

TASMANIA
LAW REFORM
INSTITUTE

Consensual Assault

ISSUES PAPER NO 24

JUNE 2017

CONTENTS

Information about the Tasmania Law Reform Institute.....	iv
How to respond.....	iv
Acknowledgments.....	v
Executive Summary.....	vi
List of Questions.....	viii
Part 1: Introduction.....	1
1.1 Background.....	1
1.2 Terms of reference.....	2
Part 2: The Current Law.....	3
2.1 Consent as a defence to assault.....	3
2.2 The law in Tasmania.....	5
2.3 The definition of ‘consent’.....	6
2.4 The meaning of ‘consent’ in the context of assault.....	6
2.5 The origins of s 182(4) and subsequent developments at common law.....	7
2.6 Section 182(4) – the legal effect of the ‘victim’s’ consent.....	10
Part 3: The Need for Reform.....	13
3.1 Introduction.....	13
3.2 Inconsistency in interpretation.....	13
3.3 The requirement that the conduct be otherwise unlawful.....	14
3.4 Injurious to the public: decisions based on policy rather than principle.....	15
3.5 Consensual assaults in the family violence context to which even genuine consent should not be a defence.....	19
Part 4: The Law in Other Jurisdictions.....	25
4.2 Common law.....	25
4.3 Legislative provisions.....	26
4.4 The law in overseas jurisdictions.....	29
Part 5: Options for Reform.....	33
5.1 Introduction.....	33
5.2 Options for reform.....	33
5.3 Final remarks.....	38

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 Associate Professor Terese Henning of the University of Tasmania (appointed by the Vice-Chancellor of the University of Tasmania). The members of the Board of the Institute are: Associate Professor 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), Simon Overland (appointed by the Attorney-General), Dr Jeremy Prichard (appointed by the Council of the University), Craig Mackie (appointed by the Tasmanian Bar Association), Rohan Foon (appointed by the Law Society) Ann Hughes (appointed as community representative), Kim Baumeler (appointed at the invitation of the Board).

How to respond

The Tasmania Law Reform Institute invites responses to the issues discussed in this Issues Paper. There are five options for reform put forward in the Paper and a number of questions posed to guide your response. Respondents can choose to address any or all of those proposals in their submissions. Respondents can also suggest alternative options for reform.

There are a number of ways to respond to this Issues Paper:

- Completing the Submission Template

The template can be filled in electronically and sent by email or printed out and filled in manually and posted to the Institute. The Submission Template can be accessed at the Institute's webpage <http://www.utas.edu.au/law-reform/>

- By providing a more detailed response to the Issues Paper

Please explain the reasons for your views as fully as possible. Submissions may be published on the Institute's website, and may be referred to or quoted from in a Final Report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all the responses, it is intended that a Final Report, containing recommendations, will be published. Responses should be made in writing.

- Answering one, a select number or all of the Questions
- Arranging to meet with the TLRI to discuss your submission

The Institute uses any submissions received to inform its research. Submissions may be referred to or quoted from in a final report which will be published on the Institute's website. However, if you do not wish your response to be referred to or identified, the Institute will respect that wish.

Therefore, when making a submission to the Institute, please identify how you would like it to be treated based on the following categories:

- (1) Public submission – the Institute may refer to or quote directly from the submission, and name the source of the submission in relevant publications.
- (2) Anonymous submission – the Institute may refer to or quote directly from the submission in relevant publications, but will not identify the source of the submission.
- (3) Confidential submission – the Institute will not refer to or quote directly from the submission in any report or publication. Confidential submissions will only be used to inform the Institute generally in its deliberations of the particular issue under investigation.

Electronic submissions should be emailed to: law.reform@utas.edu.au

Submissions in paper form should be posted to:

Tasmania Law Reform Institute
Private Bag 89
Hobart, TAS 7001

The Issues Paper is available at the Institute's web page at <http://www.utas.edu.au/law-reform/> or can be sent to you by email.

Inquiries should be directed to Ms Kira White at the above address, or by telephoning (03) 6226 2069, or by email to Law.Reform@utas.edu.au.

Closing Date for Responses: 7 September 2017

Acknowledgments

This Issues Paper was prepared for the Board by Dr Helen Cockburn. Research assistance on the law in other jurisdictions was provided by Emilie McDonnell. Valuable feedback was provided by the Institute's Director, Associate Professor Terese Henning, and members of the Board. Bruce Newey edited and formatted the final version of the paper.

Executive Summary

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. Such cases pose difficulties for the criminal justice system and legal scholars alike since they lack the clear stamp of unlawfulness that the victim’s absence of consent otherwise provides. 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 no easy task.

The Issues Paper examines the current law on consensual assault in Tasmania which is contained in s 182(4) of the *Criminal Code Act 1924* (Tas) sch 1 (the ‘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 paper 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 defence to assault and leaves those who are particularly vulnerable to violence in the home outside the protection of the law. The paper concludes by proposing five separate options for reform. In brief these options are:

Option 1: Make no change to the existing law ([5.2.1]–[5.2.2])

This option involves maintaining the status quo, on the basis that cases where the consensual infliction of violence becomes a matter for the courts are likely to be rare.

Option 2: Adopt a quantitative approach by repealing s 182(4) and amending s 53 ([5.2.3]–[5.2.13])

Option 2 proposes approaching the issue from a purely quantitative perspective and setting a legislatively prescribed upper limit of harm beyond which consent is immaterial. This 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. Currently, consent remains immaterial where death or really serious injury (specifically, ‘a maim’) is inflicted or risked except in recognised categories of cases like surgical and medical procedures. Arguably, s 53 sets the bar to consent too high. Accordingly, s 53 should be amended to provide a more comprehensive legislative statement of circumstances in which consensual violence will not be condoned, even where it does not result in physical injury.

Option 3: Repeal s 182(4) and amend s 2A ([5.2.14]–[5.2.15])

This option provides that consent as defined in s 2A of the *Code* will provide a defence to all assaults. However, arguably this fails to take account of the dynamics of power and vulnerability at play in family violence situations and fails to protect those who are most vulnerable. 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 a spouse or partner as defined in the *Family Violence Act 2004*’. In effect this would introduce a presumption of absence of consent in cases involving familial violence.

