.¹³⁸ In *R v Crosby* the court held that a consensual assault between adults who do not intend to cause harm does not automatically become an assault if, despite their intent, serious bodily harm results.¹³⁹

4.4.5 The tenor of these cases is that, in cases of the consensual infliction of violence, the same impugned public policy arguments that dominate the interpretation of the requirement of 'injurious to the public' in s 182(4) will be decisive and accordingly the Canadian regime is not likely to offer a better model than that which currently exists in Tasmania.

New Zealand

4.4.6 The *Crimes Act 1961* (NZ) defines assault in essentially the same terms as s 182 of the *Tasmanian Code*:

Assault means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on

¹³⁴ (1972) 10 CCC (2d) 324.

¹³⁵ (1991) 2 RCS 714.

¹³⁶ *Ibid* 766–67.

¹³⁷ [1995] 101 CCC (3d) 216.

¹³⁸ [2005] 1 SCR 339.

¹³⁹ (2005) 27 CR (6th) 39.

reasonable grounds that he or she has, present ability to effect his or her purpose; and to assault has a corresponding meaning.¹⁴⁰

4.4.7 The statutory definition of assault makes no reference to consent. Nevertheless, consent still exists as a common law justification, excuse or defence to assault, which has been preserved by s 20 of the *Crimes Act 1961* (NZ). Section 20 provides:

20. General rule as to justifications

(1) All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.

4.4.8 In the leading case of *R v Lee* the issue was whether consent was a defence to an offence of causing death by an unlawful assault in the course of an exorcism.¹⁴¹ The New Zealand Court of Appeal held that:

the rule (for all levels of intentional infliction of harm) is rather that there is an ability to consent to the intentional infliction of harm short of death unless there are good public policy reasons to forbid it and those policy reasons outweigh the social utility of the activity and the value placed by our legal system on personal autonomy. A high value should be placed on personal autonomy.

...

In cases where grievous bodily harm is intended, however, there may be policy reasons for criminalising such conduct despite consent, even on the test we propose. Excluding consent for the intentional infliction of grievous bodily harm can be justified on a similar basis to the justification for the common law rule as to maim – that is that the persons on whom grievous bodily harm is inflicted may become a charge on society.¹⁴²

Whether such public policy grounds exist is a matter for the judge who should take into account,

the high value of personal autonomy, the social utility (or otherwise) of the activity, the level of seriousness of the injury intended or risked, the level of risk of such injury, the rationality of any consent or belief in consent and any other relevant factors in the particular case.¹⁴³

4.4.9 The more liberal approach to consensual assault in New Zealand proceeds from the perspective that, given the high value that should be accorded personal autonomy, consensual assaults are lawful unless good reasons exist to penalise them in specific circumstances. In Part 5 below, one of the suggested options for reform is that a similar presumption of lawfulness should be enshrined in s 182(4).

United Kingdom

4.4.10 As explained above, the English common law on the legality of consensual assault has influenced the common law in Australia and also the interpretation of legislative provisions such as s 182(4) (see [2.5]). Common assault in the United Kingdom is a statutory offence under s 39 of the

¹⁴⁰ *Crimes Act 1961* (NZ) s 2(1).

¹⁴¹ [2006] 3 NZLR 42.

¹⁴² *Ibid* 116 [300]–[301].

¹⁴³ *Ibid* 214 [316].

Criminal Justice Act 1988, however the definition of assault and the elements of the offence are determined by the common law. As noted above (see [4.1.2]) the leading definition comes from the case of *Fagan* where the House of Lords stated that ‘an assault is committed where the defendant intentionally or possibly recklessly causes the victim to apprehend immediate unlawful personal violence’.¹⁴⁴

4.4.11 The general rule on the effect of consent is that stated in *Attorney-General’s Reference (No 6 of 1980)* above (see [2.5.10]), ie that consent is no defence if bodily harm is intended or caused for no good reason.¹⁴⁵ The reference to ‘no good reason’ indicates that questions of public policy will be influential in determining whether particular examples of consensual violence are, or are not, to be penalised.

4.4.12 For example, in the case of *R v Brown*, the House of Lords in a 3:2 majority deemed sadomasochistic activities that resulted in bodily harm unlawful despite the fact none of the participants complained to the police and the acts they engaged in were consensual and conducted in private.¹⁴⁶ Lord Templeman in the majority stated that, ‘society is entitled to and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized.’¹⁴⁷

4.4.13 The development of the common law in the UK is summarised above (see [2.5]). Although in *A-G’s Reference (No 6)*, which involved a consensual fist fight, the court held that it is not in the ‘public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason’,¹⁴⁸ exceptions have been recognised by the common law including properly conducted rough games or sports,¹⁴⁹ reasonable surgical interference,¹⁵⁰ tattooing and ear-piercing,¹⁵¹ and friends who engage by mutual consent in contests such as wrestling.¹⁵² Recently, the English Court of Appeal in *R v Barnes* stated that criminal proceedings arising from violence in sport ‘should be reserved for those situations where the conduct is sufficiently grave to be properly categorised as criminal’.¹⁵³

4.4.14 Other exceptions which have been recognised include that a person can validly consent to the known risk of infection and possible consequences of sexual intercourse and to the risks inherent in other aspects of everyday life.¹⁵⁴ For example, the Court of Appeal held in both *Dica* and *Konzani* that consent to the risk of transmission should provide the person who recklessly transmits HIV with a defence (see [3.5.24] above).¹⁵⁵ In *Konzani* the court made it clear that such consent had to be willing

¹⁴⁴ [1969] 1 QB 439, 444 (James J).

¹⁴⁵ *A-G’s Reference (No 6 of 1980)* [1981] QB 715. See too, *R v Donovan* [1934] 2 KB 498 (caning for purposes of sexual gratification); applied in *R v Brown* [1994] 1 AC 212.

¹⁴⁶ *R v Brown* [1994] 1 AC 212.

¹⁴⁷ *Ibid* 237.

¹⁴⁸ (No 6 of 1980) [1981] QB 715, 719.

¹⁴⁹ See *Coney’s Case* (1882) 8 CBD 534; *Barnes* [2005] Crim LR 381.

¹⁵⁰ *A-G’s Reference (No 6 of 1980)* [1981] QB 715, 719.

¹⁵¹ *R v Brown* [1994] 1 AC 212, 277.

¹⁵² *R v Donovan* [1934] 2 KB 498, 508.

¹⁵³ [2005] 1 WLR 910, 912–3 [5] (Lord Woolf CJ).

¹⁵⁴ *R v Dica* [2004] EWCA Crim 1103; *R v Konzani* [2005] EWCA Crim 706.

¹⁵⁵ [2004] EWCA Crim 1103; [2005] EWCA Crim 706.

or conscious and that this was, in effect, not possible if the infecting partner had failed to disclose known HIV positive status at the relevant time.¹⁵⁶

¹⁵⁶ *R v Konzani* [2005] EWCA Crim 706, [42].

Part 5

Options for Reform

5.1 Introduction

5.1.1 The Issues Paper sought submissions on the desirability or otherwise of amending s 182(4). It also sought feedback on what form those amendments might take. In order to facilitate comment, the Issues Paper set out a number of options for reform, several of which incorporated developments from other jurisdictions.

5.1.2 Based on the responses to the Issues Paper and its options, this Final Report sets out a number of recommendations for reform in this area.

5.2 Options for reform

Option 1: Make no change to the existing law

5.2.1 It is open to maintain the status quo, on the basis that any issues with the provision are best settled by the courts or because the provision is not considered to be problematic in practice. However, this approach fails to deal with compelling criticisms of s 182(4) namely that:

- while the case of *Holmes* continues to be the leading Tasmanian authority in interpreting s 182(4), it has attracted judicial criticism but to date has not been over-ruled. This means that the law in this area remains, in a sense, unresolved;
- it has been interpreted inconsistently and that therefore its operation is uncertain;
- there is unacceptable uncertainty about the meaning of the phrase ‘otherwise unlawful’ as it is used in s 182(4);
- the notions of ‘injurious to the public’ and the public interest are highly subjective and to date have been determined on the basis of historical exceptions that do not reflect contemporary concerns;
- section 182(4) is inapt to prevent harmful assaults, particularly in the private sphere, to which even genuine consent should perhaps not be a defence.

5.2.2 Nevertheless, the Institute sought feedback during its consultation on whether there should be no change to the existing law.

Question 1:

Is there a need to amend s 182(4) of the *Criminal Code*?

5.2.3 The TLRI received eight responses to the Issues Paper.¹⁵⁷ While each submission offered its own view of s 182(4), the majority were unified in accepting that the provision requires reform. For example, the Chief Justice expressed the view that while s 182(4) is capable of serving a valuable purpose, its archaic wording and structure limit its workability. In his view, there is a lack of clarity about its operation and application due to its language and to conflicting case law. The Chief Justice also expressed concern about the case of *Holmes*. While his approach to s 182(4) in *Palmer* marked a clear departure from that of Wright J in *Holmes*, he noted, in his submission to the Institute, that that case remains one of the few authorities on the topic of consensual assault, even though it is apparently not generally applied. He stressed that this is not a satisfactory state of affairs. His Honour acknowledged that while it is possible that this inconsistency may eventually be resolved by the Tasmanian Court of Criminal Appeal, such an opportunity has not emerged in the past seven years, even though consensual assault is raised in the Supreme Court a number of times a year. Accordingly, it is his view that waiting for the matter to be determined on appeal is not a viable option, and so legislative reform is necessary.

5.2.4 The Director of Public Prosecutions, Mr Daryl Coates SC, stated that s 182(4) is rarely used. Nevertheless, Mr Coates also submitted that amendments to the provision are warranted, given the outmoded language and the difficulty in explaining the provision to juries. Similarly, the Women's Legal Service, Tasmanian (WLST) agreed that s 182(4) suffers from the inadequacies described in the Issues Paper, and supported its reform.

5.2.5 The Solicitor-General, Mr Michael O'Farrell, deferred to the Director of Public Prosecutions' views in this area, but also provided additional comments. While not opposed in principle to amending s 182(4), he submitted that given the complex issues of policy involved in its reform, including the extent to which the law should intrude into the private lives of citizens, he recommended that extreme caution be exercised in its reform.

5.2.6 In contrast, the Secretary of the Department of Police, Fire and Emergency (DPFEM), Mr Darren Hine, submitted that the provision is relied on frequently by the police in a variety of circumstances, for example in relation to mutual fights in public and situations where the victim is unknown. He described circumstances where the victim leaves the scene of an assault as not being unusual, even where the victim is blameless. In these situations, the defence will argue that the assault was one of mutual participation, which is difficult to dispute without the victim available to give evidence, but s 182(4) allows this argument to be overcome where appropriate. Mr Hine further submitted that while he agreed that the wording in s 182(4) is outdated and potentially ambiguous, the cases cited in the Issues Paper, and in this Report, are exceptions where the ambiguities exist and in practice s 182(4) is applied without issue. The DPFEM is concerned that reform of the section may result in unintended consequences and also recommended caution in determining any reforms.

5.2.7 Ms Kim Baumeler, a Tasmanian barrister, submitted that while reform in this area could potentially address a number of different areas, such as family violence, reforming s 182(4) is justified even where it does not address those other areas of concern. In her view, simplifying the language used would be beneficial. Ms Baumeler also noted that, in practice, the most important aspect of the provision

¹⁵⁷ The Honourable Chief Justice AM Blow OAM; Director of Public Prosecutions Mr DG Coates SC; Solicitor-General for Tasmanian Mr Michael O'Farrell SC; Secretary for the Department of Police, Fire and Emergency Management Mr DL Hine; Executive Director of the Law Society of Tasmania Mr Luke Rheinberger; Senior Solicitor at the Women's Legal Service Tasmania Ms Lakshmi Sundram; President of the Australian Lawyers Alliance Mr Henry Pill; and Ms Kim Baumeler.

is that it makes consent available as a defence, and for the sake of clarity it should be treated as doing this.

5.2.8 The President of the Australian Lawyers Alliance (ALA), Mr Henry Pill, submitted that reform is necessary. He noted that the current wording of the section is byzantine and unhelpful, and any amendment should be designed to create clarity in its operation.