Option 4: Amend s 182(4) ([5.2.16]–[5.2.18])

This option aims to deal with the problems that are identified with some of the concepts employed in s 182(4), notably the requirements of ‘otherwise unlawful’, ‘injurious to the public’ and ‘breach of the peace’. The proposal is to amend s 182(4) to replace these with a single requirement that, if consent is to be immaterial, the prosecution must establish that the conduct involves positive harm (rather than an absence of social utility). In effect, this would mean that consensual assaults are presumptively lawful unless positive harm is proven.

Option 5: Amend the Family Violence Act 2004 (Tas) (‘FVA’) so that violence in front of children amounts to a family violence offence ([5.2.19]–[5.2.21])

Elsewhere in the paper it is argued that 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. As currently formulated 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 the violence 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.

List of Questions

The Institute welcomes your response to any individual question or to all questions contained within the paper.

Question 1	Is there a need to amend s 182(4) of the <i>Criminal Code</i> ?
Question 2	<p>(a) Should the <i>Code</i> be more prescriptive about the type of violence that cannot be consented to?</p> <p>(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?</p> <p>(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?</p>
Question 3	Should s 182(4) be repealed and an additional vitiating circumstance inserted in s 2A of the <i>Code</i> 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 <i>Family Violence Act 2004</i> ’?
Question 4	<p>(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?</p> <p>(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?</p>
Question 5	<p>(a) Should the definition of family violence in the <i>FVA</i> be amended to include exposing a child to the effects of family violence?</p> <p>(b) If so, should women who consent to violent behaviours by their partners be exempt from prosecution, even where children are exposed to the effects of the violent behaviour?</p>

Part 1

Introduction

1.1 Background

1.1.1 In May 2015 the Attorney-General requested the advice of the TLRI on whether there is a need to amend s 182(4) of the *Criminal Code*. Section 182(4) is one subsection in a lengthy provision dealing with the offence of common assault. It establishes rules about the availability of consent as a defence to assault. The Attorney-General's request was prompted by a number of concerns the Chief Justice has expressed about the provision, including that 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'.

1.1.2 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. There is also a view that it may be overly paternalistic and unjustifiably infringe people's right to determine what types of forceful behaviour they will accept. According to this view, consent should be a defence to all forms of assault, except in the circumstances stipulated in the generally applicable s 53 of the *Code*.

1.1.3 Attempts to set the parameters of the defence of consent in the domain of the consensual infliction of violence are inherently problematic. It is difficult to define when consent should not be a defence to assault because it involves balancing competing interests. Public policy suggests that some limits to the defence are justified, if only as a matter of respect for human dignity. However, the result of de-legitimising the defence of consent for particular categories of violence will be to preference prevailing social perceptions of that violence over participants' individual liberty. Sport, for example, is a socially valued activity and consent is therefore available as a defence to the (non-malicious) infliction of even serious harm. Sado-masochistic sexual activity on the other hand has not been recognised as socially useful in the same way.

1.1.4 The common law antecedents of s 182(4) were directed at the problem of *public* violence. In the era before the establishment of effective police forces, where consent was excluded as a defence to assault, 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.

1.1.5 This Issues Paper examines the operation of consent as a defence to a charge of common assault. Specifically, it is concerned with the question whether consent should provide a defence to assault in all cases, or whether there are some circumstances in which the putative victim's genuine consent is

immaterial to the accused's culpability for an offence. This necessarily entails considering whether s 182(4) of the *Criminal Code* should be reformed or indeed abolished.

1.1.6 At times throughout the paper the author uses the term 'consensual violence'. It is acknowledged 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, ie the application of force to another person.

1.2 Terms of reference

1.2.1 At its meeting on the 7th 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* (Tas). The terms of reference distilled from the Attorney-General's request are:

- 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);
- whether s 182(4) should be reformed to encapsulate modern concerns about the consensual violence.

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.

Part 2

The Current Law

2.1 Consent as a defence to assault

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 Article 9 of the *International Covenant on Civil and Political Rights* to protect citizens' right to security of the person.² However, the law legitimates the infliction of injury on others in some circumstances, including where there is consent to the application of force.

2.1.2 The criminal 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 violence on each other is wrong, the general rule will not apply where it would amount to an unwarranted interference by the state into the private lives of citizens or where the violence itself serves some other public good.

2.1.3 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 the 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. Nevertheless, in this context, consent will not be a defence if the force applied is unreasonable.

2.1.4 Decisions on the extent to which, and the circumstances in which consent should legitimate conduct which would, in its absence, be unlawful depend on larger philosophical perspectives on the moral limits of the criminal law. Broadly speaking, there are three main competing approaches to criminalisation: liberalism; paternalism; and legal moralism. Each of these perspectives will generate different answers about the appropriate degree of state intervention in the private activities of its citizens.

2.1.5 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:

[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 *International Covenant on Civil and Political Rights 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 ('ICCPR'). See *Delgado Páez v Colombia*, Merits, Communication No 195/1985, UN Doc CCPR/C/39/D/195/1985, IHRL 1701 (UNHRC 1990), 12 July 1990, Human Rights Committee, [UNHRC]; *Jayawardena v Sri Lanka*, Merits, UN Doc CCPR/C/75/D/916/2000, (2002) 10 IHRR 55, IHRL 1677 (UNHRC 2002), 22 July 2002, Human Rights Committee [UNHRC].

³ J S Mill, *On Liberty*.

2.1.6 Liberal ideals and values are implicit in the consent defence. If the only 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 choice. This would exclude children and to some extent those with a 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.

2.1.7 The second of these philosophical approaches to criminalisation is a paternalistic approach. 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.’⁵ A paternalistic approach can be seen, for example, in the legal proscription of the consensual infliction of really serious harm. The state is justified in legislating to deny an individual freedom of choice because it is done for their own good.

2.1.8 The final approach is legal moralism. From this perspective, the denial of individual choice in some circumstances is justified either because the activity is considered inherently immoral, regardless of whether it causes injury, or because it represents a threat to the established social order. This is the basis on which many categories of activity, the infliction of violence for sexual gratification for example, have conventionally been deemed not to be in the public interest.

2.1.9 In Tasmania, s 182(4) of the *Criminal 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.⁶ 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. Until only relatively recently, consensual violence in the private sphere was largely ignored. Thus, as a mechanism for governing consensual violence, s 182(4) condones some forms of assault that our modern society would wish to exempt from the defence of consent, particularly family violence and particularly where such violence is witnessed by minors.