5.2.9 Alone among the submissions received, the Law Society of Tasmania's Criminal Law Committee was opposed to reform. In their view, the case for reform was not sufficiently made out. In particular, while they noted the inconsistency in the decision of Wright J in *Holmes*, their view was that Blow CJ's approach in *Palmer* is not only correct, but will also effectively act as authority on this topic in future. They cited the case of *Lane v Purcell*¹⁵⁸ as an example of this in practice, and noted its similarity to the case of *Raabe*.¹⁵⁹

The Institute's view

5.2.10 It is the Institute's view that s 182(4) should be reformed. To do nothing will result in the retention of a poorly understood and inconsistently applied provision. The law relating to assault engages the fundamental human right to security of the person as well as the fundamental common law right to be free from the application of actual or apprehended unauthorised force.¹⁶⁰ It should therefore be clear and certain in its operation. Yet s 182(4) is obscure and uncertain. It uses archaic and complex terminology which is not readily comprehensible even to members of the legal profession. This undermines the educative function of the law in denouncing violence as a means of resolving conflict or as an unregulated form of entertainment because it is not clear what the law does and does not condone. Moreover, the social values on which s 182(4) is based no longer reflect major modern concerns with respect to consensual assault. In particular, in practice, it appears to regulate only consent to public violence. It is arguable that constraints on consent to violence should apply equally in the public and private domains. Accordingly, the Institute recommends that the section should be reformed to remove uncertainties in its interpretation and to modernise its operation and scope. Options and recommendations in relation to the nature of those reforms are discussed below.

Recommendation 1

Section 182(4) of the Tasmanian *Criminal Code 1924* should be reformed to modernise its operation and scope and to remove uncertainties as to its application and interpretation.

5.2.11 While the majority of submissions to the Institute favoured reforming s 182(4), there was no consensus about what shape that reform should take. Further, the submissions received made it clear that none of the options for reform presented in the Issues Paper encompass the entire range of stakeholders' concerns about s 182(4). Accordingly, in making its recommendations for reform, this Report considers respondents' views about both the options for reform canvassed in the Issues Paper and their views beyond those options.

¹⁵⁸ [2011] TASM C 19.

¹⁵⁹ [1985] 1 Qd R 115.

¹⁶⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) art 9. Acceptance of the right to security of the person dates back to art 10 of the *Bill of Rights 1689*.

Option 2: Adopt a quantitative approach by repealing s 182(4) and amending s 53

5.2.12 In the Issues Paper, the Institute sought feedback on whether the limitations on consent to assault should be set on a purely quantitative basis. This would involve prescribing an upper limit to physical harm beyond which consent is immaterial, which could be achieved by repealing s 182(4) and amending s 53 of the *Code*. Section 53 imposes limitations on the ability to consent to injury. It provides that no person has a right to consent to the infliction upon him or herself of death, an injury likely to cause death or ‘a maim for any purpose injurious to the public’.

5.2.13 This approach to consensual assault was favoured by Lord Slynn (in dissent) in *Brown’s Case*. His Lordship stated:

If a line has to be drawn, as I think it must, to be workable it cannot be allowed to fluctuate within particular charges and in the interests of legal certainty it has to be accepted that consent can be given to acts which are said to constitute actual bodily harm and wounding. Grievous bodily harm I accept to be different by analogy with and as an extension of the old cases on maiming. Accordingly, I accept that, other than for cases of grievous bodily harm or death, consent can be a defence.¹⁶¹

5.2.14 It also accords with the approach in the Queensland and Western Australian Criminal Codes detailed at [4.3.1]–[4.3.4] above.

5.2.15 If s 182(4) is repealed, then, because the Crown must prove that an assault is unlawful, genuine consent would still constitute a defence in almost every case. However, consent would remain immaterial in the circumstances prescribed by s 53 of the *Code* except in recognised categories of cases like surgical and medical procedures.¹⁶² In cases not covered by s 53, the lawfulness of the conduct would depend upon the existence of genuine consent.

5.2.16 The appeal of this option is that it does not rely on the current ‘category approach’ to criminalisation and avoids the type of subjective assessment of social value observed in *Brown’s Case*. It also offers greater legal certainty and consistency than is now the case, in the treatment of different types of human activity involving the infliction of harm. Importantly, it elevates respect for the autonomous choices of those who willingly engage in violent and risky behaviour, even if only up to a certain level of violence.

5.2.17 Nevertheless, to deal with the criticisms that the law of consent to assault is uncertain and outmoded, s 53 would also need to be amended to eliminate arcane terms like ‘maim injurious to the public’, and to grade the levels of proscribed harms or injuries in accordance with modern views of what should be tolerated. In its current form, s 53 may set the bar to consent too high. Accordingly, it should be amended to provide a more comprehensive legislative statement of circumstances in which consensual violence will not be condoned.

5.2.18 However, there are significant difficulties in assessing the legality of violence purely on the basis of the degree of harm intended, inflicted or risked since the distillation of the problem to one of degree obscures ‘the complexity of human conduct and the relations between human factors.’¹⁶³ The question of the degree of harm and whether that harm is justified cannot be divorced from the context

¹⁶¹ *R v Brown* [1994] 1 AC 212, 280.

¹⁶² This exception to s 53 is provided in s 51 of the *Code*.

¹⁶³ Law Commission (UK), *Consent in the Criminal Law*, Consultation Paper No 139 (1995) 248.

in which the assault occurs. A relatively trivial degree of harm may be wrongful in certain circumstances, whilst different circumstances may excuse even life threatening harm. For example, a relatively light tap in the context of on-going family violence, may be very threatening and similarly, apparently benign punches thrown in the course of a public brawl may appropriately invite criminal sanctions even where the injuries caused are no more than minor.

5.2.19 Another problem with the purely quantitative approach is that the legislature must grapple with the knotty problem of judging how much harm or risk of harm inheres in a given action or activity. This question is made all the more difficult because the notion of harm itself as well as notions of violence, injury and victim are complex and multilayered. Although a purely quantitative approach to criminalisation apparently eschews reliance on moral considerations, the meanings given to these concepts are inevitably shaped by moral judgements and normative perspectives of human relationships.

5.2.20 Ultimately, despite its appeal to interests of certainty and consistency, a purely quantitative approach may not suffice. Clearly there are activities which may not cause a great deal of physical harm but which we may not wish to condone, because of the context in which they occur. Perhaps chief among these are the apparently minor inflictions of force in the context of on-going family violence. The notion that the state will tolerate personal violence, at least where it risks harm falling short of really serious injury, is at odds with contemporary unease about male violence and violence against women and children, in particular, and modern understandings of the need to confront attitudes that condone violence. If young children witness violence in the home, not only does this threaten the secure fabric of the family unit but it also creates the risk that they will absorb a lesson that violence may legitimately solve problems and, so, may go on to resort more readily to violence in their adult lives. An amended s 53 should reflect these concerns.

5.2.21 Furthermore, there are some forms of physical force that the law currently condones and that an amended s 53 should not disturb, such as sporting activities that promote health and community coherence. Under s 51 of the *Code*, surgical operations for the benefit of the patient already constitute an exception to the negation of consent in s 53. This would remain undisturbed by amendments to s 53.

5.2.22 This Report does not propose amending the existing proscription against consent to the infliction of death in s 53 but apart from that, there is scope to redefine the limits of consent to the infliction of injury, the risk of injury and physical force. Arguably, as noted above, the current threshold set by s 53 is too high — consent is immaterial where the injury is likely to cause death or where it constitutes a maim — and is described only in terms of the severity of injury. The question whether consent should be relevant to culpability depends on the prospect of harm that the activity presents, the context in which the violence is perpetrated and the relationship between the parties. Accordingly, the limits of consent as expressed in s 53 should reflect these considerations. Options for reform might include:

5.2.23 Readjusting the level of injury beyond which consent is immaterial. For example, s 53 might provide that:

- Consent is immaterial where the injury caused or likely to be caused at least amounts to grievous bodily harm. Grievous bodily harm is a term well understood in the criminal law and is defined in the *Criminal Code* to include serious injuries to health.

- Consent is immaterial where the injury caused or is likely to be caused amounts to at least serious bodily harm.
- Consent is immaterial where the injury caused or is likely to be caused amounts to actual bodily harm that is not minor.

And/or prescribing circumstances in which consent is immaterial. For example, s 53 might be amended to provide that:

- Consent is immaterial where the assault involves the use of a weapon or an inherently dangerous thing.
- Consent is immaterial where there is a risk that children may witness the violence.

5.2.24 In the Issues Paper the Institute sought responses to a number of questions relevant to this option for reform.

Question 2:

- (a) Should the *Code* be more prescriptive about the type of violence that cannot be consented to?
- (b) Should an upper limit of harm be set beyond which consent is immaterial? If so, where should that limit be set? Grievous bodily harm? Serious bodily harm? Bodily harm that is not minor? Some other level of harm?
- (c) Should there be some circumstances where consent is immaterial, regardless of the harm actually caused? If so, what circumstances should be included? Assault involving a weapon? Violence in the presence of children? Any other circumstances?

5.2.25 The Chief Justice did not favour amending s 53 to alter the upper limit of the type of injury to which consent can be given. However, his Honour did support modernising its wording, specifically the terminology, ‘maim injurious to the public’ which is antiquated and no longer reflects modern perceptions of wrongful injuries. His Honour also suggested, in relation to the circumstances where consent might be considered to be immaterial, that problems in relation to consent to assault are likely to arise inevitably in the context of family violence, and that clarity on this point would be beneficial.

5.2.26 The Director of Public Prosecutions stated that the *Code* is already sufficiently prescriptive in relation to the type of violence that cannot be consented to, and therefore prescribing any other upper limit to harm that cannot be consented to is not warranted. With regard to the specification of circumstances where consent should be immaterial he suggested that any attempt to create an exhaustive list of such circumstances would be nearly impossible. He also considered that, in any event, s 53, operating in conjunction with s 2A and s 182(4), sufficiently limit the type of violence to which consent can be given. Similarly, he suggested that s 53 currently sets an appropriate upper limit to the degree of harm that can be consented to. However, he did recommend that that section be amended by replacing the term, ‘a maim’ with ‘grievous bodily harm’, so that it is easier to explain to juries. He did however, agree with the suggestion in the Issues Paper that there is a difficulty in applying s 182(4) to consensual assaults committed in private, and in this regard he recommended that the law be reformed to proscribe consent to assaults committed in private in the presence of children.

5.2.27 The Solicitor General agreed with the Director of Public Prosecutions' views on the issues raised in Question 2.

5.2.28 The DPFEM noted that being more prescriptive in relation to the conduct that cannot be consented to could have serious unintended consequences, in the sense that reform might capture exceptional circumstances where conduct should not be subject to prosecution.

5.2.29 Overall, the DPFEM considered that while the wording in s 182(4) is outdated, a test along similar lines remains the best approach. Accordingly, the section should target conduct that is not in the public interest, but it should capture both public and private conduct, such as family violence. In the view of the DPFEM it is desirable to ensure that contemporary community standards are incorporated into the proscription of consent in s 182(4).

5.2.30 However, the DPFEM did not support altering the upper limit of harm set by s 53. In determining what violence should be criminalised despite consent, the DPFEM recommended that the primary consideration should be the conduct rather than the outcome because injuries suffered in an assault can result from chance. Accordingly, setting an upper limit to harm caused may criminalise conduct that should not be exposed to sanction, while at the same time failing to criminalise deleterious conduct that does not meet the requisite level of harm.

5.2.31 The WLST opposed allowing the defence of consent to apply in family violence contexts, regardless of the level of harm inflicted. To this end it submitted that s 53 should be amended to provide that consent is never valid in a family violence context.

5.2.32 In contrast to the Director of Public Prosecutions, Ms Baumeler submitted that the term 'maim' in s 53 is relatively easily understood by juries, but suggested a number of other potential amendments to that section. Nevertheless, she submitted s 53 does not currently set an appropriate limit on harm that may be consented to. In her view, citizens should not be able to consent to a maim save for medical purposes. Ms Baumeler further submitted that the term 'maim injurious to the public' in s 53 should be amended to read 'maim, disfigure or disable', and that it would be beneficial if the section also proscribed consent to 'serious injury to health'.

5.2.33 The President of the ALA submitted that, while the wording of s 53 could be modernised, the section sets an appropriate level to harm that abrogates consent. It is the ALA's position that individual liberty should be respected, and that lowering the bar set by s 53 would be unwise.

The Institute's view

5.2.34 The Institute agrees with submissions that the upper limit on harm set by s 53 to which consent cannot be given is largely appropriate. However, the Institute agrees with submissions that the term 'maim injurious to the public' in that section is archaic and obscure. It should therefore be replaced with modern terminology. The Institute does not, however, consider that it is sufficient to replace that phrase *only* with the term 'grievous bodily harm' because that would not cover disfiguring injuries that do not affect a person's bodily functions. Accordingly, the Institute agrees with Ms Baumeler's suggestion that s 53 proscribe consent to the infliction of grievous bodily harm, disfigurement or a disabling injury.

5.2.35 The Institute also agrees with submissions that s 182(4) should be amended to proscribe consent to assaults committed in private in the presence of a child or children where the assaults are of no benefit to the person or persons assaulted other than to gratify that person's or those persons' desire to participate in the assaults. This Recommendation is detailed further below in relation to the discussion

of Recommendation 4 at [5.2.68]. The submissions received did not recommend any other circumstances where consent should not be available as a defence to assault.