2.1.11 Whilst a case can be made for extending the reach of s 182(4) for certain types of violence, we must acknowledge criticisms of the current approach to the consent defence that its availability depends on the conformity of the acts in question ‘to established gender roles, traditional relationship types and heterosexual orientation.’⁷ In order to deflect such criticisms s 182(4) should be precluded from operating in a paternalistic fashion to prevent socially acceptable forms of harm, such as genuinely consensual sadomasochistic practices. And 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

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

⁵ J Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press, 1987) vol 1, 26–7.

⁶ *Coney and Others* (1882) 8 QBD 534 (‘*Coney’s Case*’) is usually identified as the origin of the provision.

⁷ Matthew Weait, ‘Harm, Consent and the Limits of Privacy’ (2005) 13 *Feminist Legal Studies* 97, 98.

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 assaults⁸ will be dealt with in the Magistrates Court pursuant to s 35 of the *POA*. Since s 184 and s 35(1) have the same elements, the *Code* principles of criminal responsibility, including the definition of 'assault' in s 182, are applied to both offences.⁹ 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* 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.

(It is nonsensical to talk about consent to an attempted or threatened assault so this paper is focused on assaults constituted by the actual application of force).

2.2.2 In addition to proving that an assault in the nature of one of the above forms has taken place, 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) and the use of reasonable force in executing a lawful arrest (*Code* s 26). Relevantly for this paper, 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.

2.2.3 Whilst the putative victim's consent to the application of force generally affords a defence there are two situations 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 51 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. And, per s 127, the consent of a victim under the age of 17 years is no defence to a charge of indecent assault.

2.2.4 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

⁸ '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.

⁹ See *Acts Interpretation Act 1931* (Tas) s 36.

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 Central to the discussion of the operation of consent as a defence to assault is the notion of consent itself.

2.3.2 ‘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’. The legislative definition of consent was introduced in 2004¹⁰ 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) 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.’¹¹ 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 very 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. (See [5.2.10] below).

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.¹² As will be seen, the legal response has been shaped according to the particular form of consent concerned.

¹⁰ *Criminal Code* (Tas) s 2A(1), as amended by *Criminal Code Amendment (Consent) Act 2004* (Tas) sch 1 item 4.

¹¹ Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 44 (Judy Jackson, Attorney-General).

¹² This analysis is taken from the judgement of Lord Mustill in *R v Brown* [1994] 1 AC 212, 259.

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.'¹³ The provision seems to have its origins in the common law and in particular the case of *Coney and Others* (1882) 8 QBD 534, 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 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.¹⁴

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.¹⁵

...
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.¹⁶

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 (see [4.2.4]), Vincent J applied *R v Brown*. Similarly, Kellam J in the Victorian case of *R v Stein* relied on both *R v Brown* and *R v Emmett* 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]2.6.4] below).

2.5.3 For Australian Code jurisdictions, it has been said that the English common law still provides a highly persuasive line of authority.¹⁷ 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 provision in the

¹³ *Criminal Code* (Qld) s 246(2); *Criminal Code* (WA) s 223.

¹⁴ *Coney's Case* (1882) 8 QBD 534, 549.

¹⁵ *Ibid* 567 (Lord Coleridge CJ).

¹⁶ *Ibid* 539 (Cave J).

¹⁷ *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.

Code merely expresses a pre-existing common law principle.¹⁸ For example, Wright J in *R v Holmes* stated 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.’¹⁹

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;²⁰
- 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;²¹
- 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.²²

2.5.5 Despite the fact that the decision in *Coney’s Case* was limited to the particular facts of the case — ie, consent by the participants to any degree of injury 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. The case was referred to in *Donovan*²³ in which the English Court of Appeal was asked to consider the question of 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.

2.5.6 In *Donovan*, 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.

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.²⁴

2.5.7 His Honour went on to list the exceptions to the general rule, including fighting with cudgels or foils and wrestling.²⁵ 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.’²⁶ Another category of exceptions to which his Honour referred were those acts which might be termed ‘rough and undisciplined sport or play’.²⁷ 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.

¹⁸ See *Murray* [1962] Tas SR 170.

¹⁹ (1993) 2 Tas R 232, 236.

²⁰ Stephen’s *Digest of the Criminal Law* (Macmillan, 6th ed, 1904) article 227, 165.

²¹ *Ibid* article 228, 165–6. Stephen noted that it is a maim to strike out a front tooth but not to cut off a man’s nose. The former would render a man less able to fight because, as an essential preliminary to loading and discharging his weapon, a soldier must bite down on the cartridge whereas a man might still be fit to fight even without a nose.

²² *Ibid* article 229, 166.

²³ *R v Donovan* [1934] 2 KB 498.

²⁴ *Ibid* 507.

²⁵ *Ibid* 508.

²⁶ *Ibid* quoting Michael Foster, *Foster’s Crown Law* (Clarendon Press, 3rd ed) 259.

²⁷ *R v Donovan* [1934] 2 KB 498, 508.

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.'²⁸

2.5.9 In *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715, 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 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.

2.5.10 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.²⁹

2.5.11 The reference to 'intended and/or caused' seems to advocate a results based test — ie, even where bodily harm is neither intended nor foreseen, if harm is in fact caused, consent will be no defence. In Tasmania, such a test would be inconsistent with the principles of criminal responsibility for assault laid out in ss 184 and 182 of the *Code* and 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, ie 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, ie a specific intention to cause bodily harm or subjective recklessness in that regard.³⁰

2.5.12 Perhaps the most significant, and most debated, modern statement on the lawfulness of consensual assaults is the House of Lords decision in *R v Brown* [1994] 1 AC 212. 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. 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.³¹

2.5.13 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.

²⁸ Ibid 507.

²⁹ *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715, 719 (author's emphasis).

³⁰ Glanville Williams, *Textbook of Criminal Law* (Stevens, 2nd ed, 1983) 583.

³¹ *R v Brown* [1994] 1 AC 212, 276.

2.5.14 *Brown* is often contrasted with *Wilson*³² decided in the Court of Appeal only four years later. In *Wilson*, 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* 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.'³³

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.

The Crown bears the onus of proof in relation to all four matters.³⁴ It is not sufficient for the Crown to prove one or more of the elements listed above, they must prove all four.