Recommendation 2

Section 53(c) of the Tasmanian *Criminal Code 1924* should be amended to modernise its language by deleting the phrase ‘maim injurious to the public’ and replacing it with ‘grievous bodily harm, disfigurement or a disabling injury’.

Section 182(4) should be amended to proscribe consent to assaults committed by adults in private in the presence of a child or children where the assaults are of no benefit to the person or persons assaulted other than to gratify that person’s or those persons’ desire to participate in the assaults.

Option 3: Repeal s 182(4) and amend s 2A

5.2.36 Another option for reform is to repeal s 182(4) and to allow consent as defined in s 2A to constitute a defence in all cases of common assault. Such a laissez-faire approach to consensual violence may be criticised for countenancing the use of violence to resolve disputes and for failing to take account of the dynamics of power and vulnerability potentially at play in provoked situations of violence. Repealing 182(4) without making concomitant changes to the consent provision in the *Code* risks removing protections that an amended s 182(4) might otherwise provide for people whose apparent consent to violence is prompted by a highly complex set of circumstances, vulnerabilities and motivations. If consent is immaterial, prosecutions may still proceed without the victim’s testimony but if the Crown must prove absence of consent the victim becomes a crucial witness. There are many reasons why victims of violence may be unwilling to testify against perpetrators of violence. For example, they may have been intimidated or they wish to maintain an on-going relationship with the culprit that would be jeopardised by a criminal prosecution. They may feel that the criminal justice system cannot offer them adequate protection, or they might not wish the perpetrator to be dealt with through the criminal justice system. For example, a mediation response may be preferred. Such considerations can have particular relevance in family violence situations.

5.2.37 As currently formulated, s 2A first defines consent as ‘free agreement’ and then sets out a non-exhaustive list of situations where there is no free agreement. One option for reform is to add to this list by providing, for example, ‘a person does not freely agree to an act if the person agrees or submits because of emotional manipulation by another person, for example by a spouse or partner as defined in the *Family Violence Act 2004*’.¹⁶⁴ In effect this would introduce a presumption of absence of consent in cases involving familial violence. To avoid conviction, the accused would then bear an evidentiary onus to establish a reasonable doubt about the existence of emotional manipulation. In the Issues Paper the Institute sought feedback on this option. In doing so it focused on circumstances of domestic violence.

Question 3:

Should s 182(4) be repealed and an additional vitiating circumstance inserted in s 2A of the *Code* to provide that ‘a person does not freely agree to an act if the person agrees or submits because of emotional manipulation by a spouse or partner as defined in the *Family Violence Act 2004*’?

¹⁶⁴ See *FVA* s 4: ‘spouse or partner of a person means another person with whom the person is, or has been, in a family relationship.’

5.2.38 The Chief Justice recommended that s 182(4) be retained, because it currently serves a valuable purpose in explicitly preserving the defence of consent to charges of assault in the *Code*. As noted above, his Honour also suggested that problems in relation to consent to assault are likely to arise inevitably in the context of family violence, and that clarity on this point would be beneficial. This comment is relevant not only to s 182(4) but also to s 2A.

The Director of Public Prosecutions opposed repealing s 182(4), because it has a potentially valuable contribution to make with respect to a number of circumstances when consent should be vitiated on policy grounds. In addition, he did not favour amending s 2A as suggested in Question 3. In his view, this is unnecessary because s 2A(2)(e) already provides that a person does not freely agree if he or she: ‘agrees or submits because he or she is overcome by the nature or position of another person.’

5.2.39 He submitted that this subsection already covers emotional manipulation, and could apply in relationships where there is a power imbalance between partners.

5.2.40 The Solicitor General concurred with the views of the Director of Public Prosecutions in relation to the repeal of s 182(4) but differed in that he supported an amendment to s 2A to abrogate consent to assault in circumstances of family violence where children are present.

5.2.41 The DPFEM similarly submitted that there is no need to amend s 2A of the *Code*, arguing that this section already addresses emotional manipulation. Further, he argued that family violence assaults are not currently defended on the basis that the victim consented to the assault, and that consent has not arisen as an issue in charging offenders. Were it to arise, the DPFEM submitted that s 2A in its existing form would account for any imbalance of power in a relationship.

5.2.42 The WLST submitted that a repeal of s 182(4) would risk removing protections for vulnerable women, and so did not support its repeal. In similar vein to the Solicitor General, the WLST submitted that there is a need to amend s 2A to vitiate consent to family violence assaults. Nevertheless, the WLST expressed concern that this amendment would require victims to testify against their partners, arguing that there are a range of reasons why victims may refuse to do so. In particular, the cycle of abuse often leaves victims unaware that they are being controlled or manipulated into refusing to testify and that their reluctance in this regard may unduly restrict prosecutions. This can undeniably be a factor in prosecutorial decisions despite the fact that ss 19(f) and 19(fa) of the *Evidence Act 2001* (Tas) render spouses compellable in relation to offences of personal and family violence. Accordingly, the WLST supported an amendment in s 2A to the effect that a person does not give free agreement to an act if the act is committed in circumstances of family violence circumstance.

5.2.43 Ms Baumeler was cautious about amending s 2A, submitting that there is a tension between the desire to protect vulnerable people and retaining the operation of the defence of consent. It was her view that consent may be valid in family violence scenarios.

5.2.44 It was the ALA’s view that s 2A currently makes adequate provision for absence of consent in family violence situations. In relation to the repeal of s 182(4), the ALA submitted that preferred approach is to respect individual liberty and choice. This approach would favour the repeal of s 182(4) because it abrogates individual choice in prescribed circumstances.

The Institute’s view

5.2.45 The Institute agrees with submissions that s 182(4) should not be repealed. Instead it should be reformed and modernised. The Institute agrees that circumstances involving power imbalances *may*

already act to vitiate consent under s 2A(2)(e) of the *Code*. However, the cases of *Crisp v R*¹⁶⁵ and *Pafitis v R*¹⁶⁶ both address s 2A(2)(e) (then known as s 2A(2)(b)) and construe the section quite narrowly, suggesting that its operation may be limited to cases involving young children and their parents. In practice, a spousal or partner relationship may not be viewed as involving the necessary degree or type of power imbalance that could negate mutual consent to assault. It may be beneficial to clarify this matter.

5.2.46 Accordingly, the Institute recommends that s 2A be amended to specify that a person does not freely agree to an act if that act occurs in circumstances of family violence within the meaning of the *Family Violence Act 2004*.

Recommendation 3

The Institute recommends that s 182(4) not be repealed but that instead it be reformed.