Otherwise unlawful

2.6.2 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.³⁵ The implication is that, before a consensual assault can be unlawful it must constitute an assault and some other offence as well. This is the sense in which it seems the condition of 'otherwise unlawful' is generally understood in the context of s 182(4). For example, the act could be a breach of s 178 of the *Code* — being armed in public; taking part in an affray, s 80; or duelling contrary to s 81. The circumstances in *Brown* may not constitute 'otherwise unlawful' conduct in this sense, so that, in Tasmania, consent would remain an operative defence to sadomasochistic consensual sexual conduct of the kind engaged in that case. Consent would not be rendered immaterial by s 182(4).

2.6.3 Where the putative victim consents to an application of force, one of the fundamental justifications for the criminalisation of assault no longer applies — there is no violation of the victim's physical integrity. Arguably, the requirement that the act constitutes another offence supplies the wrongfulness that is otherwise absent.

³² *R v Wilson* [1997] QB 47.

³³ *Ibid* 49.

³⁴ *Woolmington v DPP* [1935] AC 462.

³⁵ 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).

Injurious to the public

2.6.4 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.³⁶ 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* 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 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,³⁷ reasonable surgical interference,³⁸ dangerous exhibitions and ‘well-intentioned horseplay’. 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

2.6.5 The origin of the requirement (again unique to Tasmania) that the assault is injurious to the person assaulted is clearly 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.³⁹

2.6.6 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 straight forward.

2.6.7 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 ‘as to hurt, harm, damage’ 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’.⁴⁰

Breach of the peace

2.6.8 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

³⁶ *Bank of England v Vagliano Bros* [1891] AC 107.

³⁷ *Criminal Code 1924* (Tas) s 50.

³⁸ *Ibid* s 51.

³⁹ (1882) 8 QBD 534, 549.

⁴⁰ *R v Donovan* [1934] 2 KB 498, 509.

Code, the UK Court of Appeal case of *Howell*⁴¹ 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.⁴²

2.6.9 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 [ie, ‘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.’⁴³

⁴¹ [1982] 1 QB 416.

⁴² *Ibid* 427.

⁴³ [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’.⁴⁴ 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 many cases, effectively rendering the provision inutile, particularly in situations where, now, we might most wish it to apply, such as in the context of family 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, ie, 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. The criminal law should also reflect current social values. Opportunities for judicial consideration and clarification of the principles governing the lawfulness of consensual assaults are likely to be rare so clarification must come from 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*. The case involved numerous allegations of physical assault by the accused against his former partner. The accused’s defence was that the activities in which they were engaged were consensual. In that case Wright J stated,

⁴⁴ Blackwood and Warner, *Criminal Law Text & Cases* (University of Tasmania Law Press, 2015) vol 2, 573.

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.⁴⁵

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 is irrelevant and the assault is unlawful.⁴⁶ 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 Juries have been directed in subsequent cases in accordance with *Holmes*. However, in an unreported case 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.⁴⁷

3.2.4 It is submitted, with respect that the 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 unlawful’ nor that it be injurious to the person assaulted. Moreover, it is not the law in Tasmania that the blows struck by the accused were likely or intended to cause bodily harm.

3.2.5 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 [unlawful] 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.⁴⁸

3.2.6 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 formulation however, makes the prosecution’s task more difficult where consent is in issue. 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’.⁴⁹

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. Where the fighting occurs in a public place it might also constitute the offence of public annoyance found in the *POA* s 13 or affray in s 80 of the *Code*. In many cases,

⁴⁵ [1993] 2 Tas R 232, 236.

⁴⁶ Ibid 234.

⁴⁷ *State of Tasmania v K A Palmer and M E Palmer*, quoted in *Lane v Purcell* [2011] TASMC 19.

⁴⁸ Ibid.

⁴⁹ *Lane v Purcell* [2011] TASMC 19, 24.

however, particularly where violence is inflicted in private, *if the requirement of otherwise unlawful is strictly applied*,⁵⁰ the assault will not also amount to another separate offence. In such a case, a failure to establish that the assault is otherwise unlawful will prevent proof of the element of unlawfulness and conviction for assault.

3.3.2 The effect of exposing those engaging in consensual violence to criminal sanctions is to subordinate their claims to personal autonomy to public interest considerations. In a society where the law embraces the notions of personal responsibility and the protection of individual rights rather than collective rights, the prioritising of the collective good over individual interests (at least where those interests don't pose a risk of harm to others) will only be justified in exceptional circumstances. Since the criminalisation of consensual acts of violence amounts to a significant infringement of fundamental rights it is appropriate that a more demanding test for culpability should be in place. However, as currently formulated s 182(4) is all but inoperative in a private context. This is problematic because it follows that the domestic sphere is an 'unregulated zone'⁵¹ in the sense that a charge of assault can only be sustained where the Crown can establish absence of consent within the meaning of s 2A. Women in particular are most at risk of violence within the home.⁵² If s 182(4) in effect does not apply to violent interactions in that context, then that section will not accord women and children any protection from assault in the environment where they are most at risk. It also calls into question the purpose of having such a provision within the *Criminal Code* where it is almost entirely ineffectual in the private arena.

3.3.3 '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. If the requirement of otherwise unlawful is abolished, facilitating the prosecution of familial violence, this carries the risk that the provision will be drawn too widely and catch conduct — such as the consensual homosexual violence in *Brown* — which ought not be criminalised. The conundrum posed for proponents of reform is how to obviate consent in familial violence cases without criminalising genuinely consensual conduct that injures no one beyond those who consent to the assault.

3.3.4 Formulated as it was to deal with the consequences of public, male violence, s 182(4) is ill-equipped to deal with the problem of private violence which has become a matter of significant public concern. In the context of public violence, the requirement of otherwise unlawful might be relatively unproblematic but it represents a significant barrier to prosecution in relation to private violence. If, as has been argued above, the requirement of otherwise unlawful supplies the necessary wrongfulness that is absent in the case of consensual assaults, the proposals for reform which follow in Part 3 consider whether there might be other means of achieving this which don't quarantine familial violence in this way.

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. It is 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

⁵⁰ Note that Wright J in *Holmes* did not single this criterion out as a separate requirement of s 182(4).

⁵¹ Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985).

⁵² 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*, cat. no. 4906.0, ABS, Canberra, 2012.

exceptions which may no longer be contemporarily relevant or accepted and it is in many ways an arbitrary expression of the presiding judge's particular prejudices.⁵³

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,⁵⁴ reasonable surgical interference,⁵⁵ 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 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 example⁵⁶ — 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'.⁵⁷ The skills needed to be a strong warrior are honed by engaging in violent sport. The contemporary acceptance of violence in sport reflects more the physical and mental health benefits of physical activity and also 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 institutionalises 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.⁵⁸

By creating an exception to the general rule for sporting violence the law does not condone violence but controls it.

⁵³ An interesting illustration comes from the case of *Bravery v Bravery* [1954] 3 All ER 59 where Denning LJ ruled 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.

⁵⁴ *Criminal Code, 1924* (Tas) s 50.

⁵⁵ *Ibid* s 51.

⁵⁶ *Ibid*.

⁵⁷ *R v Donovan* [1934] 2 KB 498, 508 (Swift J).

⁵⁸ 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.

3.4.6 Participants in contact sports may impliedly consent to a more or less continual risk of violence. In fact, bumps, tackles and shepherds are often part of the game, 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 the players taking part impliedly consent to the use of force and 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 society. The criminal law will only intervene where there is an egregious breach of the rules.⁵⁹ For example, in *Tasmania v Medcraft*⁶⁰ 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.'⁶¹

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'.⁶² 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.⁶³

3.4.10 Part of the difficulty in categorising sporting contests 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.

⁵⁹ And sometimes not even then. In the case of *Re Jewell and Crimes Compensation Tribunal* (1987) 1 VAR 370, the Administrative Appeals Tribunal of Victoria 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: at 371.

⁶⁰ *Tasmania v Medcraft*, Comments on Passing Sentence (1 July 2016).

⁶¹ *Emmett v Arnold* [2006] TASSC 5, [9].

⁶² G D Lundberg, 'Boxing Should Be Banned in Civilised Countries' (1983) 249(2) *Journal of the American Medical Association* 250, 250.

⁶³ 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>>.

Consensual sexual violence

3.4.11 One type of activity not recognised at common law as an exception is the consensual infliction of pain between men for the purpose of enhancing sexual pleasure. Assuming that at least bodily harm is caused, the common law treats the person who inflicts violence in the course of sexual activity as a criminal. Bodily harm ‘includes any hurt or injury calculated to interfere with ... health or comfort ... Such hurt or injury need not be permanent, but must ... be more than merely transient and trifling.’⁶⁴

3.4.12 According to the majority of the House of Lords in *Brown*,⁶⁵ sadomasochistic acts, in private, involving no permanent injury and with the full and willing consent of all the participants are injurious to the public and punishable as an assault. As noted above (see [2.5.12]) this case concerned the sadomasochistic activities of a group of homosexual men. Arguably, the majority allowed a subjective 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 Lowry:

Those who will inflict and ... suffer the injury wish to satisfy a perverted and depraved sexual desire. Sadomasochistic homosexual activity cannot be regarded as conducive to the enhancement ... of family life or conducive to the welfare of society.⁶⁶

3.4.13 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)⁶⁷ 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* is often contrasted with *Wilson*⁶⁸ decided in the Court of Appeal only four years later. Whereas *Brown* concerned the sadomasochistic activities of a group of homosexual men, in *Wilson* the sexual violence was inflicted by a husband upon his wife (the facts of this case are outlined above at [2.5.14]). In upholding the appeal, the Court distinguished Mr Wilson’s conduct from the activities in *Brown* 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 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.⁶⁹

3.4.14 The conduct in both *Brown* and *Wilson* 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). Both were cases involving the intentional infliction of harm and both involved evidence of the infliction of a considerable degree of harm although the facts suggest that the participants in *Brown* had taken measures to ensure that any injury received timely medical attention. Yet, in *Wilson* the court *overturned* the conviction. The fact that most of the arguments successfully raised by the appellant had been rejected in *Brown* lends credence to claims that *Brown* was essentially a homophobic decision.

3.4.15 The counter argument is that the majority decision in *Brown* is an instance of the right to individual autonomy being trumped by the higher interest in protecting human dignity. It might be argued that by refusing to sanction sexual violence, particularly where it involves one participant

⁶⁴ *R v Donovan* [1934] 2 KB 498, 509.

⁶⁵ *R v Brown* [1994] 1 AC 212.

⁶⁶ *Ibid* 255.

⁶⁷ *Laskey v United Kingdom* (1997) 24 EHRR 39, [47].

⁶⁸ *R v Wilson* [1997] QB 47.

⁶⁹ *Ibid* 49.

dominating another, the majority judges endorsed a normative stance in relation to non-violent standards of sexual behaviour.

3.4.16 This argument, however, ignores the homophobic elements of the majority judgment in *Brown*. Further, the stance in *Brown* was contradicted by that in *Wilson*. Additionally, it constitutes a paternalistic approach and leaves those who genuinely consent exposed to criminal sanctions. As the contradictory approaches adopted in *Brown* and *Wilson* show, the choice to criminalise certain activities is determined by subjective, personal preferences and prejudices regarding consensual sexual conduct. Rather than endorsing a general non-violent standard for sexual conduct, the majority judgment in *Brown* appears to have endorsed a conservative, prudish, narrow-minded, prescriptive approach to acceptable sexual behaviour.

3.4.17 These problems appear to refute any suggestion that the court is the appropriate forum where such decisions should be made. According to this view, it is impractical for Parliament to legislate exhaustively for exceptions to the defence of consent and far better to allow the court to undertake the balancing exercise between individual autonomy and wider public interest in light of the specific facts of the case. As Gonthier J stated in *R v Jobidon*:

Policy-based limits [to the defence of consent] are almost always a product of the balancing of individual autonomy ... and some larger societal interest. That balancing may be better performed in in the light of actual situations, rather than in the abstract, as Parliament would be compelled to do. ... that kind of balancing is a function the courts are well-suited to perform.⁷⁰

However, the decisions in *Brown* and *Wilson* demonstrate that the intrusion of prejudices and individual bias may preclude optimum judicial decision-making in this difficult area.