The Institute recommends that s 2A be amended to specify that a person does not freely agree to an act if that act occurs in circumstances of family violence within the meaning of the *Family Violence Act 2004*.

Option 4: Amend s 182(4)

5.2.47 Assuming that we wish to continue to outlaw some forms of assault regardless of consent, another option for reform is to amend s 182(4) to attempt to deal with the problems that have been identified with the requirements of ‘otherwise unlawful’, ‘injurious to the public’ and ‘breach of the peace’. As noted, unless the assault occurs in public, it is likely to be very problematic for the Crown to establish that it also amounts to another offence. One solution might be to remove this requirement altogether. This would make it easier to secure a conviction but it also carries the risk that some genuinely consensual behaviours that shouldn’t be criminalised would be caught. However, this risk might be mitigated if, at the same time, changes were made to the requirement of ‘injurious to the public’.

5.2.48 As it currently stands, consensual violence will be unlawful if the Crown proves that the assault is ‘injurious to the public’ (as well as each of the other requirements of s 182(4)). This does not mean that the Crown is required to establish that the activity is positively harmful, merely that it has no social utility.¹⁶⁷ However, this position, that private violence, which risks harm only to the consenting participants, must have positive social consequences if it is to escape penalisation, is by no means compelling. Arguably, the appropriate question for the court is not, ‘has the prosecution proved that the activity serves no beneficial social purpose’ but rather, ‘has the prosecution proved that the activity is positively harmful’. An amendment to s 182(4) to clarify that the prosecution must establish positive harm (rather than an absence of social utility) in effect, would mean that consensual assaults are presumptively lawful unless it is proven that they entail positive harm. It is argued above that the requirement that the assault be ‘otherwise unlawful’ supplies the wrongfulness that is otherwise absent in consensual assaults (see [2.6.3]). If Option 4 is adopted and this requirement is dispensed with, wrongfulness might instead be supplied by proof of public harm.

¹⁶⁵ Unreported Serial No 74/1990.

¹⁶⁶ [2000] TASSC 52.

¹⁶⁷ See *Coney’s Case* (1882) 8 QBD 534, 549. See too *Brown’s Case* [1994] 1 AC 212: ‘Sadomasochistic activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society.’ at 255.

5.2.49 The stipulation in s 182(4) that the assault amounts to a breach of the peace has also proved problematic. The common law rules surrounding the consensual infliction of violence were developed before the establishment of an effective police force and reflect a central concern to limit the risk that an altercation between individuals might escalate into a public brawl. Thus, unless the public was drawn into the exchange, the law would not intervene. This justification for requiring that the behaviour amounts to a breach of the peace no longer holds good and indeed the concern about consensual assault now encompasses the private as least as much, and perhaps even more than the public sphere. Accordingly, this option proposes the removal of the requirement that the assault also constitutes a breach of the peace. This recommendation is also based upon the concern that the term, ‘breach of the peace’ is somewhat arcane. It has dropped out of common parlance and understanding and is therefore difficult to explain to juries.

5.2.50 The Institute sought feedback on these issues and how best s 182(4) might be amended to deal with the problems arising from the test it prescribes that to nullify consent the assault must be ‘otherwise unlawful’, ‘injurious to the public’ and constitute ‘a breach of the peace’.

Question 4:

- (a) Should s 182(4) be amended to remove the requirements that the assault be ‘otherwise unlawful’, ‘injurious to the public’ and ‘a breach of the peace’? Should those requirements be replaced with the requirement that the prosecution be required to establish that the activity entails positive social harm? If some other requirement should replace the current requirements in s 182(4), what should that be?
- (b) Should only some, and if so, which of the requirements in s 182(4) be removed? If ‘yes’, what, if anything, should those requirements be replaced with?

5.2.51 The Chief Justice agreed that the current language of s 182(4) imposes obstacles to its operation. He said that the phrase, ‘injurious to the public’ is archaic and should be replaced, and that the requirement that the assault be a ‘breach of the peace’ is difficult if not impossible to make comprehensible to juries. In his view, an amendment to the language of the section is both necessary and urgent. Its reform should aim to achieve clarity in the provision’s operation.

5.2.52 The Director of Public Prosecutions also agreed that s 182(4) is in need of rewording, but rejected replacing the existing requirements with a condition that the prosecution establish that the activity in question entails positive social harm. He argued that this would constitute an overly onerous test. He suggested the following rewording:

- (4) Except in cases in which it is specially provided that consent cannot be given, or shall not be a defence, an assault is not unlawful if committed with the consent of the person assaulted, unless:
- (a) it occurs in the presence of a child or children (excepting sporting events or activities);
 - (b) it occurs in a public place and is not for a purpose which is in the public interest;
 - (c) serious injury is intended.

5.2.53 The Solicitor General noted that s 182(4) addresses both the act and the injury. He suggested:

If, as it is suggested in the paper, the provision is derived from the judgments in *Coney & Ors*, the act referred to in the section should relate to both the act which is said to be

otherwise unlawful and to the act said to involve a breach of the peace of the peace. As presently drafted the section does not directly attach a breach of the peace to the act, but arguably to its effect on the person assaulted. That does not seem to me to reflect the judgments in *Coney*.

5.2.54 He further argued that the cumulative effect of this construction has the effect of limiting the reach of s 182(4) where the exposure of children to violence is concerned. The Solicitor General's view was that this should be corrected by an amendment to s 2A. He also submitted that the requirement that the injury be injurious to the public could arguably be seen as the mechanism by which the law is permitted to intrude on matters which concern private morality. The section thus requires a policy reason that justifies this intrusion into the private affairs of citizens.

5.2.55 The DPFEM submitted that s 182(4) would benefit from a reform to its language, which removes its ambiguity. The DPFEM further submitted that it may be desirable to remove all three requirements listed in Question 4(a), and supported a replacement wording that incorporated a social harm test.

5.2.56 However, the DPFEM cautioned against using the wording 'entails *positive* social harm', as this may be no less ambiguous than the present 'injurious to the public'. Both require a value judgment to be made without providing significant assistance to the court as to the form and nature of that judgment. Having suggested a test of 'not in the public interest', the DPFEM noted that even that expression may create similar problems to the existing wording. Whatever wording is used must be the subject of careful consideration, and, accordingly, the DPFEM felt that it was not possible to provide a definitive answer in relation to this matter.

5.2.57 The WLST supported the option of amending s 182(4), noting that one of the main issues with the provision is that it does not appear to abrogate consent in family violence situations.