3.4.18 One final observation can be made regarding how the courts deal with sporting violence as opposed to sexual violence. In both *Brown* and *Wilson*, the test that was applied (although ultimately with different results) was the test from *Donovan* — ie whether the violence was intended or likely to cause *bodily harm*. In contrast, McInerney J in the case of *Pallante v Stadiums Pty Ltd*⁷¹ 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*’.⁷² 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 questions for this Issues Paper 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. 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* clearly enables it to nullify consent to assault in the context of family violence,⁷³ his interpretation was rejected by Blow CJ in *State of Tasmania v K A Palmer and M E Palmer*.⁷⁴ According

⁷⁰ *R v Jobidon* (1991) 2 RCS 714, 744.

⁷¹ [1976] VR 331.

⁷² *Ibid* 343 (emphasis added).

⁷³ See [2.2.1]–[2.2.2] above.

⁷⁴ Quoted in *Lane v Purcell* [2011] TASM 19 and see discussion at [2.2.3].

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.⁷⁵ However, the problem with Wright J's interpretation is that it makes no reference to the requirement in s 182(4) that the assault be 'otherwise unlawful'. In fact, it is difficult to see how that requirement could be satisfied where consensual assaults are performed in private. Accordingly, if interpreted according to its own terms, it is unlikely that s 182(4) abrogates consent to assault in circumstances of private family violence. This begs the question whether it should be reformed so that it does abrogate consent in that situation. Decisions about this matter must take into account the difficulties and complexities surrounding consent to assault in the family violence context.

3.5.2 Arguments against state intervention in the home on the grounds of a right to privacy and personal autonomy have been well aired⁷⁶ 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 [3.5.11]). It also fails to take account of the problematic nature of genuine consent to violence between family partners.

3.5.3 The reality is that it is only in a minority of cases that legal authorities become involved in family violence cases. As noted elsewhere,⁷⁷ for a variety of reasons victims of intimate and domestic violence fail to report what has happened to them to the police. Accordingly, there is a large hidden figure of domestic violence.⁷⁸ 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.⁷⁹ 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.

3.5.4 It is a historical and contemporary fact that violence between domestic partners has been and continues to be trivialised by police, by the courts and by 'offenders', and dismissed as no more than a by-product of a volatile relationship where both partners communicate with violence. Such views create a culture of presumed consent that victims themselves may accept. The explanation for this is found in the very nature of such violence. As the Report on the Victorian Royal Commission into Family Violence states, family violence is 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 [sic] 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 [sic] come to believe they [sic] deserve the violence.⁸⁰

⁷⁵ *R v Holmes* (1993) 2 Tas R 232, 234.

⁷⁶ See, eg, Claire Bessant, 'Protecting Victims of Domestic Violence – Have We Got the Balance Right?' (2015) 79(2) *Journal of Criminal Law* 102.

⁷⁷ 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.

⁷⁸ See ABS, above n 52, Table 25 which reveals 80% of women who experienced partner violence since the age of 15 did not report the incident to police.

⁷⁹ See, for example, the study by M Heenan and S Murray, reported in *Study of Reported Rapes in Victoria 2000-2003: Summary Research Report* (Melbourne, Office of Women's Policy, Department for Victorian Communities, 2006).

⁸⁰ Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 17.

3.5.5 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 desensitised to the violence and begin to lose perspective about what count 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. Nevertheless, 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.

Typologies of family violence

3.5.6 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.

3.5.7 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.

3.5.8 One of the first to describe typologies of family violence was Michael Johnson.⁸¹ 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.⁸²

3.5.9 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 describe 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;⁸³ 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'.⁸⁴

3.5.10 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

⁸¹ M P Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women' (1995) 57 *Journal of Marriage and the Family* 283.

⁸² M P Johnson, and K J Ferraro, 'Research on Domestic Violence in the 1990s: Making Distinctions' (2000) 62 *Journal of Marriage and the Family* 948.

⁸³ The accused's defence in *Holmes* was that both parties were 'in a highly emotional state and willingly engaged in violence towards each other.'

⁸⁴ Jennifer Langhinrichsen-Rohling, 'Controversies Involving Gender and Intimate Partner Violence in the United States' (2010) 62 *Sex Roles* 179, 187.

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 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

3.5.11 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.

3.5.12 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.

3.5.13 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.

3.5.14 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.⁸⁵

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).⁸⁶

3.5.15 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

⁸⁵ Royal Commission into Family Violence, above n 80, vol II, 106 (footnotes omitted).

⁸⁶ See *Children, Young Persons and Their Families Act 1997* (Tas) s 4(1)(ba).

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’.⁸⁷ 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.

3.5.16 Because there is a clear distinction between cases of consensual assault between adults that is witnessed by children and those where it is not and because the case for criminalising adult consensual assaults observed by children is apparently stronger than cases where it is not observed, this Issues Paper seeks community feedback on whether it is appropriate to preclude the defence of consent in either or both of these situations.

Transmission of HIV

3.5.17 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.

3.5.18 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*⁸⁸ 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.

3.5.19 However, more recent cases have recognised HIV infection as a specific type of harm that requires explicit consent. In *R v Dica*⁸⁹ 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*, 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* 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.’⁹⁰ He went on to observe that adults take risks with their health in other contexts where it has never been suggested that

⁸⁷ Paulina Tomaszewska and Barbara Krahé, ‘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.

⁸⁸ (1889) 22 QB 23.

⁸⁹ [2004] 2 Cr App R 467.

⁹⁰ *Ibid* [51].

criminal sanctions should follow, citing as an example, a parent who comforts a child with a serious, contagious illness by taking their hand and thereby runs the risk of becoming infected themselves.⁹¹

3.5.20 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.⁹² However, in the later case of *R v Konzani*⁹³ his Lordship retreated from this position, holding that only informed consent would act as a defence.⁹⁴ 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*⁹⁵ the court held that, where the appellant failed to disclose his HIV status, consent to sexual intercourse was vitiated by fraud.

3.5.21 The decision in *Dica* was approved by the Victorian Court of Appeal in *Neal v The Queen*.⁹⁶ The court held that it was consistent with the decision in *Brown* 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.’⁹⁷

3.5.22 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.

⁹¹ Ibid.

⁹² Ibid 480, [47].

⁹³ [2005] 2 Cr App R 14.

⁹⁴ Ibid [41].

⁹⁵ [1998] 2 SCR 371.

⁹⁶ [2011] VSCA 172 (15 June 2011).

⁹⁷ 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 state 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.⁹⁸ Common assault is a common law offence in Victoria but s 31 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.⁹⁹ The definition derives from the United Kingdom case of *Fagan v Commissioner of Metropolitan Police*: ‘An assault is any act which intentionally or possibly recklessly causes another person to apprehend immediate and unlawful personal violence.’¹⁰⁰

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.’¹⁰¹

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 criminalisation evident in the common law position in the UK. Accordingly, in these jurisdictions

⁹⁸ Although the ACT has enacted a *Criminal Code* the offence of assault is still contained in its *Crimes Act*.

⁹⁹ 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.

¹⁰⁰ [1969] 1 QB 439, 444 (James J).

¹⁰¹ *R v Bonora* (1994) 35 NSWLR 74, 78.

consent would be a defence to the infliction of harm in organised games and sports, including regulated boxing matches, lawful chastisement or correction,¹⁰² reasonable surgical interference,¹⁰³ 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.’¹⁰⁴ 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.¹⁰⁵

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 [3.5.21] above) that, in accordance with the English Court of Appeal case of *R v Dica*,¹⁰⁶ informed consent is capable of providing a defence to a charge of *recklessly* endangering a person with HIV through sexual intercourse.¹⁰⁷ However, it was also held in *Neal* that it cannot be suggested, as it was in the New Zealand case of *R v Lee*,¹⁰⁸ that the defence can apply in the case of an *intentional* infliction of serious injury.¹⁰⁹

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 Western Australia *Criminal Code* are in essentially identical terms. The relevant sections of the Queensland *Code* for present purposes are:

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.

¹⁰² In Tasmania, this defence is contained in s 50 of the *Code*.

¹⁰³ In Tasmania, this defence is contained in s 51 of the *Code*.

¹⁰⁴ [1999] VSC 358, [11]–[15].

¹⁰⁵ [2007] VSCA 300.

¹⁰⁶ [2004] EWCA Crim 1103; [2004] QB 1257.

¹⁰⁷ (2011) 213 A Crim R 190, 214.

¹⁰⁸ [2006] 3 NZLR 42.

¹⁰⁹ (2011) 213 A Crim R 190, 214.

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.

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.

4.3.2 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.¹¹⁰ In *Lergesner v Carroll* the Queensland Court of Criminal Appeal unanimously held that consent could be a defence to such offences.¹¹¹ However, the court also concluded:

[T]he 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).¹¹²

4.3.3 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.¹¹³ 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.

Northern Territory

4.3.4 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.

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

¹¹⁰ (1984) 14 A Crim R 381.

¹¹¹ (1990) 49 A Crim R 51.

¹¹² *Ibid* 63–4.

¹¹³ *Ibid*, 64 (Cooper J); *R v Raabe* (1984) 14 A Crim R 381, 125 (Derrington J).

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 ...

4.3.6 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 NT mirrors that of Qld and WA in that absence of consent is clearly an element of the charge which the prosecution must prove beyond reasonable doubt.

4.3.7 Section 187(d) of the NT *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

4.3.8 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. ...

4.3.9 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)).

4.3.10 Authorities on the interpretation of this provision tend to be limited to situations involving the exchange of blows in the context of sporting matches.¹¹⁴ 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:

(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; ...

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.¹¹⁵ 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.¹¹⁶ The

¹¹⁴ See, eg, *McKenzie v Police (SA)* [2015] SASC 78; *Sutton v Police* [201] SASC 294.

¹¹⁵ (1972) 10 CCC (2d) 324.

¹¹⁶ (1991) 2 RCS 714.

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:

[T]he 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.¹¹⁷

4.4.2 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.¹¹⁸

4.4.3 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.¹¹⁹ 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.¹²⁰

4.4.4 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

4.4.5 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 reasonable grounds that he or she has, present ability to effect his or her purpose; and to assault has a corresponding meaning.¹²¹

4.4.6 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.

¹¹⁷ Ibid 766–7.

¹¹⁸ [1995] 101 CCC (3d) 216.

¹¹⁹ [2005] 1 SCR 339.

¹²⁰ (2005) 27 CR (6th) 39.

¹²¹ *Crimes Act 1961* (NZ) s 2(1).

4.4.7 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.¹²² The New Zealand Court of Appeal held that:

[T]he 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.¹²³

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.¹²⁴

4.4.8 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) (see [5.2.13]).

United Kingdom

4.4.9 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 *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 [4.2.1]) 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’.¹²⁵

4.4.10 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.¹²⁶ 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.

4.4.11 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

¹²² [2006] 3 NZLR 42.

¹²³ *Ibid* 116 [300]–[301].

¹²⁴ *Ibid* 214 [316].

¹²⁵ [1969] 1 QB 439, 444 (James J).

¹²⁶ *Attorney-General’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.

complained to the police and the acts were consensual and conducted in private.¹²⁷ 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.’¹²⁸

4.4.12 The development of the common law in the UK is summarised above (see [2.5]). Although in *Attorney-General’s Reference (No 6 of 1980)*, 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’,¹²⁹ exceptions have been recognised by the common law including properly conducted rough games or sports,¹³⁰ reasonable surgical interference,¹³¹ tattooing and ear-piercing,¹³² and friends who engage by mutual consent in contests such as wrestling.¹³³ 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’.¹³⁴

4.4.13 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.¹³⁵ 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 [3.5.19] above).¹³⁶ In *Konzani* the court made it clear that such consent had to be willing 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.¹³⁷

¹²⁷ *R v Brown* [1994] 1 AC 212.

¹²⁸ *Ibid* 237.

¹²⁹ [1981] QB 715, 719.

¹³⁰ See *Coney’s Case* (1882) 8 CBD 534; *Barnes* [2005] Crim LR 381.

¹³¹ *Attorney-General’s Reference (No 6 of 1980)* [1981] QB 715, 719.

¹³² *R v Brown* [1994] 1 AC 212, 560.

¹³³ *R v Donovan* [1934] 2 KB 498, 508.

¹³⁴ [2005] 1 WLR 910, 912–13 [5] (Lord Woolf CJ).

¹³⁵ *R v Dica* [2004] EWCA Crim 1103; *R v Konzani* [2005] EWCA Crim 706.

¹³⁶ [2004] EWCA Crim 1103; [2005] EWCA Crim 706.

¹³⁷ [2005] EWCA Crim 706, [42].