5.2.58 In particular, the WLST supported the removal of the terminology, 'otherwise unlawful', because this appears to be the main barrier to the application of the provision to assaults that occur in the home. It was submitted that not only would this allow s 182(4) to operate in the home, and in respect of family violence, but it would also better reflect the modern societal view that violence within relationships is not a private problem, but a matter of public concern that should accordingly be dealt with by the law.

5.2.59 The WLST further submitted that a requirement that the prosecution establish that the alleged activity entails positive social harm may be an appropriate compromise position. It was the WLST's view that any violence within the relationship unit entails positive social harm, and that any definition of positive social harm should refer to family violence.

5.2.60 Ms Baumeler submitted that an appropriate reform would be to retain 'otherwise unlawful' but remove 'injurious to the public' and 'breach of the peace', which would greatly simplify the operation of the provision, while also limiting the types of conduct unnecessarily captured by the provision. However, she did not go into further reasons regarding retaining 'otherwise unlawful'.

5.2.61 The ALA felt unable give a definitive answer to this question at the present time, but recommended that the focus of reform should be on achieving clarity.

The Institute's view

5.2.62 It is the Institute's position that s 182(4) should be amended to incorporate updated language, and to bring it into line with contemporary societal expectations. As discussed earlier in this Report, in addition to archaic wording, judicial construction has resulted in inconsistent interpretations of s 182(4). Proceeding from an understanding that s 182(4) does have a valid role to play in relation to consent to assault, it follows that it should work in all contexts where consent to assault may be a matter of concern, including in both the public and private spheres. At present, it is apparent that s 182(4) has a limited role, if any, to play in the private arena. This discrepancy should be resolved.

5.2.63 The Institute recommends against absolutely disallowing consent in family violence contexts. Such an approach is unjustifiably paternalistic, and would amount to the *Code* providing as a matter of law that all relationships involving family violence are inherently the same. Given the earlier discussion on the typologies of family violence, such a position is not tenable. Individual family circumstances differ significantly. Consequently, the possibility of consent in family violence scenarios not amounting to free agreement should be dealt with by reference to s 2A.

5.2.64 The Institute is mindful of the need to avoid abrogating consent to assault too broadly and capturing generally acceptable behaviour. For example, while the Institute agrees with submissions that the question of consent to assault between adults in private should largely be governed by s 2A of the *Code*, where such violence occurs before children, there is merit in abrogating consent under s 182(4) unless the assault is beneficial to the person assaulted in a way that goes beyond mere gratification of that person's desire to participate in the assault. A reform couched in these terms will target the unacceptable quality of the violence (the fact that it is perpetrated in the presence of children) while avoiding criminalising acceptable conduct, such as sporting events, legitimate entertainment and beneficial personal contacts.

5.2.65 As explained earlier, the 'otherwise unlawful' requirement in s 182(4) creates a barrier to its operation in private contexts and is the main impediment to s 182(4) operating consistently in both the public and private spheres. However, removal of this requirement may result in some conduct being criminalised when, perhaps, it should not be. An example would be consensual sadomasochistic sexual activity. To this end, the Institute suggests that any reform should avoid terms that are vague and open to widely varying interpretations which may enable biased or discriminatory views such as those evident in *Brown's Case* to inform decisions about whether consent is lawful. Accordingly, the Institute takes the view that where there is genuine consent, that consent should be abrogated only where there is some aggravating circumstance that justifies the law intruding into the matter. For assaults in private, such a circumstance is supplied where the assault occurs in the presence of children and it is not performed for the benefit of the person assaulted, or otherwise than to gratify the combatants desire to participate in violent behaviour. The latter circumstance also supplies public fighting with an element of wrongfulness that might otherwise not exist where there is consent.

5.2.66 Accordingly, the approach recommended by the TLRI resembles that advocated by the Director of Public Prosecutions. However, the Institute suggests a slightly different reform for s 182(4). Where assaults between adults in private are concerned, the question of consent should be governed almost entirely by s 2A. There should be an exception where the assault occurs in the presence of children and it is of no benefit to the person assaulted beyond mere gratification of that person's desire to participate in the assault. This approach avoids criminalising conduct of the kind that occurred in *Brown's Case* as well as legitimate private sporting or entertainment activities. It also accords with submissions to the Institute that recommended that consent should be immaterial in relation to assaults committed in

private in the presence of children. With regard to assaults in public places, the Institute suggests abrogating consent where the assault is of no benefit to the persons assaulted beyond mere gratification of their desire to participate in the assault. Again, this avoids criminalising sporting contacts, acceptable entertainment, and beneficial personal contacts. An example of the last might be where one person thumps another on the back during a coughing fit or performs Heimlich's manoeuvre to prevent someone choking. Additionally, the Institute agrees with the Director of Public Prosecutions that consent should be immaterial in relation to assaults perpetrated in public or private with the intention of causing serious non-beneficial personal injury. That intention also supplies an element of wrongfulness that might otherwise be absent where there is consent. If reformed according to these recommendations, s 182(4) might read:

Except in cases in which it is specially provided that consent cannot be given, or shall not be a defence, an assault is not unlawful if committed with the consent of the person assaulted, unless:

- (a) the assault is committed by an adult and occurs on private premises in the presence of a child or children and it is of no benefit to the person or persons assaulted other than to gratify that person's or those persons' desire to participate in the assault; or
- (b) the assault occurs in a public place and it is of no benefit to the person or persons assaulted other than to gratify that person's or those persons' desire to participate in the assault; or
- (c) the assault is committed with the intention of causing serious personal injury that is of no benefit to the person or persons assaulted.

5.2.67 The Institute acknowledges that some kinds of rough play between children, and between children and their family members such as a son wrestling with his father, could potentially be criminalised by this reform despite such behaviour being understood to be acceptable and in some cases even beneficial to participants. It is not the Institute's intention to extend the operation of the law of assault into this kind of play, and instead suggests that the risk of criminalisation is minimised. It may be the case that rough play is already covered by s 182(3) of the *Code*, in the sense that it constitutes part of normal human interaction. If this is not the case, the benefit element of the recommendation could reasonably preclude the criminalisation of rough play. The recommendation incorporates a test that assesses whether or not the act in question is of some benefit to the alleged victim, a test that could exclude rough play. If there were fears of an unintended operation of the provision, it would be open to have s 182(4) specify that rough but non-hostile play is excluded.

5.2.68 The Institute also recommends that for the sake of clarity, it may be wise to provide that nothing in s 182(4) is intended to deprive people of the ability to consent to medical and surgical treatment or to participate in sporting activity and lawful public entertainment.