Part 5

Options for Reform

5.1 Introduction

5.1.1 The purpose of this Issues Paper is to seek submissions on the desirability or otherwise of amending the provisions in the *Code* which regulate the consensual infliction of violence. It also seeks to elicit comment on what form those amendments might take. This Part sets out several options for reform, some of which incorporate developments in other jurisdictions.

5.2 Options for reform

Option 1: Make no change to the existing law

5.2.1 One option, of course, is to maintain the status quo, on the basis that cases where the consensual infliction of violence becomes a matter for the courts are likely to be rare. However, this approach is problematic. It fails to deal with compelling criticisms of s 182(4) namely:

- (1) That while the case of *Holmes* continues to be applied in interpreting s 182(4), it has attracted judicial criticism, but to date has not been over-ruled;
- (2) That it has been interpreted inconsistently and that therefore its operation is uncertain;
- (3) That there is unacceptable uncertainty about the meaning of the phrase ‘otherwise unlawful’ as it is used in s 182(4);
- (4) That 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.
- (5) That s 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 To do nothing leaves us with a poorly understood and inconsistently applied provision. Moreover, the educative function of the law in denouncing violence as a means of resolving conflict or as an unregulated form of entertainment is undermined because it is not clear what the law does and does not condone. As noted above (see [2.1.2]), opportunities for judicial consideration and clarification of the principles governing the lawfulness of consensual assaults are likely to be rare so clarification must come from the legislature.

Question 1:

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

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

5.2.3 Another option is to approach the issue from a purely quantitative perspective and set a legislatively prescribed upper limit of harm beyond which consent is immaterial. This 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’.

5.2.4 This option is an approach favoured by Lord Slynn (in dissent) in *Brown*. 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.¹³⁸

5.2.5 If s 182(4) is repealed, then, because the Crown must prove that an assault is unlawful, genuine consent would be a defence in almost every case. If s 53 of the *Code* is retained in its current form, consent remains immaterial where death or really serious injury (specifically, ‘a maim’) is inflicted or risked except in recognised categories of cases like surgical and medical procedures.¹³⁹ In all other cases the legality of the conduct would depend only upon the existence of genuine consent. Accordingly, s 2A of the *Code* and the definition of consent provided there would be the focus of the court’s scrutiny.

5.2.6 The appeal of this option is that it does not rely on the current ‘category approach’ to criminalisation and avoids the type of subjective assessments of social value that were criticised in decisions such as *Brown*. 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.

5.2.7 To deal with the criticisms that the law around consent in relation to assault is uncertain and outmoded, s 53 would 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 this regard, s 53 may set the bar to consent too high. Accordingly, s 53 should be amended to provide a more comprehensive legislative statement of circumstances in which consensual violence will not be condoned, even where it does not result in physical injury.

5.2.8 However, there are significant difficulties in assessing the legality of violence purely on the basis of the degree of harm intended or inflicted or the risk of harm since the distillation of the problem to one of degree obscures ‘the complexity of human conduct and the relations between human factors.’¹⁴⁰ The gravity of harm is not necessarily the most important consideration. And some applications of force which are objectively accompanied by a great deal of risk may nevertheless be justified because of the great benefits they offer.

5.2.9 The question of the degree of harm and whether that harm is justified cannot be divorced from the context 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.

¹³⁸ *R v Brown* [1994] 1 AC 212, 280.

¹³⁹ This exception to s 53 is provided in s 51 of the *Code*.

¹⁴⁰ Law Commission (UK), *Consent in the Criminal Law*, Consultation Paper No 139 (1995) 248.

5.2.10 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.

5.2.11 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.

5.2.12 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.

5.2.13 This paper 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:

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.

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?

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

5.2.14 This option accepts that consent as defined in s 2A of the *Code* will provide a defence to all assaults. Arguably, such a laissez-faire approach to consensual violence fails to take account of the dynamics of power and vulnerability at play in family violence situations and fails to protect those who are most vulnerable. Repealing 182(4) without making concomitant changes to the consent provision in the *Code* will remove such protections as currently exist for women whose apparent consent to violence is prompted by a highly complex set of circumstances 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 a woman may refuse to testify against her partner, including that the victim of domestic abuse may have become inured to the violence or is no longer able to make rational decisions in her own interests, she may feel that the criminal justice system cannot offer protection to her or her children, or she might be prepared to put up with the situation in order to keep the family unit intact.

5.2.15 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 a spouse or partner as defined in the *Family Violence Act 2004*'.¹⁴¹ 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.

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*'?

Option 4: Amend s 182(4)

5.2.16 Assuming that we wish to continue to outlaw some forms of assault regardless of consent, another option 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

¹⁴¹ 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.'

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'.

5.2.17 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.¹⁴² 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.

5.2.18 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.

Question 4:

- 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?
- 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?

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

5.2.19 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

¹⁴² See *Coney's Case* (1882) 8 CBD 534, 549. See too *Brown* [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.

behaviour elsewhere defined as ‘family violence’.¹⁴³ 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.¹⁴⁴ New Zealand provides similarly in its domestic violence legislation.¹⁴⁵ 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.

5.2.20 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]’.¹⁴⁶ The Commission noted that submissions to the Consultation Paper on family violence¹⁴⁷ 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 behaviour.¹⁴⁸ Others expressed concern that such a move risked criminalising women in particular for failing to protect their children.¹⁴⁹

5.2.21 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 partners.

Question 5:

- Should the definition of family violence in the *FVA* be amended to include exposing a child to the effects of family violence?
- If so, should women who consent to violent behaviours by their partners be exempt from prosecution, even where children are exposed to the effects of the violent behaviour?

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 really difficult problem for law reformers. Critically, any proposals for reform must not jeopardise the advances that have been achieved in creating public awareness of the importance generally of eschewing a culture of violence and instead fostering more civilised and rational ways of resolving disputes.

¹⁴³ *FVA* s 7.

¹⁴⁴ *Family Violence Protection Act 2008* (Vic) s 5.

¹⁴⁵ *Domestic Violence Act 1995* (NZ) s 3(3).

¹⁴⁶ ALRC, *Family Violence – A National Legal Response*, Final Report No 114 (2010) Recommendation 5–1.

¹⁴⁷ ALRC, *Family Violence – Improving Legal Frameworks*, Consultation Paper 1 (2010).

¹⁴⁸ ALRC, above n 146, [5.141].

¹⁴⁹ *Ibid* [5.147].