5.2.69 The ultimate purpose of this reform is modernisation and consistency. It seeks to eliminate archaic language, but also seeks to eliminate the disparity between public and private assaults in the current consensual assault scheme. By introducing a new test that is common between public and private spheres, the recommendation will essentially close the gap and create more predictable outcomes in cases. Further, the reform is intended to provide a means of addressing children being exposed to unacceptable violence, even where the participants allegedly consent to that violence.

Recommendation 4

Section 182(4) should be amended to remove the conditions that currently abrogate consent to assault — that the assault be ‘otherwise unlawful’, ‘injurious to the public’ and ‘a breach of the peace’.

Section 182(4) should be amended to provide that consent will not be a defence in respect of assaults committed by adults in private, where they occur in the presence of a child or children and where the assaults are of no benefit to the person or persons assaulted other than to gratify that person’s or those persons’ desire to participate in the assaults; in respect of assaults committed in public, where they are of no benefit to the person or persons assaulted other than to gratify that person’s or those persons’ desire to participate in the assaults; or where the assault is committed with the intention of causing serious personal injury that is of no benefit to the person or persons assaulted.

For the sake of clarity, s 182(4) should also provide that nothing in that section is intended to deprive people of the ability to consent to medical and surgical treatment or of the ability to participate in sporting activities, ordinary rough play and lawful public entertainments.

Option 5: Amend the Family Violence Act 2004 (Tas) so that violence in front of children amounts to a family violence offence

5.2.70 As noted in Option 4, s 182(4) is primarily concerned with consensual violence which is detrimental to the public interest in some way, including where it constitutes a breach of the peace. It leaves unregulated instances of consensual violence in a domestic setting where the only witnesses are the children who reside there. This is problematic both because children are likely to find it distressing and because of the evidence that being exposed to family violence can have deleterious long-term effects. The purpose of Option 5 is therefore to protect vulnerable children who live in violent homes. The *FVA* defines a family violence offence as any conduct the commission of which constitutes behaviour elsewhere defined as ‘family violence’.¹⁶⁸ These behaviours include assaults and sexual assaults, threatening behaviour and stalking. In Victoria, causing a child to be exposed to family violence also constitutes family violence.¹⁶⁹ New Zealand provides similarly in its domestic violence legislation.¹⁷⁰ Although an affected child (see [3.5.14]) may apply for a Family Violence Order under s 15 of the *FVA*, in Tasmania, exposing a child to family violence does not constitute a family violence offence.

5.2.71 In its Report on family violence, the Australian Law Reform Commission (ALRC) recommended that a common definition of family violence be adopted in all Australian jurisdictions, which includes ‘behaviour by the person using violence that causes a child to be exposed to the effects of [family violence]’.¹⁷¹ The ALRC noted that submissions to the Consultation Paper on family violence¹⁷² were divided on the question of whether exposing children to family violence should be a family violence offence in its own right. Amongst the reasons given in support of such a move were that children who witness family violence are far more likely to use violence or become victims of family violence themselves in the future and that it may cause parents to reconsider their violent

¹⁶⁸ *FVA* s 7.

¹⁶⁹ *Family Violence Protection Act 2008* (Vic) s 5.

¹⁷⁰ *Domestic Violence Act 1995* (NZ) s 3(3).

¹⁷¹ ALRC, *Family Violence – A National Legal Response*, Final Report No 114 (2010) Recommendation 5-1.

¹⁷² ALRC, *Family Violence – Improving Legal Frameworks*, Consultation Paper 1 (2010).

behaviour.¹⁷³ Others expressed concern that such a move risked criminalising women in particular for failing to protect their children.¹⁷⁴

5.2.72 The definition of family violence in the Tasmanian Act impliedly refers only to non-consensual episodes of violence or intimidation. If this option, to expand the definition of family violence to include situations where a child is exposed to the effects of violence, is adopted, consideration must be given to whether or not women who consent to violent behaviours by their partners should be exempt from prosecution, even where it exposes children to the effects of the violent behaviour. Whilst this might be desirable in the interests of the child, the question arises whether the *FVA*, concerned as it is primarily with the protection of vulnerable women and children, should be used as a vehicle for prosecuting women who willingly engage in violent conduct with their partner.

5.2.73 In making the following recommendation, this Report acknowledges a limitation in scope with regards to family violence topics. The WLST pointed out that the proposed amendments to the *FVA* could have undesirable unintended consequences, including exposing vulnerable people to inappropriate legal sanction.

5.2.74 Further, while not all submissions touched on this topic, those that did saw reform as unnecessary. The Director of Public Prosecutions noted that the definition of family violence in the *FVA* is a comprehensive one and would not be assisted by the proposed amendment, in part because it would not actually work to protect children. The DPFEM noted that the proposed amendment would only capture acts of violence committed in the presence of children in the context of family relationships, while the proposed reform of s 182(4) would capture violence in family contexts, and others.

5.2.75 The focus of concern in this Report is the operation of s 182(4), and while that section can interface with family violence legislation, there is little effective guidance in the case law or legislation on this topic. This Final Report submits that any amendment to the *FVA* should only occur following a dedicated study that draws on a wide pool of stakeholders, a pool that includes a large number of advocates against, and experts in, family violence.

Recommendation 5

The Institute does not, *at this stage*, recommend amending the *Family Violence Act 2004* (Tas) to make violent conduct engaged in in the presence of children a family violence offence. Such reform should only occur following a dedicated study that draws on the experience and views of a wide pool of stakeholders, a pool that includes a large number of advocates against, and experts in, family violence.

5.3 Final remarks

5.3.1 The Institute acknowledges that the clarification of the operation of the defence of consent in the context of consensual assaults presents a difficult hurdle for law reformers. Section 182(4) serves a valid purpose in recognising consent and should not be ousted entirely. Equally however, any proposals for reform must not jeopardise the advances that have been achieved in creating public awareness of

¹⁷³ ALRC, above n 171, [5.141].

¹⁷⁴ *Ibid* [5.147].

the importance generally of eschewing a culture of violence and instead fostering more civilised and rational ways of resolving disputes.

5.3.2 This balancing act is not a simple one, and given that the provision is little known amongst the public, the value in pursuing reform may not be immediately clear. However, this is an opportunity to clarify a confused provision in the *Criminal Code*, one that is in operation and which inflects directly on both personal liberty and violence in society. Reform will have a meaningful practical effect, and can be used to affirm a clear position on mutual violence.